No. 27. Answered: Any renunciation of a power to revoke in such a case is of no avail, because it necessarily partakes of the nature of the deed itself, in the same manner as if it had occurred in a donation *inter virum et uxorem*. The two parts of the deed therefore are not to be contradistinguished, both being of the same testamentary nature.

The Lord Ordinary having reported the cause,

The Lords found, that the discharge was revoked.

Reporter, *Lord Dreghorn.* Act. *Arch. Campbell.* Alt. *Macleod Bannatyne.* Clerk, *Sinclair*

S. *Fac. Coll. No. 65. p. 118.*

1793. *December* 10. OGILVIE *against* MERCER.

No. 28.

Dispositive words are necessary in order to convey heritage.

Fac. Coll.

*** This case is No. 114. p. 3336. *voce* DEATH-BED.

1795. *December* 9. ROBERTSON'S CREDITORS *against* MASON'S DISPONEES.

No. 29.

Heritable property in Scotland cannot be conveyed by a testament executed in England, and in the English form.

Fac. Coll.

*** This case is No. 45. p. 4491. *voce* FOREIGN.

*** See to the same effect the case Henderson against Selkrig, 10th June, 1795, No. 44. p. 4489. *voce* FOREIGN.

1802. *January* 12. GALLOWAY, Petitioner.

No. 30.
The words *assign, transfer, and make over*, goods, gear, *debts*, and sums of money, used in a testament, not effectual to

Walter Macfarlane of Macfarlane, and his brother William, were debtors to Mrs. Helen Spottiswoode, widow of James Garthshore, writer to the signet, in two sums constituted by bonds, granted in February, 1767; the one for £.155 Sterling, and the other for an annuity of £.50 Sterling during her life. An adjudication was led upon the first, in 1781, over the estate of Macfarlane.

Of this date, (10th November, 1786,) Mrs. Garthshore "nominated and appointed William Galloway, merchant in Edinburgh, not only to be my sole executor,

but also my universal legatary, and intromitter with the whole goods, gear, *debts, and sums of money* that shall pertain and belong, and be resting and owing to me at the time of my death, by whatsbever person or persons, in virtue of *bonds*, bills, or *any other manner of way; all which I hereby assign, transfer, and make over* to and in favour of the said William Galloway; but under the burden always of the payment of my just and lawful debts, funeral-charges, and the legacies underwritten, which I do hereby legate and bequeath to the persons following," &c.

No. 30. convey a debt secured by adjudication.

Among these legacies were the two following: " To Miss Helen Macfarlane, daughter of William Macfarlane, Esq. the sum of £.150 Sterling, and to Miss Rachel Macfarlane the sum of £.150 Sterling; and I appoint the legacies above written to be paid out of the first and readiest of my means and effects; excepting the legacies to Helen and Rachel Macfarlane, which shall *not* be paid until my executor shall have recovered as much of the annuities *or other debts* due by the said William Macfarlane to me as will satisfy the same."

Conceiving that this was an explicit declaration, that the bond upon which adjudication had followed was specially conveyed by this settlement, that being the only other debt besides the annuity due by Macfarlane to Mrs. Garthshore, Galloway urged this claim in a process of multiplepoinding, in which Mr. Spottiswoode of Spottiswoode, who had served heir in general to her, was (20th January, 1801,) preferred by the Lord Ordinary. The universal legatee reclaimed, and

Pleaded: An heritable subject may be effectually settled in a testamentary deed, provided the language employed be that of a conveyance *inter vivos* or *de præsenti*; Erskine, B. 3. Tit. 8. § 20.; Henderson against Henderson, 31st January, 1667, No. 6. p. 15927.; Douglas against Allan, 11th July, 1733, No. 15. p. 15940.; Brown against Brand, 4th December, 1735, No. 17. p. 15941.; Mitchell against Wight, 21st November, 1759, No. 32. p. 8082.; Ross against Ross, 2d March, 1770, No. 15. p. 5019.; Robertson against Robertson, 17th June, 1785, No. 25. p. 15947.; Lamont against Creditors of Lamont, 4th December, 1789, No. 53. p. 10230.; Trotter against Hale, 21st May, 1790, (Not reported; see APPENDIX.)

In the present case, Galloway is appointed " executor, universal legatary, and intromitter with the whole goods, gear, debts, and sums of money," belonging to the testatrix; and then follows a conveyance of them *de præsenti*, " all which I hereby assign, transfer, and make over." The words of conveyance in Robertson's case were, " dispone, assign, and convey;" but the term " transfer" does not seem to be less dispositive in its meaning than that of " convey;" nor " make over" less expressive of conveyance than " dispone." The word " assign" is common to both, and is of itself sufficient to express the conveyance. All these are alike dispositive words, as they are all alike *verba de præsenti*; nor does there seem to be any peculiar or technical phrase, which is exclusively essential to the conveyance of an heritable subject.

The intention of the granter is an essential circumstance in a case of this kind. Now, when she makes over all her debts, the debts due by the Macfarlanes can-

No. 30. not be meant to be excluded. Though secured by real diligence, they must still be held as debts, and are still comprehended under that general term. It was so found in Robertson. Besides, here there is an actual specification of this very debt—" The legacies to Helen and Rachel Macfarlanes shall not be paid, until my executors shall have recovered as much of the annuities or other debts due by the said William Macfarlane to me as will satisfy the same." Now, Mrs. Garthshore knew they were owing no other debts to her besides the annuity, except this bond, followed by adjudication; so that the one expression is precisely tantamount to the other.

The Court doubted the intention of disponing this bond; but were satisfied that the proper terms of conveyance of heritage were not used, besides that the words " goods, gear, debts, and sums of money," were not sufficiently descriptive of an adjudication; Ross against Ross, 2d March, 1770, No. 15. p. 5019.

The petition, accordingly, (12th January, 1802), was refused, without answers. Another reclaiming petition was refused, 4th February, 1802.

Lord Ordinary, *Ankerville*. For the Petitioner, *Stuart*. Agent, *Ja. Balfour, W. S.* Clerk, *Colquhoun*.

Fac. Coll. No. 13. *p.* 27.

1802. *January* 12. CRICHTON, Petitioner.

No. 31.

A testamentary deed being improbative, not sustained as a conveyance of moveables.

Walter Macturk bequeathed to his niece, Mary Crichton, the contents of a bill of exchange, and some other articles, in a testamentary deed, subscribed by him in presence of two witnesses, whose subscriptions are adhibited to the deed, which, however, is not holograph, and which contains neither the name of the writer nor the designation of the witnesses. His brother Robert was decerned executor, and took possession of his whole effects.

Against him the legatee brought an action, claiming the articles bequeathed to her,

Pleading: That both in the acts 1593, C. 175, and 1681, C. 5. on which the defence of the improbative nature of the writing rests, the writings specially mentioned are deeds *inter vivos*, and deeds conveying heritable property. Testamentary conveyances can be affected only by the general words, " other writs," following the special enumeration; but, in all such cases, the general words never comprehend things totally different, but those only of the same class and description. Testamentary deeds, destitute of the solemnities requisite to the authenticity of contracts and obligations, are sustained by the English law, if there exist sufficicient proof of intention; Bacon Abridg. by Gwillim, vol. 7. p. 328.; and by the civil law, Lex 4. Cod. Lib. 4. Tit. 13. In contracts, the want of the statutory solemnities cannot be supplied by the granter's acknowledgment; Crichton against Syme, 21st July, 1772, *voce* WRIT; Macfarlane against Grieve, 22d May, 1790, No. 51. p. 8459.; as it is in this last case expressed, " that these are required