

seems, therefore, to be, that all the grantor's property, even those subjects which may have formerly been subject to special gratuitous destinations, must be held as included, unless they are specially excepted.

The Lord Ordinary pronounced the following judgment: " Finds, That the disposition 1798, by the deceased John Fleming, contains words sufficient to comprehend a conveyance of the lease in question, and that there are no sufficient grounds alleged for holding that the lease was meant to be excepted from the general conveyance contained in said disposition: Finds, That the said conveyance of the lease must be effectual in a question between the pursuers and defender, unless the proprietor were to institute a challenge of the disposition 1798: Finds, that the lease is therefore to be considered as a common property belonging to these parties; but that, as it cannot be divided, alienated, or subject, without occasioning just grounds of dissatisfaction and of challenge to the proprietor, sustains the defences *hac statu* against the conclusions for any such measure: Finds, That the subject set must be managed at the common expense, for the common behoof, and by a person agreeable to the majority of those having interest, and against whom no reasonable objection can be made by the minority; so that the defender cannot continue sole manager against the will of the pursuers: Ordains the parties, in eight days, to suggest severally a person they deem fit for being manager, and the defender, within the same space, to lodge the accounts of his bygone management."

On advising a reclaiming petition, with answers, some of the Judges entered into the views of the Lord Ordinary; but the Court, by a great majority, and on the ground that a special destination of a particular subject is not affected by a posterior general settlement, altered his Lordship's interlocutor, and sustained the defences.

Lord Ordinary, *Meadowbank.*

Act. *Cathcart.*

Alt. *Hope.*

Clerk, *Pringle.*

R. D.

Fac. Coll. No. 203. p. 468.

1801. *January 22.*

ANDREW SOUTAR *against* THOMAS MACGRUGAR and Others.

ANN SOUTAR executed a settlement, by which she conveyed her whole property to Thomas Macgrugar and two other persons, and to the acceptor or survivor of them as her trustees.

The grantor had an only son, who, prior to the date of the deed, it was rumoured, had died in America. By her settlement she accordingly directed her trustees, after paying her debts and funeral expenses, to pay and deliver the whole residue of her fortune to her son, if he should be heard of within a year after her death; but, in the event of his not appearing, she appointed a variety of legacies to be paid to her relations, amounting in all to £400 Sterling.

No. 1.

No. 2.

A woman having executed a settlement, conveying her whole fortune to trustees, and afterward directing them to pay certain legacies, but without mentioning how

No. 2.
the residue of
her funds
was to be
applied, it
was found to
belong, not
to the trust-
disponees, but
to the grant-
er's next of
kin.

The settlement also contained the following clause : “ And I hereby appoint my said trustees, or acceptor or survivor of them, to pay to the said Andrew Soutar, my brother, if he shall be alive at the time, whatever interest or annual-rent may arise on the aforesaid sum of £400 Sterling, bequeathed to my said legatees, before the term of payment of the said legacies, the same to be paid over to him if alive at the period of twelve months after my decease.”

In the event of the granter's son not appearing, (the event which happened) the deed was silent as to the disposal of the residue of her funds, after payment of the legacies.

At the date of the settlement, Ann Soutar was possessed of money to the amount of £500 in cash, besides her household-furniture. The funds realized by the trustees amounted to £550, so that a balance of £150 remained in their hands, which, they contended, belonged to themselves.

On the other hand, a claim for this sum was made by Andrew Soutar, the brother and representative of Ann, and in a multiplepounding raised by the trustee, he

Pleaded : The maxim of the Roman law, that *Nemo pro parte testatus, pro parte intestatus decedere potest*, has no place in our practice. The claimant, therefore, as the next in kin of the deceased, falls to be preferred to that portion of his sister's effects, of which she has not disposed. Had she meant that her trustees should take the residue for their own proper use, she would have said so in express terms ; but so far is this from being the case, that her property is conveyed merely to themselves personally, for special purposes, without any mention either of their heirs or assignees.

Answered : The deed in question is a general disposition of the whole of the granter's funds, *sub onere* of certain legacies, and whatever surplus may remain after these are paid, must of course belong to the disponees ; 31st January 1724, Hamilton against Gordon, No. 3. p. 6588 ; 10th January 1755, Earl of Crawford against Ure, No. 3. p. 3818.

From Mrs. Soutar being possessed of £500, besides her household-furniture, at the time when she made her settlement, she must have been fully aware, that there would be a residue after paying her legacies ; and if she had intended this residue for the claimant, it cannot be supposed that she would have made him a special bequest of the interest of the legacies for the year which they were to remain in the hands of the trustees, as, without any such bequest, this sum would just have enlarged the residue to which he would have been entitled as her legal representative.

The Lord Ordinary took the case to report on informations.

The Court, on the grounds stated for Soutar, unanimously preferred him to the residuary fund in the hands of the trustees.

Lord Ordinary, *Cullen*. For the Claimant, *Cathcart*. Alt. *H. D. Inglis*. Clerk, *Pringle*.
R. D. *Fac. Coll. No. 212. p. 483.*