table subject, and that if the matter were entire to be determined on the principles of the civil law, they would have thought the legacy not due, as being *legatum rei alienari prohibitæ*. But they thought it not entire, for that by the course of our decisions, legacies of heritable subjects were put upon the same footing with *legata rei alienæ*; and their only doubt in this case was, Whether or not the testator knew that the house and feu did not fall under the general description of things left in his testament; for, if he did not, then it was in the case of *res aliena* left by a testator, believing it to be his own, which would not be due, the presumption being that he would not have left it in legacy had he known it. But that difficulty being removed by an admission from the bar, that the testator was told it after his signing the testament, they were then clear that the legacy was due; though there were some who said they did not think that our law stood so, that *legata* of heritable subjects in testaments were on the same footing with *legata rei alienæ*, which would be in a great measure to give up the law of death-bed; and who were also of opinion, that wherever a legacy is given to be paid out of a certain subject, it cannot be due further than the subject extends. No 28.

Kilkerran, (LEGACY.) *No* 4. *p.* 328.

1749. *February* 25.

ANN FOTHERINGHAM, and DAVIDSON her Husband, *against* NAIRNS.

No 29.
Legatees were found entitled to possession, in opposition to the executor; the legatees finding caution to be accountable to creditors, if the fund should prove deficient.

JOHN MURRAY, son to Lord Edward Murray, by his testament in April last, nominated Louisa and Henrietta Nairns his executors, and universal legataries; and by another deed in September last, he bequeathed to Mrs Ann Fotheringham, spouse to John Davidson of Whitehouse, certain particular pieces of furniture, free of all burdens, and gave power to her, after his decease, to intromit with the said particulars. As Mr Murray died in Mrs Davidson's house, in which the particulars legated were, a question arose between the legatary and the executors as to the possession of the subjects legated; the legatary and her husband insisting that the possession as well as the property was transmitted by the legacy; on the other hand the executors contending, that as the defunct's debts were preferable to the legacies, the possession of the goods ought to be with them, until it should appear, whether or not there was sufficiency to pay the debts beside the legacies.

Upon this debate, the Commissaries, after having found that the possession was not transmitted, and that action at the legataries' instance was necessary to be brought against the executors for obtaining the same, did, by another interlocutor in the action brought against the executors, find, 'That special titles ought to be made up to the same before delivery.'

No 29.

Which being complained of by bill of advocation, the LORDS found, 'That there was no occasion for confirming the special legacy, and that the legataries were entitled to retain their possession upon caution to answer for the values to all persons having interest, the same being ascertained by appretiation made by persons of skill.'

THE LORDS considered, that were the subjects confirmed, the legataries might pursue the executors to give them up upon caution; and if so, why not detain them upon caution, as no lapse of time can hurt the creditors in their preference to the legacy.

Fol. Dic. v. 3. p. 379. Kilkerran, (LEGACY.) *No 5. p. 330.*

1749. *November 17.* SMITHS *against* TAYLOR.

No 30.

A PERSON on his death-bed acquainted his nephew, that he intended, that he, along with two others who were his half-neices, should equally share his effects. After the death of the uncle, the neices pursued the nephew, on his implied consent, to make good his uncle's destination. It being found, That the nuncupative testament could not be sustained on the nephew's implied consent, but that the provision in their favour resolved into verbal legacies, a question arose, whether the destination should be sustained only to the extent of L. 100 Scots, to be divided equally among the three, or whether each of them had a claim to the extent of L. 100 separately. THE LORDS found, That the share of each of the legatees should be sustained to that extent.

Fol. Dic. v. 3. p. 379. D. Falconer. Kilkerran.

*** This case is No 9. p. 6594. *voce* IMPLIED WILL.

1756. *February 13.*

ARCHIBALD ARBUTHNOT, ROBERT GORDON, and MARGARET GORDON, *against* ELISABETH ARBUTHNOT.

No 31.

A legacy was left, after others, in these words, 'And 'the remaining L. 600, 'residue of 'the said 'L. 1600, I 'bequeath to 'A. B.' A

IN July 1750, Robert Arbuthnot, in his marriage contract with Mary Arbuthnot, became bound to secure L. 900 Sterling of his own, and L. 700 of his wife's, with half of the conquest to the wife in liferent, and to the children of the marriage in fee, declaring, That whatever he should be worth at the dissolution of the marriage over L. 1600 should be esteemed conquest; in case one daughter only should exist of the marriage, the fee of the L. 1600 was declared restricted to L. 800.

Of this marriage there was one daughter, Elizabeth.