1681. February 23. Hamilton against Hamiltons.

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

UMOUHILE James Hamilton of Mountoun-Hall, having tailzied the lands of Mountoun-Hall to his three daughters, and the heirs of their bodies, after others fuccessive, 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 tufor 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 faid Margaret and James Baird, younger of Saughtonhall, her husband, purfues 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 confent 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: 1mo, 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. 2do, 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. 3tio, 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 infifted in. nor she defired to choose these persons; but, on the contrary; she did not marry before the was of full maturity; and to a hufband fully deferving her, after he. had frequently made address to her as a fuitor 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 resulal to declare it.

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