was found ,that this being a disposition *inter vivos*, the heirship moveables were included. *See* APPENDIX. No 22.

Fol. Dic. v. 2. *p.* 133.

*** A similar decision was pronounced, 18th November 1737, Boswell against Boswell; *see* APPENDIX.

1735. *July* 3. MONRO *against* MONRO.

No 23.

A CREDITOR in a bond secluding executors, assigned the same to a person, his heirs and assignees, but took a backbond, declaring the assignation to be a trust, in order to do diligence. This was found not to presume any alteration of will, nor to make the bond moveable.—*See* APPENDIX. See No 8. p. 11344.

Fol. Dic. v. 2. *p.* 134.

1742. *July* 27. WILLIAM JACK, *&c. against* JOHN LAUDER.

No 24.
A testator's receiving payment of a bill, which he had bequeathed to certain persons, found to be a revocation of the legacies.

THE deceased Hugh Kennedy disponed his heritable and moveable effects to the said John Lauder, and, of the same date with the disposition, he made a codicil, wherein, in case of his death, he desires that Bailie Muirhead's L. 40 bill may be disposed of as follows; viz. to William Jack L. 10 Sterling, and to three other persons named, each L. 10. Some days after the date of the codicil, he received payment of the said L. 40 bill; and before he died, he inclosed the codicil in a piece of paper, and directed it thus: "Hugh Kennedy, his "will and disposition, not to be opened; but, in case of his death, to be open-"ed by Major Roberton."—After Hugh Kennedy's death, Margaret Burns, in whose house he staid and died, and who had the keys of his repositories, gave the foresaid packet to Major Roberton, and with it L. 29, to defray the expense of the testator's funerals; which sum, he in the codicil desired might be laid out thereon, and that the Major would take the direction and oversight thereof, and for which L. 29 the Major granted his receipt to Margaret Burns, to account to her and all others concerned.

William Jack, and the three other legatees, brought a process, both against the Major and Margaret Burns; against the first, on his receipt for the L. 29, and against Margaret, not only for that L. 29, but likewise for the remaining L. 11, as being the L. 40 contained in Muirhead's bill, and entrusted to her keeping by Hugh Kennedy; and which, being referred to her oath, she deponed, That she saw Bailie Muirhead's relict pay the L. 40 bill to Mr Kennedy, and that soon thereafter, he took L. 40 out of his trunk, which he told her was the money he had received in payment of the said bill, and which L. 40 he delivered to the deponent with the codicil, ordering her to keep the same

No 24. till he died, and then to deliver it to Major Roberton, in order that he might distribute that money among the legatees, as directed by the codicil: That, accordingly, she did deliver the codicil to the Major, with L. 29, upon his receipt produced. During the dependence of this action, the four legatees brought another process against John Lauder, for payment of the L. 29, as being liable to the defunct's funerals, which had been defrayed by part of the said L. 40 legated to them.

The defences for John Lauder were, That the disposition from the defunct to him gave him a right to all lying money that the defunct either then had, or should have at his death; consequently, it gave him a right to the L. 40 in Margaret Burns's custody; and that the defunct's taking payment of Bailie Muirhead's bill imported not only a revocation of the legacy, but an extinction of it; the bill, which was the subject of the legacy, no longer existing; so that the legatees could enter no claim thereon, as is established, § 21. *Inst. De Legat.* and, as the defender's right to the defunct's lying money was established by writ, nothing less than the defunct's will to the contrary, in writing, could take it from him. It is true, verbal legacies, to the extent of L. 100 Scots, are sustained probable by witnesses; but that can only take place where there is not a written will to the contrary. Now, What is there here to supply the defunct's revocation in writ, or establish a verbal legacy by two witnesses, but Margaret's Burns's oath, taken in a process to which John Lauder was no party, and, on that account, liable to objection, if he were to insist on it, as he does not? But what the defender insists upon is, that the depositation of this L. 40 by the defunct in her hand, cannot be proved to any effect whatever; two witnesses would not be sufficient for that purpose; and much less she a single person, suspected and exceptionable, not only as she is a woman-witness, but likewise interested in the cause, one of the four legatees being her son. In the next place, she had free access to the defunct's repositories, and, therefore, must be presumed to have taken the money and writs thereout, as she did not seal up the keys, &c. after the defunct's death, as enjoined by the act of sederunt 1692. Upon this account, likewise, her oath cannot be regarded, though it were otherwise unexceptionable.

The pursuers *answered;* That a testator may take payment of a bond or bill without thereby extinguishing the legacy; so that the rule objected admits of many exceptions. Besides, the case in question is not within that rule, as there is no evidence that he exacted, but only received payment when offered to him, never having done any sort of diligence, or sent messages seeking his money. But no doubt can remain, when it is considered, that it appears from Margaret Burns's oath that he had retained the sum by him, and delivered it to her, in whom he had confidence; and to say, that neither her oath, nor even that of two witnesses, could prove the depositation, is really disclaiming the very law on which the objection is founded, which admits of a proof by witnesses, of circumstances, and *indicia non mutatæ voluntatis.* As for Margaret Burns,

her testimony is very credible; she was a necessary witness, the defunct's landlady, and a favourite in whom he had great confidence; if she had been capable of swearing falsely, in order to get the fourth part of the L. 40 to her son, she would rather have kept the whole to herself. As to the act of sederunt, it is a very inaccurate composition, and should either be explained, or deserves to be neglected; it appears to be extended singly for the better execution of the act 1672, for making up the inventories of the writings or effects of deceased persons, whose heirs happen to be infants or minors; and as to the sanction thereof, 'That, if the master and mistress of a house neglect to seal 'up the keys of the dying person, they shall be holden and reputed embez-'zlers of writs, money,' &c.; the pursuers acknowledge they are at a loss what meaning to put upon it, and would be obliged to the defender to inform them what writs, or how much money, is to be holden as abstracted. No 24.

THE LORDS found the legacy revoked.

Fol. Dic. v. 4. p. 116. C. Home, No 205. p. 340.

1745. *February 7.* WEIR of Johnshill *against* Mr WILLIAM STEILL.

No 25.
A clause in a contract of marriage, providing the estate, failing heirs of the marriage, to heirs and assignees whatsoever, does not, on default of the heirs of the marriage, alter the former destination made by the contractor.

WILLIAM WEIR of Weygateshaw made a disposition of the bulk of his estate to Mr William Steill minister of the gospel at Dalserf, his nephew, and of the rest of it to others his relations, reserving his own liferent, with a power to alter, and dispensing with not delivery, and containing a procuratory of resignation.

He afterwards married, and in the contract provided his estate to himself and the heirs of the marriage; which failing, to his heirs and assignees whatsoever.

Upon Weygateshaws death without issue of the marriage, John Weir of Johnshill his brother claimed to be served heir of provision to him, in virtue of the last destination in the contract; and the service coming in before the macers, was opposed by Mr Steill; upon which assessors were appointed by the Court of Session, who took the debate to report.

Pleaded for Johnshill; That the settlement in favours of Mr Steill being alterable at pleasure, was altered by the contract of marriage, in virtue whereof any child of Weygateshaw's by a subsequent marriage would certainly have succeeded, failing the issue of this, and yet they were only called as heirs whatsoever, which the claimant equally is; that no person was entitled to oppose his claim but who himself could serve, which Mr Steill could never do, as he was by no means a substitute, but directly a disponee; that the two deeds must be taken as if infeftment had passed on both; and then Mr Steill would have been vested in the fee resolvable by the act of his uncle, whose posterior infeftment on his contract would have been a resolution thereof, and stripped him of the whole right; that Craig, L. 2. Dieg. 16. § 21. says, "Tallia dissolvitur per re-