for the lands themselves, but only for the money which he had given her, or which she had taken from him. But I should think that the lands would be a *surrogatum* in place of the money, with respect to the wife, who certainly was debtor in the money, but not with respect to the purchaser, who never was debtor to the husband in the money.

The Lords sustained the purchase.

1766. *June* 17. WILLIAM BAILLIE *against* MRS CHATTO.

[*Fac. Coll. IV.* No. 39.]

IN this case the Lords found that an estate being devised to A and his heirs; whom failing, to B and his heirs, and assignees; whom failing, to the donor's heirs whatsoever;—that by A's heirs were meant only the heirs of his body, and therefore, these having failed, they gave the estate to B., *dissent. tantum* Barjarg.

1766. *June* 17. PORTERFIELD *against* FALL.

[*Fac. Coll., IV.* 374.]

ONE merchant was owing money to another, which he desired payment of by an order upon Edinburgh; and accordingly a bill was sent him by the debtor on a merchant in Edinburgh, indorsed by the debtor to the creditor. This bill the creditor acknowledged the receipt of, adding, "that when paid it should be noted accordingly." This bill was not duly negotiated, and the question was, Whether, nevertheless, the creditor had recourse against the indorser?

It was said for the creditor, that these words, "when paid," plainly denoted that the bill was not taken either in payment or for value given, but in security of a debt, and therefore that he was bound to do no diligence upon it, because it is an established rule, that, when a debt is assigned in security, the assignee is bound to do no diligence, but only to impute the money, when he gets it, in payment of his debt;—and so it was decided in the very case of a bill betwixt merchants, *9th January* 1758, *Alexander* against *Cuming*. But, on the other side, a later decision was quoted, *6th February* 1762, *Walter Grosset* against *Receiver-General*, where the like judgment was given by this Court, but it was reversed in the Houso ef Lords.

My Lord Alemore said, by this last mentioned decision of the House of Lords, and by the judgment in the case of *Brebner* against *Haliburton*, where the decree of this Court was likewise reversed by the House of Peers, he understood it to be established law, that when one merchant indorses a bill to another, in the way of commerce, whether for value received, for payment, or for security of a debt, or by way of commission, in order to recover payment of it for behoof of the in-

dorser, which was the case of *Haliburton*, the merchant who gets the bill must duly negotiate it, otherwise be liable for it; and he said the nature of commerce required this.

And this was the unanimous opinion of the Court.

1766. *June* 17. MRS SETON *against* SIR JOHN PATERSON.

IN this case the Lords found that a writing having been destroyed by the obligant, it was not necessary that the obligee should insist in a process of proving the tenor of it; but it was sufficient, in a process for payment, to prove what the contents of the writing were, and that it was destroyed; and this might be done by witnesses, without adminicles in writing, such as might be necessary in the case of a proving of the tenor; and this, Lord Auchinleck said, had been several times decided, particularly in a late case, which he mentioned.

1766. *June* 18. CHARLES INGLIS *against* ROBERT WADDEL.

THE nomination of the clerk to the bills formerly belonged to the Lord Register; but, ever since the year 1730, it has been assumed by the Crown, and the practice has been of a great while to nominate two conjunct clerks of the bills, with power of naming deputes for whom they should be answerable. Two of these conjunct clerks did, in the year 1713, nominate a depute to officiate during his life, and the practice of naming deputes for life has been constant and uniform ever since. And among others, Charles Inglis, present clerk of the bills, was named in that manner depute; but both the principal clerks who named him being now dead, Robert Waddel, one of the two named in their place, insists in a reduction of Charles Inglis's nomination, as having fallen by the death of his constituents.

Charles Inglis's defence was, 1*mo*,—That his office, was, by its nature, an office during life; and he having got it in that manner, it must subsist notwithstanding the death of those who granted it. 2*do*, That Robert Waddel, one of the principal clerks, had no right to insist in this action by himself, not only without the concurrence of the other clerk, but in opposition to him.

As to the first, Pitfour was of opinion that this office, being an office which required skill and a particular education, was, of its nature, a liferent office, independent of the practice. That, for the same reason, the office of principal clerk of Session was always during life, even when they were named by the Clerk Register; and for the same reason the depute-clerks of Session are during life, though named by the principal clerks; and the sheriff-clerks, though named by the keeper of the signet. But the rest of the Lords were of a different opinion upon the general point, and thought it was impossible that a man who had only his own office during life, could name a depute who was to officiate after his death;