No 26.

being taken to himself. It were a strange metamorphosis to change them from fiars to substitutes, and it was impossible any jury could serve them in that shape.

In all the cases cited it appeared *quod non agebatur* to alter the succession, which could not be said here, as alterations were frequent in contracts of marriage; and there was no probability that Weygateshaw, who had acquired a considerable estate by his own industry, and had frequent occasion to be concerned in settlements of land, could be ignorant of the import of the terms; and the claimant apprehended it nowise competent to take a proof of his intentions, to defeat a settlement expressed in the legal terms, the meaning whereof was determined and well known.

The Lords, 9th December 1744, granted diligence for proving the condescendence; and, 7th February 1745, having considered the report, and advised the testimonies of the witnesses adduced, they found; that the clause in the contract of marriage, providing the lands therein mentioned to the heirs and assignees of William Weir, failing children of the said marriage, was no alteration or revocation of the settlements made by him in favours of Mr William Steill, and others his disponees, by the said settlements produced, nor was intended for any alteration by the defunct of the said settlements; and that the defunct's intention not to alter his former settlements was supported and confirmed by the proof adduced; and therefore found, that the lands contained in the said settlements, upon failure of issue of the said marriage, did pertain to the said disponees in the terms thereof; and that John Weir of Johnshill, purchaser of the brieve, his claim for serving himself heir of provision to the said William Weir his brother, in virtue of the said contract of marriage, in the lands contained in the foresaid deeds of settlements, was thereby excluded.

This case was taken up between the parties after the first interlocutor allowing a proof.

Assessors to the service, *Elchies & Murkle.* Alt. *Ferguson.* For the Claimant, *W. Grant & Lockhart.* Clerk, *Forbes.*

Fol. Dic. v. 4. *p.* 119. *D. Falconer, v.* 1. *p.* 67.

1752. *December* 22.

Emilia Belshes and Ebenezer Oliphant her Husband *against* Sir Patrick Hepburn Murray.

No 27.
A legacy in a second settlement is presumed to include a legacy for a smaller sum contained in a former settlement.

In the year 1738, Anthony Murray, in a settlement of his estate, bound and obliged the disponees to pay all his debt that should be owing by him at the time of his decease, and all legacies left and bequeathed, or that should be left and bequeathed by him; and particularly, to pay to Mrs Emilia Belshes, his neice, L. 300 Sterling at the first term after her marriage, with annualrent

No 26. thereafter, &c.; as also, to pay L. 15 Sterling yearly of annuity to her, from the first term after his decease until the said principal sum should become due.

Two years afterwards, Mr Murray made a new settlement, wherein he left out the first disponees, and in their place substituted the defender; declaring, that he should be obliged to pay the disponer's debts and legacies left in the former disposition.

Soon thereafter, Emilia Belshes married Ebenezer Oliphant, and had issue two sons.

In the year 1744, Mr Murray executed a bond, mentioning, that for the love and favour he bore to Mrs Emilia Belsches, spouse to Ebenezer Oliphant, he bound himself, his heirs, executors, and successors, to pay to her in liferent, and to her children in fee; which failing, to her husband; which failing, to return to the granter, the sum of L. 1200 Sterling at the first term after his decease, with annualrent thereafter; and which sum was to be divided amongst the said children by the said Emilia Belsches, &c. excluding always her said husband's *jus mariti*, &c.

After Anthony Murray's death, his succession was taken up by the defender in terms of his settlements, and he implemented to the pursuers the deed for L. 1200; but the pursuers claimed also, and brought their action for the first legacy of L. 300, with interest from the first term after their marriage; and they insisted that the two legacies are entirely separate and distinct, are granted in different deeds, are different in their sums, in the term of payment, and are even payable to different parties, and with different substitutions: Further, the bond containing the second legacy is granted for love and favour, and expresses no antecedent cause: For these reasons the latter legacy cannot be said to revoke the former. See the cases of Stewart against Fleming, 24th July 1623; Lord Cardross against the Earl of Mar, 20th February 1639; Stirling against Deans, 20th June 1704, *Omnes infra, h. t.*; also L. 12. De probat et presumt.

Pleaded for the defender; *Debitor non præsumitur donare*; and it is evident from the circumstances of the case, that, though not so expressed, the first legacy is included in the second. When Mr Murray made the first grant of L. 300, his neice was unmarried; and the deed was only calculated in the view of her remaining so until after his decease: This is evident by his settling upon her an annuity of L. 15 Sterling, payable from the first term after his decease to the first term after her marriage. But when he saw her married to his satisfaction, and have issue, he gave her a new provision, four times as large as the former, and settled it upon her children: It is therefore to be presumed, that this was all he intended for her, and that he had forgot the first legacy, else he would either have included or excluded it. Had he been a party to her contract of marriage, and therein bound himself to pay the L. 1200, there couldhave been no doubt of its including the former legacy: (*Vide infra, h. t.*) What he did was equivalent; seeing the grant, though post-

nuptial, was plainly in contemplation of the marriage, and contained all the clauses and provisos that he would have put in her contract, for securing and disposing of the sum he gave her. See the case of Wallace against Wallace, 11th and 13th November 1624, No 14. p. 6344; Burnet against Maitland and Young, 24th February 1709, Div. 3. *h. t.*; Davidson against Rendal, 25th June 1706, Ibidem; also L. 34. § 3. D. De legat. 1. L. 22. D. De legat. 2. L. 1. § 14. D. De dote prælegata. L. 11. Cod. De legat. No 27.

With regard to the decisions quoted by the pursuers, the question in each of them was, whether a donation *inter vivos* should deprive the donee of a settlement *mortis causa?* and in the case from the civil law, the question related to the validity of the latter deed, not of the former.

"The Lords found the L. 300 not due."

Reporter, *Lord Elchies.* Act. *R. Craigie.* Alt. *Ja. Ferguson.* Clerk, *Gibson.*

Fol. Dic. v. 4. *p.* 119. *Fac. Col. No* 52. *p.* 77.

*** Lord Kames reports this case:

Anthony Murray, *anno* 1738, made a settlement of his estate, real and personal, upon John and Thomas Belsches's, taking them bound to pay several sums to his relations, and in particular L. 300 Sterling to their sister Emilia Belsches, payable at her marriage. Mr Murray altered this settlement in the year 1740, in favours of Sir Patrick Hepburn-Murray, his heir at law; adding to this new settlement a clause, obliging Sir Patrick to pay all the legacies contained in the former settlement. In the year 1744, Emilia Belsches being now married and having children, Anthony Murray executed a bond to her upon the narrative of love and favour, obliging himself to pay to her in liferent, and her children in fee, at the first term after his decease, the sum of L. 1200 Sterling.

After Anthony Murray's death, Sir Patrick took up the succession upon the settlement 1740, made no objection to the bond 1744 in favour of Emilia Belsches; but declining to pay the L. 300 Sterling contained in the first settlement, she and her husband demanded the same in a process. The case was reported by Lord Elchies. It occurred for the pursuers, That in strict law, and *ex figura verborum*, both sums were due; that it is incumbent upon the defender to prove his defence, viz. that the defunct intended the last bond to be in full; that this intention was not legally verified, and therefore whatever suspicion may be indulged, judges must act upon legal evidence. In *answer* to this it was *observed*, That Anthony Murray undoubtedly forgot the first provision when he granted the second, otherwise some mention would have been made of the first, signifying that it was included or excluded; whence this consequence was drawn, that the sum in the second bond was all he intended for Emilia, and that no more can be due; for though intention cannot extend an obligation beyond the

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words, it must limit an obligation within the words, which, without intention, are not effectual in law. "The Lords sustained the defence, and assoilzied."

Sel. Dec. No 31. *p.* 34.

1758. *November* 17.

Winifred Johnston, Relict of John Wilson, Officer of Excise at Dumfries, *against* Mary Wilson, Sister and Executrix of the said John Wilson.

No 28.
Found, that ready money lying in the defunct's custody at his death, was not to be considered as comprehended under a disposition of his goods, gear, and household plenishing.

John Wilson, in 1751, executed a settlement of his affairs, whereby he disponed to Mary Wilson, his sister, a tenement of houses, and assigned her "in and to all and sundry goods, gear, debts, and sums of money, gold and silver, coined or uncoined, which then pertained and belonged to him, or which should pertain and belong to him, or be owing by whatsoever person or persons at the time of his death."

In 1752, John Wilson married Winifred Johnston, and by the contract between them, became bound to pay her a yearly annuity of L. 32 Sterling; and likewise disponed to her the half of his household-plenishing, in case there should be no children procreated between them, and the third part thereof in case there should be a child or children.

Of this marriage a son was born, but died soon after; and in October 1753, John Wilson executed a deed, proceeding on the recital of his settlement 1751, and of his marriage-contract 1752, and narrating, "That it had pleased God to call away, by death, the only son procreated of the marriage; so that the right and interest falling to his wife in his household-furniture, in all probability would be confined to one-third part thereof; therefore, and for the love, favour, and affection he bore to her his well-beloved spouse, he thereby assigned and disponed to her his whole moveable goods and gear, and household-plenishing, of whatever nature or species the same be of, which should pertain and belong to him at his death."

At Wilson's death, which happened soon after executing this last deed, there was found in his cabinet L. 25 : 19s. Sterling in cash; which was intromitted with by Mary Wilson, the sister, and general disponee and executrix of the defunct.

Winifred Johnston the relict brought a process against Mary Wilson for payment of the said sum, as conveyed to her by the foresaid disposition 1753 of the defunct's whole moveable goods and gear, and household-plenishing.

Pleaded for the defender; It is a certain rule, That in all settlements of succession, words must receive such a construction as shall appear from the scope of the deed to have been put upon them by the testator, his will being in such cases the governing rule. Here it appears from the narrative of the deed 1753, that the reason of executing it was to obviate a doubt which might arise as to the wife's share of the household-furniture, in the event which had happened,