defined what he considered as a reasonable provision, this was not to be defeated by the adjecting of an unreasonable condition. No 38.

It was also considered as a circumstance of importance, that the codicil was not communicated to the daughter before the marriage. But little stress was laid upon the *misnomer* above mentioned, though founded on by the pursuers.

THE LORDS reduced the codicil.

Reporter, *Lord Dreghorn.* Act. *M. Ross.* Alt. *Abercromby.* Clerk, *Home.*

S. *Fol. Dic. v.* 3. *p.* 160. *Fac. Col. No* 205. *p.* 431.

*** This cause was appealed, and the HOUSE OF LORDS reversed the judgment of the Court of Session.

SECT. III.

Condition, whether to be understood Copulative or Disjunctive.

1677. *January* 11. BAILLIE *against* SOMMERVILL.

No 39.

THERE being a provision in a contract of marriage in these terms, that 5000 merks of the tocher should return to the father-in-law, in case his daughter should decease before her husband, within the space of six years after the marriage, there being no children betwixt them then on life; and in case the father-in-law should have heirs male within the space of six years after the marriage;

THE LORDS found the said provision copulative; and that the tocher should not return, albeit the father-in-law had heirs male within the foresaid time; seeing the other member of the said condition did not exist; in respect, albeit his daughter deceased within the said time, yet she had a child of the marriage that survived.

Reporter, *Gosford.* Clerk, *Hay.*

Fol. Dic. v. 1. *p.* 191. *Dirleton, No* 423. *p.* 210.

1712. *July* 17.

DAME RACHEL NICOLSON, Lady Preston, *against* DR GEORGE OSWALD of Preston.

No 40.
A Lady renounced her jointure, with

SIR THOMAS HAMILTON of Preston having infeft Dame Rachel Burnet, his Lady, in an yearly annuity of 1200 merks out of his barony of Preston; in a

No 40.
this provision, that if it should happen, the party in whose favour she renounced, to die without heirs male of his body, or to have but one daughter; then, and in either case, the renunciation should be null. The renunciation was found null, upon his dying without an heir male, though he left several daughters.

contract of marriage betwixt Sir William Hamilton, Sir Thomas's eldest son and Dame Rachel Nicolson, his Lady's daughter of a former marriage in the year 1670, Dame Rachel Burnet granted a renunciation of the annuity, containing this clause irritant, viz. If it shall happen the said Sir William Hamilton to die without heirs male of his own body, or to have but one daughter; then, and in either of these cases *respective* foresaid, the renunciation should be null, and of no avail, strength or effect. Sir William having died leaving no heirs male, but only three daughters; Dame Rachel Nicolson his relict, who was assigned by her mother to the annuity foresaid, pursued a poinding of the ground.

Compearance was made for Dr Oswald, present heritor of Preston, who *alleged*, That the liferent annuity stood renounced.

Replied for the pursuer; The renunciation is not simple, but conditional and irritated, 1*mo*, By Sir William Hamilton's dying without heirs male of his body; 2*do*, By his leaving a daughter; the words, 'in case he have but one daughter,' importing if there be but so many as one daughter.

Duplied for the defender; The clause irritant must not be divided into two alternatives, but taken complexly as if it had run thus, 'If Sir William die 'without heirs male, leaving only one daughter, then the renunciation shall be null:' Now albeit Sir William wanted heirs male, he had several daughters, and so cannot be said to have but one; consequently, the irritancy is not incurred *in terminis*, nor yet in the meaning of parties. The Lady was allowed recourse to her annuity, if Sir William left only one daughter, and not in the case of his leaving more daughters; because, an estate is more incumbered with the provision of several children, than with the provision of one. This absurdity would follow from taking the controverted clause in a divided sense, so as to infer the irritancy from either the failure of Sir William's heirs male of his body, or the existence of one daughter, viz. *esto* there had been twenty sons and but one daughter, the second member of the irritancy would have been incurred. Now *verba ita accipienda sunt, ut illud de quo agitur magis valeat, quam pereat. Et quoties idem sermo duas sententias exprimit, ea potissimum accipitur, quæ rei gerendæ aptior est.*

Triplied for the pursuer; The words must have effect, though the consequence were hard; for *ita lex scripta est;* and by an old act of Sederunt, in the year 1713, the Lords declared they would interpret irritant clauses according to the express words thereof. And justly, seeing otherwise, contracts would not be the deeds of parties, but the deeds of their successors, and very often of their contradictors or opposites, and at best, of the Judges, who should advise what was most reasonable for the parties to have done and intended, taking their rule of conjecture from the present time and argument, though never so different from the inclination and circumstances of parties at the granting of the deed; 2*do*, Neither is it absurd to make the irritancy take effect, as the pursuer pleads it should; for the grand-mother, in case of an heir male and no

daughters, ceded her jointure out of respect to the family; but secured her return to it in the event of a daughter, that she might be in a condition to provide that daughter; and though there might have been many sons, she did not think it worth her while to look to their provision; because the sons of great families are generally better able to provide for themselves than the daughters, whose station and quality is a burden to them, and makes them miserable if unprovided. No 40.

THE LORDS found, That seeing there was no heir male of the marriage, the renunciation was void and null.

Fol. Dic. v. 1. *p.* 191. *Forbes, p.* 618.

1747. *December* 3. BOTHWELLS *against* The EARL of HOME.

No 41.
A person having left portions to younger children, payable on their marriages or majorities, or at their mother's death, which-ever event should first happen, providing that the portion of any of them dying before marriage or majority should fall to the rest; one of them having died before marriage, but after majority, the Lords found, that the condition of the substitution was not purified; and that the portion went to her representatives,

and not to the substitutes.

ALEXANDER, Earl of Home, granted a bond of provision to his brother and two sisters, who were unprovided by their father, in these terms: 'We, with and 'under the provisions and conditions under-written, bind and oblige us to make 'good and thankful payment to Ladies Marjory and Margaret Homes, our lawful sisters, and to Mr George Home, our youngest lawful brother, of the sum 'of 20,000 merks, in manner, and according to the division under-written, viz. 'To ilk ane of the said Ladies Marjory and Margaret Homes, the sum of 7000 'merks, and to the said Mr George Home the sum of 6000 merks, and that at 'the first term after their respective marriages or majorities, or after the decease 'of Anne Countess of Home our mother, which of the said three events shall 'first fall out; together also with the due and ordinary annualrent of the just 'and equal half of the said principal sum, from and after the term of Martin-'mas next to come, and the annualrent of the said hail principal sum from and 'after the said terms of payment, which of them shall first fall out.' By a subsequent clause it is provided, 'That in case of the decease of any of the said 'Ladies Marjory and Margaret, or Mr George Homes, before their respective 'majority or marriage, then and in that case, if one of them deceased, her 'part and portion of the sums should *ipso facto* fall and belong to the other two 'survivors equally betwixt them; and in case of the decease of one or both of 'the said two last survivors, the portion of the deceasing should fall, accresce, 'and pertain to the said Alexander Earl of Home:' Declaring that this bond should be in full satisfaction of all other claims competent to the said brother and sisters out of the succession of either their father or mother.

The two Ladies having survived their majority, took an adjudication against their brother, after which Lady Marjory died unmarried; and Lady Margaret being married to Alexander Master of Holyroodhouse, conveyed in her contract of marriage her own provision, together with the half of her sister's, as accresced to her by the substitution, Lady Marjory having died unmarried, to Henry Lord Holyroodhouse; who assigned it to Mrs Eleanora, Mary and Anne