willing to pay this last bond, but contended that he was not also liable for the L.300 legacy, and that the L.1200 which the defunct secured in the same manner as a marriage settlement, was plainly intended in lieu of the legacy, and that had the defunct intended that both should be paid, he would have taken some care of the interest of the wife and children in the L.300, whereas it was simply moveable at the time of the marriage, and if at all due, must belong to the husband alone. On the other hand, Oliphant and his wife alleged that though two legacies are left by different deeds to the same person, both are due, much more when so very different as these two deeds;—that it would make Judges too arbitrary, if they could on remote conjectures set aside legacies where no words are to be found in the deed importing a revocation; and on the contrary, in this case, the bond for L.1200, is so far from bearing to be in place or satisfaction of L.300, it is expressly for love and favour.—Whereupon a process was raised for the L.300, which came before me, and I reported the debate;—and the Lords found the L.300 legacy not due. *Renit.* Kilkerran, Shewalton, and Kames. I observed that that legacy became imprestable *in forma specifica*, even during Mr Murray's life, by Emilia Belchies's marriage, which made it impossible for either Mr John or Mr Thomas Belchies, or Sir Patrick Hepburn Murray, to pay it at the first term after the marriage; and therefore, though in equity it might be still due had there been no posterior settlement or legacy, yet in strict law I doubted if a legacy that becomes imprestable during the testator's life, and which he knew, could be due; and if the pursuer's claim was only in equity, then the defence on the apparent meaning of the defunct in this case would be good also.

No. 19. 1753, Jan. 2. JOHN BARBOUR *against* AGNES HAIR.

BARBOUR made a deed settling part of his small stock upon his wife, more than she had before been provided to, and thereafter made a testament, and named executors, wherein he distributed the rest of his effects amongst a great many poor relations. He had given his wife right to all his household plenishing and crop, so she continued in possession, and had intromitted with his writings, which she afterwards delivered to the executors, except two small bills of 156 merks, and 151 merks, and they sued her in an exhibition and delivery of these bills, and she deponed and exhibited them with blank indorsations, and added a quality, that after the testament he had indorsed these bills blank, and given them to her in a present a few days before his death. The cause was brought before me either by advocation or suspension, and as it seems, I doubted if the defence on that quality in her oath was good. She offered further to prove the fact by witnesses, and I allowed a proof before answer, which came this day to be advised. The proof was not very clear; there was indeed one witness that proved, but the other did not quite come up to it; but the dispute turned on the point of law which none of us had time to consider or look into precedents. The President thought this was making a legacy by a bill, contrary to our decision in the case of Weir and I think John Parkhill. I thought it rather worse than that case, for here was no writing at all in the defender's favours, only she was possessed of two bills of her husband's with blank indorsations, and though in the case of a stranger such possession would give them right, yet in the case of a wife who has access to all her husband's writings, it signified nothing. As to the quality

in her oath I mentioned the case of Mr William Lyon and his Lady, and the Heiress of Kinfaun's; and as to the proof by witnesses, that was proving a legacy by witnesses above L.100 Scots. However, it carried to sustain the relict's right. *Renit.* President, Strichen, Leven, Shewalton, *et me*, 30th November 1752.—*Vide* 2d January 1753, where by mistake it is again marked, (as follows:)

HUMPHRY BARBOUR having in his testament left his wife about the half of his effects, and several legacies to poor relations, and appointed Barbour and Blackwood his executors, his wife, after his death, intromitted with all his writs, and his executors pursued her in an exhibition and delivery in the Sheriff-Court, and she deponed and exhibited *inter alia* two accepted bills payable to him, and by him indorsed blank one for 156 merks, and the other for 151 merks, and deponed that the defunct, six days before his death, gave her those bills for her own use, and the Sheriff sustained the defence as to those bills, and found her not obliged to deliver them. The cause was brought before me by advocation, and the defender having offered to astruct the quality in her oath by witnesses, I pronounced an act before answer. Only two witnesses were adduced; one proved the fact, but the other swore only that he saw the defunct give her two papers he called bills, and she asked if she should put them with the rest of the papers, and the defunct answered no, lay them by themselves. At advising this proof, the Court was much divided. Some of us thought, though there had been a concurring proof by witnesses, that such proof was not competent, for that it was the proving a legacy, or *donatio mortis causa*, above L.100 Scots by witnesses, which our law does not admit; that a wife's being possessed of her husband's bills or other writings, was no evidence, and far less in this case, where the defender had possessed herself of all his writings; that what is law in this case, would be law in the case of any merchant in Scotland, if the bills had been for L.500 or L.1000 sterling, and possession of his bills indorsed blank could give her no more right to them than the possession of his bank-notes to any value, though the case would be different had he filled up her name in the indorsation, and therefore the whole depended on the proof by witnesses, which neither was a habile means of proof, nor sufficient, because there was but one proving witness. Others thought that the blank indorsation took it out of the case of a nuncupative legacy; that great regard was to be had to her oath in the exhibition, and that the quality was sufficiently astructed. And it carried to sustain her right 30th November last, as then marked (but I had forgot it) and this day we adhered. *Renit.* Minto, Strichen, Woodhall, Kames, *et me*, but it seems both the President and Shewalton had changed their opinions.

LEGITIM.

No. 2. 1737, Nov. 10. MR JAMES JUSTICE *against* MURRAY, &c.

THIS question was, Whether one only child who was both heir and nearest of kin is entitled to a legitim of which his father could not prejudge him by any deed of a testa-