of the taxative words, and of the writer's omitting the words *or otherways,* when every body must in their conscience be convinced the intention was to exclude her executors in case of her predecease, as well as her own claim in case of her husband's predecease.

" I say the question comes to this, whether these words, *her executors or nighest of kin* are in effect to be left out; for though it is true that where the husband predeceases, if she neglect in her own time to prosecute her claim, her executors may do it, yet it is absolutely unprecedented in style to exclude the claim of her executors, except where the exclusion is designed to comprehend the case of her predecease, which is a convincing evidence of the intention. 2*do,* In reality the expression, " which her executors or nighest of kin can claim," does only properly apply to the case of her predecease, for in that case, indeed, her nighest of kin have, as such, a direct claim; whereas in case of the husband's predecease, she, and not they, has the immediate claim, to which case therefore the expression here does not in strict propriety apply.

" *February* 18, 1743.—The Lords altered their former interlocutor, and found the clause renounced not only the wife's claim in case of the husband's predecease, but also her executors' and nighest of kin's claim in case of her predecease.

" *December* 13, 1743.—The Lords adhered, without one word of reasoning, the question being barely put by the President to the vote. It being late in the day when the bill and answer was moved, and that the interlocutor on the report had proceeded upon a full reasoning."

1745. *February* 7. JOHN WEIR *against* WILLIAM STEEL.

The facts and proceedings in this case, are narrated in the reports of it by D. Falconer, 1—67. (*Mor.* 11359;) and by Elchies, (*Presumption, No.* 17.) *Vide etiam Elchies, Service of Heirs, No.* 4. and *Witness, No.* 25.

Lord KILKERRAN gives the following account of the proceedings:

" 19*th December*, 1744.—This day Lord TINWALD was Ordinary in the Outer-House, but called in by the Lords after twelve. Lord ELCHIES made the report very full, and observed particularly the different manners in which the decision concerning the Aikmans was stated by Craig and by Balfour; and further took notice, that he had looked into the decision, as it was observed by Ledington, who had observed it in the manner as stated by Mr. Weir's procurators. That at the time of the decision, Ledington was a judge of the court, and Balfour an official in the ecclesiastical court at Edinburgh, who consequently must have been better acquainted with the decision than Craig, who, in the year 1530, was not then come to the Bar, and consequently might more easily have been mistaken than they.

" When the report was finished, Lord ARNISTON spoke first, and said that he saw no evidence that Weygateshaw had altered the solemn settlement he made, for that the contract of marriage was entered into to secure the children and issue of it, and that the heirs whatsoever were added of course, without any meaning other than to save the estate from being caduciary. That as the substitution was to heirs and assignees, the word assignees comprehended dispositions and assigna-

tions prior, as well as posterior. And the assignations in favour of Mr. William Steell, and the others, particularly so much of them as related to the wife's heritage, having been carefully kept by the defunct uncancelled, so as they were found lying by him at his death, brought such as were disponees very properly under the persons called, upon failure of the issue of the marriage.

" Lord DRUMORE spoke shortly, and somewhat to the same purpose.

" Lord TINWALD spoke after, and said that he was of opinion the defunct's will ought to be the rule in this case; that the defunct had at least in one period declared the same, by a particular and by a total settlement. That it was incumbent on the heir of line to show clearly that Weygateshaw had departed from this settlement. If he did not show it evidently, and render it only dubious, Ulpian's rule with regard to donations *inter virum et uxorem*, which were not so favourable as testaments solemnly made, he thought was a good guide for him; which rule is laid down in the *L.* 32. § 4. *De donationibus inter virum et uxorem. Sed ubi semel donatorem penituit etiam heredi revocandi potestatem, tribuimus, si appareat, defunctum evidenter revocasse voluntatem; quod si in obscuro sit, proclivior esse debet Judex ad comprobandam donationem.* That the arguments used against the deeds were artificial, learned, and ingenious, but served only to puzzle, but not to convince him that the defunct had at once reversed the system of his thoughts, deliberately signified by his total settlement.

" That all the evidence of the alteration was put upon the last termination in the contract of marriage, conceived in words not at all apt to show an alteration of the former settlements; that heirs whatsoever were words homonymous, comprehending heirs of conquest; heirs of line; heirs *in mobilibus* or executors; and the meaning and purport of them was different according to the nature of the security, according to the nature of the subject, and often was to be explained *applicando singula singulis.* In *feudo novo*, it signified heirs of conquest; in *feudo antiquo*, heirs of line; in moveable subjects, executors. In an heritable bond, where there was a clause for infeftment, these words carried the subject to the heirs at law. But, though the *subjecta materia*, as well as the words, were the same, if the creditor charged the debtor's heirs, " whatsoever" then signified executors.

" In bonds of corroboration, wherein principal sums contained in heritable bonds were accumulated, and taken payable to heirs and assignees whatsoever, these words were like *Janus Bifrons*, signifying as to the principal sums, if they were *feuda nova*, the heir of conquest; and as to the annualrents, executors. That when collateral rights were taken to heirs whatsoever, and special heirs had been nominated in the principal right, heirs whatsoever signified the special heirs. And from all the decisions alleged on either side, this proposition was plain, that it could not be said that heirs whatsoever had one determined signification proper to it upon all occasions. That this he did not say, as if he insinuated it was uncertain what the meaning of heirs whatsoever in a deed of this kind was, or that law could not distinguish, from the nature of the deed, from the nature of the subject, or from other circumstances, what the meaning of the words were, though sometimes that had occasioned very great controversy. Yet it was a fair collection from it, that they were unapt words to point out his brother as a *predilecta persona*, called in the contract of marriage, in order to defeat this settlement. To this purpose, it may not be improper to observe, that where an entail is made, instituting and substituting proper heirs, and this clause added, the

limitations have been found to fly off, and the heir serving upon the general clause is not bound by them, because he is not a *predilecta persona.*

" In order to obviate the authorities, decisions, and arguments that have been used on the other side; he said, the authority of Craig, Balfour, Maitland, and other authors, were not wanting to satisfy him or any other lawyer, that an infeftment in favour of heirs male, was presumed to be altered by an infeftment posterior, taken to heirs and assigness whatsoever. That there, and upon every such occasion, *cæteris paribus posteriora derogant prioribus.* Further, he said, That if the disposition in favours of Mr. Steel, revocable, had been delivered in Wygateshaw's life, and infeftment had been actually taken upon it, the argument for the revocation would have been much stronger. But here *cætera* were not *paria,* for the deeds in question being a full settlement of the testator's estate, and lying by him under his power, being no deeds effectual until either they were delivered, or until the testator was dead, having never been delivered, but remained with the testator himself until he died, they behoved to be considered as of date the last moment of his life; and, consequently, as posterior to the contract of marriage itself. That this is no novelty if we look into the Roman law, and the laws of all countries, by which the testament or total settlement to take effect after death is considered as done the last moment of life; and for that reason is called *ultima voluntas; supremum judicium defuncti.* And when the question is, whether the defunct had *factio testamenti,* or *jus testandi,* the *tempus mortis* is only considered; and the reason of this is no subtilty, but founded in common reason; because, until the testator is dead, the deeds signed by him are no more than resolutions or cogitations which gather force upon the death of the testator; in the same manner as it would have been, had the testator delivered these deeds after the contract of marriage. Again, to illustrate this, it was observed that the testator, when he signed deeds, stood infeft in the lands, the fee in himself, and the substitution, to heirs whatsoever. If posterior to these deeds, he had resigned the lands again with the same substitution upon any other account than that of marriage, no man could pretend that this resignation which might possibly be occasioned in order to change the holding from ward to taxtward, or to feu, or to erect the lands into a barony, did signify any intention to alter his special heir. This was done, because of course that is a substitution to the fiar, and mankind are never willing to publish their settlements till their death. In the same manner, if any man shall dispone the whole estate he shall have in the world when he dies, to a special heir, and takes rights to himself, and his heirs, and assignees, no man can with reason say that the taking the rights in that manner denotes or imports an alteration of his settlement. The case is the same here, and the fallacy of the arguments on the other side lies in this, that they suppose a settlement which is to have birth only upon the death of the testator, is to be considered as a deed not only executed, but delivered at the date it bears, which is not true in law, for the reasons already offered. But then it was said, that when the testator entered into the contract of marriage, it was with intention to settle his succession, and *de facto,* as to the issue of the marriage, the settlement that undeniably was made, was entirely inconsistent with the dispositions, under which claims are now entered: and not only the issue of the marriage then entered into, but the issue of a future marriage must have taken upon that contract. The answer to this is, that the intention of the parties contractors was to secure the issue of the marriage and none other, and the covenant in favours of them was a revocation;

but conditional and eventual only; and the condition never existing, the case was the same as if that had been no revocation at all. That as to children of a second marriage, they could not have been cut out by the dispositions, because the law would construe the settlements so as if all the children of his body were *in conditione positi:* and whatever difficulty might have been, had the dispositions actually been delivered, when they remained in the testator's custody till his death, there could have been no more difficulty, even with regard to land rights, to find that the disponer's children were *in conditione positi,* than there could have been with regard to an universal legacy. And though the dispositions severally were of particular subjects, yet the whole was disponed away, so that the case was the same as if the whole had been disponed in favour of one person.

" LORD KILKERRAN delivered his opinion much to the same effect; and so did LORD PRESIDENT. LORD JUSTICE CLERK, and LORD ELCHIES the reporter, were of a different opinion. The substance of what was offered by them has been taken notice of, in relating what was said by the Lords who differed from them in opinion. But then, a question arose, whether, before answer, a proof should be allowed of the facts and circumstances condescended on for Mr. Steel? And the Lord reporter said, it was dangerous and new to allow any proof to explain rights to lands. That it might be pernicious to the property of many persons, if the validity of them were to depend upon parole evidence, which our law had justly distrusted, because of the corruption and degeneracy of the age in which we live, as well as in the age of our immediate ancestors.

" On the other hand, the LORD PRESIDENT declared he was ready then to give his opinion in favour of the deeds, as the case lay before the Court; but as it might tend to explain and confirm the same, to have other facts and circumstances proven, he was for granting a proof before answer. That he believed there could be no danger to property from granting such a proof, for that the case was concerning a last will and settlement, as to which proofs had often been granted. That it was before answer, and was still in the breast of the Court after the proof was led, to examine what stress ought to be laid upon what the witnesses depose; and according to law, to judge upon the whole matter. The greater part of the Lords declared that opinion even upon the case, to be for supporting the deeds. However, they went into a proof before answer.*

" *Edinburgh, February* 7, 1745.—The Lords having resumed consideration of the report made by the Lord Elchies, assessor of the foregoing debate, and advised the testimonies of the witnesses adduced; They find that the clause in the contract of marriage betwixt the deceased William Weir, and Isobel Dickie, providing the lands therein to the heirs and assignees of the said William Weir, failing children of the said marriage, was no alteration or revocation of the settlements made by him in the year 1741, in favours of Mr. William Steel and others his disponees by the said settlements produced, nor was intended as any alteration by the defunct of the said former settlement; and that the defunct's intention not to alter his former settlements, is supported and confirmed by the proof adduced; and therefore find, that the lands contained in the said settlements upon

* At this part of the Report there is the following note:

" The above is a copy of what Tinwald had wrote on the margins of his copy of the information. He had been lawyer for Steel and was very full of the case, and the more so, that the Ordinary had treated the argument for Steel, when pled by Tinwald, as the lawyer, some weeks before, with more than ordinary contempt. He sent me his said copy of the information with the above wrote upon it, next day after the interlocutor passed."

failure of issue of the said marriage, do pertain to the said disponees in the terms thereof, and that John Weir, of John's-Hill, the 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 settlement, is thereby excluded; and decern and declare accordingly in the before repeated summons of declarator, at the instance of the said Mr. William Steel and others, disponees before mentioned."

1745. *February* 13. JAMES WILSON of Giles *against* THOMAS PURDIE.

This case is reported by Falconer, 1—76. (*Mor.* 10451.)

The following report of it by Lord Elchies, is bound up with Lord Kilkerran's papers.

"At the ingiving of the petition, *Feb.* 22, 1744, what follows was wrote on the Ordinary's own copy of it, which he sent to me by a macer, at advising petition and answers.

"Against my interlocutor, finding that Thomas Purdie is not bound to communicate to the petitioner the ease of the debt acquired by him, secured by inhibition, though he is made consenter to the bond, and though there was infeftment on it before his father's disposition to him, and though I had before found in a question with his sisters, whose provision he was taken expressly bound by his acceptance to pay, he could not state that debt more than he paid for it.

"1704.—James Purdie was pursued in a count and reckoning at the instance of Samuel Purdie's children, and inhibition raised on the dependence, and, 1718, a long decreet obtained for L.6240, with annual-rent from the expiry of the tutory.

"1711.—He had granted a bond of provision to the respondent and other three younger children for 4000 merks, payable after his death, but with a power to alter.

"*June* 5, 1711.—He granted heritable bond on the lands of Westforth for 400 merks, and the respondent Thomas Purdie, his second son, is inserted in the docquet as consenter and witness, and signs accordingly as both, but is not mentioned in any other part of the bond, nor had he then any interest in the lands.

"*November* 28, 1711.—James Purdie disponed these lands of Westforth to the said Thomas his second son, reserving his own liferent and power to alter, *Proviso*—That Thomas, by his acceptation to his two younger brothers and sister of 2400 merks, that is, 800 merks to each, and their lands expressly burdened therewith; and these lands are said to be only 206 merks of free rent, deducting feu and teind duties, &c.

"1720.—He granted an heritable bond of corroboration of the first 4000 merks bond, on the same lands of Westforth, in favours of his said four younger children, including the respondent, but allotted to him no more of it than ten merks; and the three children, and, I suppose, also the petitioner, were infeft in that bond May 27, 1720.

"*October* 20, 1720.—The respondent's two younger brothers, Robert and Andrew, got from the said James Purdie, a tack of the lands for nineteen times nineteen years, at the yearly rent of 100 merks.