No. 15. 1748, June 22. CATTO *against* GORDON.

CATTO by his testament appointed Catto, &c. his executors with the burden of certain legacies, and then he legates to another William Catto 400 merks out of the money that shall arise on the sale of his houses and feu in Ellon, and the like sum to another Catto; and on the above conditions and restrictions he appointed and constituted the said persons, his uncles, his executors and universal legatars, in all and haill his stock and fortune; these were the words.—These houses had never been sold, and the question was, Whether the executors were liable to make good the two sums out of the executry, though they have no right to the houses or feu, out of the price whereof they were payable? Mention was made of the legatars' relation, but it was so remote that we laid no weight on it. On the question we found the legacies due, if there is so much free executry, *renit.* Arniston, Kilkerran. Leven did not vote.

No. 16. 1748, Dec. 7. ROBERT LECKIE *against* DAVID RENNIE.

See Note of No. 21. *voce* TUTOR, &c.

No. 17. 1749, Feb. 25. DAVIDSON, &c. *against* EXECUTORS OF MURRAY.

THE defunct, the son of Lord Edward Murray, by a codicil legated several particulars of furniture to Mrs Davidson, &c. who sued before the Commissaries to have them delivered up to them after being valued, on caution to repeat in case the executry be exhausted by debts. The Commissaries had found that they must make a special title; but on advocation we found they must be delivered on caution without any further title.

No. 18. 1752, Dec. 22. EMILIA BELCHIES, &c. *against* SIR P. MURRAY.

IN 1738, Mr A. Murray disponed his estate, what he then had, or should have at his death, failing heirs of his own body, to his nephews John and Thomas Belchies, with sundry substitutions, and burdened them with several legacies, *inter alia*, to Emilia Belchies, his niece, of L.300 sterling, payable at the first term of Whitsunday or Martinmas after her marriage, with penalty and annualrent from the term of payment, and an annuity of L 16 sterling yearly, commencing at the first term of Whitsunday or Martinmas after his death, until the L.300 should become due. In 1740 he altered his disponees, and disponed the whole to Sir Patrick Hepburn Murray, his nephew, but with the burden of all his legacies granted or to be granted, particularly those in the former deed, which he declared he noways intended to revoke. Thereafter Emilia Belchies was married to Oliphant, and had two sons; and in 1744 Mr Murray, without any mention of the former legacy, granted a bond (revokable) of L.1200, payable after his death, with penalty and annualrent to the said Emilia in liferent, and her two sons, in trust for themselves, and the other children to be procreated of that marriage in fee, whom failing, to the husband and his heirs of any other marriage, whom failing, to his own heirs and assignees, excluding the husband's *jus mariti* and his right of administration, with power to the mother, and failing her, the father, to divide among the children. Sir Patrick was

willing to pay this last bond, but contended that he was not also liable for the L.300 legacy, and that the L.1200 which the defunct secured in the same manner as a marriage settlement, was plainly intended in lieu of the legacy, and that had the defunct intended that both should be paid, he would have taken some care of the interest of the wife and children in the L.300, whereas it was simply moveable at the time of the marriage, and if at all due, must belong to the husband alone. On the other hand, Oliphant and his wife alleged that though two legacies are left by different deeds to the same person, both are due, much more when so very different as these two deeds;—that it would make Judges too arbitrary, if they could on remote conjectures set aside legacies where no words are to be found in the deed importing a revocation; and on the contrary, in this case, the bond for L.1200, is so far from bearing to be in place or satisfaction of L.300, it is expressly for love and favour.—Whereupon a process was raised for the L.300, which came before me, and I reported the debate;—and the Lords found the L.300 legacy not due. *Renit.* Kilkerran, Shewalton, and Kames. I observed that that legacy became imprestable *in forma specifica*, even during Mr Murray's life, by Emilia Belchies's marriage, which made it impossible for either Mr John or Mr Thomas Belchies, or Sir Patrick Hepburn Murray, to pay it at the first term after the marriage; and therefore, though in equity it might be still due had there been no posterior settlement or legacy, yet in strict law I doubted if a legacy that becomes imprestable during the testator's life, and which he knew, could be due; and if the pursuer's claim was only in equity, then the defence on the apparent meaning of the defunct in this case would be good also.

No. 19. 1753, Jan. 2. JOHN BARBOUR *against* AGNES HAIR.

BARBOUR made a deed settling part of his small stock upon his wife, more than she had before been provided to, and thereafter made a testament, and named executors, wherein he distributed the rest of his effects amongst a great many poor relations. He had given his wife right to all his household plenishing and crop, so she continued in possession, and had intromitted with his writings, which she afterwards delivered to the executors, except two small bills of 156 merks, and 151 merks, and they sued her in an exhibition and delivery of these bills, and she deponed and exhibited them with blank indorsations, and added a quality, that after the testament he had indorsed these bills blank, and given them to her in a present a few days before his death. The cause was brought before me either by advocation or suspension, and as it seems, I doubted if the defence on that quality in her oath was good. She offered further to prove the fact by witnesses, and I allowed a proof before answer, which came this day to be advised. The proof was not very clear; there was indeed one witness that proved, but the other did not quite come up to it; but the dispute turned on the point of law which none of us had time to consider or look into precedents. The President thought this was making a legacy by a bill, contrary to our decision in the case of Weir and I think John Parkhill. I thought it rather worse than that case, for here was no writing at all in the defender's favours, only she was possessed of two bills of her husband's with blank indorsations, and though in the case of a stranger such possession would give them right, yet in the case of a wife who has access to all her husband's writings, it signified nothing. As to the quality