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-

N 26. signationem vassalli pro nova investitura ei et hæredibus quibuscunque." And to the same purpose Hope expresses himself, M. P. Title Tailzie, (*See* Appendix.); and Balfour, Title Tailzies, cap. 6. (*See* Appendix.); and so the decisions have gone; January 1569, in a case of one Maxton, No 1. p. 11335.; Calderwood against Pringle, No 5. p. 3036.; and in a latter case, February 1729, between the heirs of Sir Thomas Nicolson. (*See* Appendix.)

Pleaded for Mr Steill; That there was no presumption Weygateshaw had all of a sudden altered his mind with regard to his succession, in excluding all those whom he had formerly honoured by deliberate settlements, and in calling his brother, whom it was pretty apparent he had no great favour for; and that if he was to do this, he should do it not expressly, but by implication: The last termination in the contract was therefore to be considered as a clause of stile, not adverted to by the parties, who were *aliud agentes*, and did not understand any such consequence as was now pleaded to follow from it. That the expression "heirs whatsoever," meant heirs of line, when there was nothing to determine it to any other signification, but it also signified whatever heirs the subject stood otherwise destined to; and so had been often found, January 1665, Scot of Clarkington against Margaret Scot, No 8. p. 11344.; 31st July 1725, Lady Feveran against Lady Skene, (Edgar) No 20. p. 11354.; 3d July 1735, Monro of Achany against Rachel and Elizabeth Monroes, No 23. p. 11357.; 8th January 1740, Duke of Hamilton against the Earl of Selkirk, No 10. p. 5915.; and February 1742, Mr James Smollet against Anne Smollet. (*See* Appendix.)

That it was the general purport of all these decisions, that a deliberate settlement of succession would not be altered by a clause to heirs whatsoever, inserted in a deed done for a different purpose, and this rule applied to the case in hand; for Mr Steill's right was plainly a settlement of succession, being to take place allenarly after the granter's death, on account of the reserved liferent, and power to alter; yet if it should be thought the term *heirs* could not apply to him, in the second deed, though he was in reality an heir, and only nominally a disponee, yet he was called as assignee whatsoever; for the meaning of that must be, to any assignee to be made or already made by the granter; and indeed, as his disposition by being in the disponer's power took only effect from his decease, he was assignee by a deed posterior to the contract, and so had undoubted right in virtue thereof.

Lastly, If the disponer's meaning were dubious, Mr Steill apprehended it might competently be explained by a proof; and he offered a condescendence of facts and expressions of his, from which it would plainly appear, that he intended nothing less than to alter what he had done in favours of his disponees.

Replied; It was absurd to pretend the disponees could claim in virtue of the contract as assignees whatsoever. By the deed in their favour they were directly disponees; the fee was lodged in them; and this was again annulled, by its

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