that substitution was not altered by the general disposition by Provost Campbell five years before the testament. Arniston also differed; yet 11th November they adhered. *Vide* 13th July 1681, Christie, (DICT. No. 30. p. 8197.)

No. 8. 1741, Feb. 17. HAY *against* CUTHBERT of Castlehill.

FIND the heir not *passive* liable, (for they thought it indeed only a legacy,) but found that the defender, the heir, having taken up the subjects in the second deed 1732, he must account for and apply the surplus of the subjects, if any be, after paying debts, for payment of the children's provisions.

No. 9. 1741, June 4. PATERSON AND MILLER *against* PATERSON.

A MAN by a testamentary deed having made a trust-deed for the use of certain legatees, and obliged the trustees to pay to the legatees after-mentioned, their heirs executors and assignees, the sums of money after specified, and then names the legatees and sums, and among the rest Charles Paterson 1000 merks without adding the heirs executors or assignees to any of them; this Charles died before the testator, and the Lords found that the legacy fell by his death by a majority; 2dly, they found no place for *jus accrescendi;* 3dly, that the wife's share of the household plenishing, so far as they were extent at the husband's death must abate from the legacy of household plenishing.

No. 10. 1742, Feb. 12. PRESBYTERY OF KIRKCUDBRIGHT *against* BLAIR.

THOUGH a special legacy or an assignation of sums of money, that is revokable, is effectually revoked by uplifting the money assigned, yet a design to uplift it though ever so clear by giving orders to a writer to intimate to the debtor to pay and apply the money when paid to certain other uses, and lodging the bonds in his hands, the party dying before the money is paid, or any express revocation in writing, the special assignation subsists, 18th December 1740.—27th November 1741, Before answer grant diligence as prayed for, *renit.* President, Justice-Clerk, *et me.*

This case is stated before, 18th December 1740, and we had two questions, 1st, Whether the calling for the money from the debtors is itself a revocation? and 2dly, If it is, whether we could allow the pursuer to prove by witnesses that he did it not *animo* to revoke the mortification? 1st, We found the witnesses could not be admitted; 2dly, We altered the former interlocutor, and found sufficient evidence to operate a revocation of the mortification.—N. B. This very morning in the case of Hugh Ross of Holm against his father's widow, a bond taken by the father to his wife in liferent which was revokable, and the father having charged with horning actually got payment of a part, we unanimously found that this was no revocation in so far as the money was not uplifted. I did not hear how they all voted, but the President and I differed as to this last from the interlocutor.—12th February 1742.

No. 11. 1742, July 27. LAUDER of Winepark *against* JACK.

A BILL of L.40 sterling being legated, the testator thereafter obtained payment, but some days thereafter, as was said, put the money in his landlady's hands to be applied as

directed by the former legacy, at least so swore her own son being one of the legatars. We generally agreed to vary the interlocutor sustaining the legacy, but the President moved the examining some more witnesses. Several of us thought a proof by witnesses not a habile proof to re-establish the legacy, and upon the question found there should no witnesses be examined.

No. 12. 1742, Nov. 2. WHITEFOORD *against* AYTON.

DR HAMILTON when he thought himself and truly was dying wrote a letter to Mrs Jean Whitefoord, wife of Captain Dalrymple, "I leave you my gold watch, &c. to be enjoyed by you after my death." The Doctor lived more than a year, and after his death Mrs Dalrymple pursued Ayton, who had been his landlord, for the watch, and referred the having to oath. He deponed that when the Doctor was at the goat-whey he gave the watch in a present to the deponent for the use of his son; and the time seemed to be about 12 months before the Doctor's death. The case came before Minto by advocation, who thought the letter imported only a *donatio mortis causa*, and therefore allowed the defender by witnesses to prove the delivery of the watch to him and his possession of it in terms of his oath. The pursuer reclaimed, for that the donation to her was irrevokable; 2dly, that it could not be revoked but by writ; and the defender also complained, for that the quality in his oath was intrinsic. We all agreed that the donation to the pursuer was revokable. 2dly, We generally agreed that a donation *mortis causa* was not proveable by witnesses, agreeable to 4th July 1678, Hume against Livingston.* But then I thought the pursuer's donation might be revoked either by a sale or donation *inter vivos*; and as this donation said to be made to the defender was so long before the Doctor's death, I was for allowing the proof before answer, though I thought the case of the defender's being the defunct's landlord was suspicious. President and Arniston agreed with me as to the sale or donation *inter vivos*, but thought that from the defender's oath, if any donation was made to him it behoved to be only *mortis causa*, and upon that ground it carried to refuse a proof, and repel the defence.

No. 13. 1744, Nov. 10. MITCHELL *against* PINKERTON.

WE agreed that a nuncupative legacy actually left though afterwards ordered to be put in writing and the testator died before signing, would be good as far as are nuncupative legacies, *i. e.* L.100; but the Court thought there was here no more proven than that the defunct intended to leave that legacy.

No. 14. 1745, Feb. 19. MR FRANCIS KERR *against* JOHN YOUNG.

A CONTRACT of marriage providing to the wife a certain share of household furniture and other moveable goods that shall be in the husband's possession or in common betwixt them the time of his decease, if he be the first deceaser, which was the event that happened,—the Lords gave the like judgment as they had done 18th February 1737, Dr Cunningham against Livingston, (No. 4.) and found the wife entitled to the share of all *corpora*, but not of *nomina* or current coin.

* DICT. APP. II. *voce* PRESUMPTION.