1681. *February* 23. HAMILTON *against* HAMILTONS.

No 3.
A man, in the event of his daughter's marriage without consent, provided her in a sum, which was left blank, and never filled up.—The Lords found they might fill it up, and restrict the provision according to the match she made.

UMQUHILE James Hamilton of Mountoun-Hall, having tailzied the lands of Mountoun-Hall to his three daughters, and the heirs of their bodies, after others succeſſive, he provided alſo to Margaret, the eldeſt, 20,000 merks, with this clauſe 'That in caſe Margaret marry without his conſent, being in life, and after 'his deceaſe, without the conſent of ſuch perſons as he ſhall nominate to be tu-'tors or curators to her; in that caſe he declares her proviſion to be void; and 'in caſe thereof, ſhe ſhall have the ſum of ,' which he never filled up. The ſaid Margaret and James Baird, younger of Saughtonhall, her huſband, purſues the other two daughters, as heirs-portioners, to fulfil the tailzie and proviſion; who *alleged* abſolvitor from the proviſion of 20,000 merks, becauſe the purſuer had married without conſent of the perſons nominate by her father in his teſtament, and recommended to her, to be choſen as her curators; but had within few weeks of her father's death, married herſelf to James Baird, without proclamation.—It was *answered* for the purſuer: 1*mo*, That ſuch clauſes reſtraining the freedom of marriage are null, as *contra bonos mores;* and, whatever the reverence of a father might import, yet that power could not be extended to others. 2*do*, Though it could, yet it can only import, that if the purſuer had married with diſparagement, her father might have reſtricted her portion, and given the ſuperplus to the reſt; but the proviſion of children being a natural obligation, the want of conſent, though in an unequal marriage, could not annul, but reſtrict the proviſion; which cannot now be reſtricted, her father being dead, and having left the reſtriction blank, and ſo in effect paſt from it. 3*tio*, This clauſe could have no effect, unleſs it had been known to the daughter, and ſhown to her, together with the recommendation in her father's teſtament; which was never inſiſted in, nor ſhe deſired to chooſe theſe perſons; but, on the contrary, ſhe did not marry before ſhe was of full maturity; and to a huſband fully deſerving her, after he had frequently made addreſs to her as a ſuitor in her mother's houſe.

THE LORDS found the laſt defence relevant, but repelled the former defences; ſuch clauſes being both juſt and ordinary; and found that the Lords, as *boni viri* might reſtrict the proviſion, in caſe the clauſe were tranſgreſſed, and might fill up the blank according to the condition of the family, and the parties matched. (*See* CONDITION.)

Fol. Dic. v. 1. *p.* 52. *Stair, v.* 2. *p.* 865.

1684. *January.* MR GEORGE SHOLEE *against* JANET ALISON.

Found that the Lords of Seſſion might determine the quantity of a legacy *collatum in arbitrium tertii*, according to the defunct's eſtate, and circumſtances of the perſons, in the caſe of the third party's death, or refuſal to declare it.

Fol. Dic. v. 1. *p.* 52. *Harcarſe*, (LEGACY.) *No* 664. *p.* 189.