No 38. that notwithstanding thereof, all the sisters should succeed as heirs portioners, yet that the said testament should be looked upon as a codicil; whereupon it was *alleged* for the eldest sister, That she ought to have right to the whole moveables, albeit as to the nomination of her as sole executrix, the testament was null. It was *anwered* for the younger sister, that albeit her right were sustained to that universal legacy, yet it ought to be burdened with 10,000 merks left to the younger sister for her provision, which being a debt most favourable, ought to be first paid, and then if there be any superplus, they ought to have the half thereof as their portion natural, and the eldest could only have the defunct's part. To this it was *replied*, That the eldest sister's right was only burdened with the sum of 10,000 merks of provisions, in contemplation of the whole estate, both heritable and moveable, left to her wholly; and now her right as to the lands and heritage being reduced, and her younger sisters being co-heirs with her, they can have no right to the moveables, neither can they be burdened with the said provisions, seeing that can never have been thought to have been the mind of the defunct; for thereby the younger sisters should be in a far better condition than the eldest, having an equal division with her as to the lands and heritage; and besides burdening the moveables with 10,000 merks, it would exhaust the whole moveables and value thereof, and take away the portion natural due to the eldest, and all that she could crave out of the defunct's part. THE LORDS found, That the will of the defunct being so express and clear, that the eldest should have the whole estate, heritable and moveable, with the burden only of 10,000 merks; that her right as to the heritage being reduced, the provision as to the moveables ought not wholly to affect the same; and therefore decerned, that the three sisters should have each of them their portion natural out of the half of the inventory, and that the eldest, by virtue of the codicil and legacy, should have right to the defunct's half of the free goods.

Gosford, MS. No 302. *p.* 131. No 327. *p.* 147.

1688. *February.*

STEWART KETTLESTON's Three Daughters *against* JAMES HAY.

No 39. A person to whom John Suttie had disponed a considerable real and personal estate to the value of L. 5000 Sterling, with the burden of L. 1000 Sterling to another, being pursued for the legacy, *alleged*, That the said legacy was left with a view that the defender was to get the whole fortune, whereas the real estate, which is the greatest part, was evicted by the heir in a reduction *ex capite lecti*; and, therefore, the legacy ought to suffer a proportionable abatement, as being in so far *legatum rei alienæ;* and as the defender was preferred to the legatar in getting the disposition, it is to be presumed the defunct intended the greatest share of the estate for him, who was obliged to

take the disponer's name and arms; whereas, if the pursuer get the whole legacy, after the payment of debts, the defender will have no benefit by the disposition. No 39.

Answered, The pursuers, who are the defunct's aunts, are more favourable than the defender, who is a remote relation. 2*do*, The disposition being burdened with the legacy, and an irritancy adjected in case it were not paid, that imports, that *in omnem eventum* the whole legacy was to be paid.

THE LORDS decerned for the whole legacy, and ordained the defender to pay or assign to the defunct's estate. But found not annualrent due for bygones.

Fol. Dic. v. 1. *p.* 427. *Harcarse*, (EXECUTRY.) *No* 480. *p.* 131.

1729. *February* 20.

COUNTESS of STRATHMORE and LADY KATHARINE COCHRAN *against* MARQUIS of CLIDESDALE and EARL of DUNDONALD.

No 40.
A final settlement of entail, by which bonds of provision were granted, found to preclude the grantees from taking up as heirs, in prejudice of the entail, subjects accidentally omitted in the settlement, unless they would renounce their provisions.

JOHN Earl of Dundonald, by a bond of entail, made a total settlement of his estate to the heirs of tailzie therein expressed. Two days before subscribing this tailzie, he executed bonds of provision in favour of his daughters, and at the same time, made a will in relation to his moveables; which deeds, jointly taken, and in effect executed at the same time, and kept by him undelivered, made a total settlement of his estate, and shewed his firm intention that the lands should descend to his heirs of entail, and that the ladies, his daughters, should have nothing but their provisions. After the said Earl of Dundonald's death, it being discovered, That some of the lands contained in the tailzie had never been habily vested in the tailzier, but were still *in hæreditate jacente* of a remote predecessor, the Lady Strathmore, and Lady Katharine Cochran, his two daughters, insisted in a declarator, That, as heirs of line to the said remote predecessor, they were entitled to serve themselves in these lands that remained yet in his *hæreditas jacens*. This was opposed by the heir of tailzie, for whom it was pleaded, That they could not approbate and reprobate their father's will; if they accepted their bonds of provision they could not quarrel the tailzie; and if they quarrelled the tailzie, that they must renounce their provisions. *Answered*, The bonds are conceived simply, and absolutely without any condition; and the accepting thereof cannot cut them out of any other right, competent to them; That one cannot approbate and reprobate the same individual deed, which would be an inconsistency; but there is no inconsistency in one approbating a deed which the granter had power to make, and at the same time reprobating another deed which the granter had no power to make. *Replied*, Since the Earl of Dundonald granted these provisions to his daughters upon this very cause and consideration, That they were to have nothing else out of his estate; and since he burden-