found, that a charge of horning made these bonds so moveable, that, notwithstanding of the clause secluding executors, yet they did belong to the executors, sicklike, as if the foresaid clause had never been inserted in the bonds, in regard that, by the charge of horning, the creditor had sufficiently declared his mind to have up his money from the debtor; in which case, if it had been lying by the defunct, it would have belonged to the executors, and that the debtor's not making payment in obedience to the diligence, could not be profitable to the heir so as to keep the money still heritable. This interlocutor was pronounced upon a hearing in presence, and hereby, they altered a former interlocutor given upon a report from the Outer-House. No 109.

Fol. Dic. v. 1. *p.* 372. *P. Falconer, No* 43. *p.* 23. *& No* 56. *p.* 35.

1707. *December* 4.

ALEXANDER AITKEN of Middlegrange *against* JAMES GOODLETS, elder and younger of Abbotshaugh.

No 110.
A person disponed his estate to his eldest son, with the burden of certain provisions to his younger children, which he had become bound to pay in his contract of marriage. Found, that the provisions were heritable.

JAMES GOODLET, in his contract of marriage with Agnes Melross, 'obliged 'himself, his heirs and successors, in the estate therein mentioned, to pay to 'the rest of the children, to be procreated of the marriage, the sum of L. 10,000 'Scots, to be divided equally among them at their respective ages of sixteen 'years, with annualrent during the not payment, and this provision, that the 'portion of any of these younger children dying unmarried should fall to the 'survivers.' There having been four children of the marriage, whereof one went abroad without returning home, the father disponed his estate in favours of his eldest son James Goodlet younger, with the burden of paying his anterior just and lawful debts, and 10,000 merks to Alexander and Jean Goodlets his other children, as their portion natural. Jean having died, leaving a daughter behind her, who was served heir to her mother, and then died, Alexander Aitken, the father, as heir to his child, pursued James Goodlets, elder and younger, for payment of the 5000 merks provided to Jean his wife, and for the equal third part of John's portion, who had deceased before his sister, after he was sixteen years complete.

Alleged for the defenders; Absolvitor, *quoad* the 5000 merks, because moveable, and so not to be carried by a service. 2*do*, Absolvitor from any share of the brother's portion, because *non constat* he is dead. And *esto* his death were proved, the pursuer's wife being neither heir nor executor to him, his portion would belong to the surviving brother.

Replied for the pursuer; Though the 5000 merks was moveable by the contract of marriage, it became heritable by the supervenient disposition, which made it a real right upon the estate disponed by James Goodlet elder to his son, both the procuratory of resignation and precept of sasine being affected with

No 110. the burden thereof, whereby the daughter was preferable to all the deeds of the son. 2*do*, That the brother is dead is instructed by the disposition, wherein the father reckons on no more children but three; especially considering, that the pursuer having offered to prove, by the defender's oath, that he was dead, the deponent acknowledged, 'that he suspected the worst.' Again, the portion of the deceasing children being provided, in the contract of marriage, to the survivers, the surviving children had right to draw the same without any title of succession. And though the former, by arriving at the age of sixteen, might seem *facere partes;* yet by their death, without uplifting the money, the latter's right revived as if the deceased children had never existed.

Duplied for the defender; The younger children's provision, that was moveable by the contract of marriage, became not heritable by the disposition, more than all the father's other debts wherewith he thought fit to burden his son; for, though the burden did undoubtedly make the son, and lands disponed to him, liable for the debts and provisions, which thereby turned heritable *quoad debitorem*, it did not change the nature of these debts, which notwithstanding remained personal *quoad creditorem*. Nor doth it appear to have been the father's intention, by the burdening clause in the disposition, to alter the nature of his daughter's provision, but only to secure her as to the payment; especially considering, that it was not originally constituted by the disposition.

THE LORDS found, that the provision in favours of the four younger children, by the disposition granted by the father to the son, became heritable; and that the brother is presumed to be dead. *See* PROOF.

Fol. Dic. v. 1. *p.* 372. *Forbes, p.* 201.

1734. *November* 21. CLELAND *against* PROVOST M'AULAY.

No 111.

A PERSON infeft upon an heritable bond, not payable, nor bearing annualrent till after his decease, having assigned the same in security of a moveable debt due by him, with procuratory and precept, this accessory security was found to make the sum contained in the bond heritable, though the creditor died before the term of payment of the annualrent-right.

Fol. Dic. v. 1. *p.* 372.

1740. *January* 8. DUKE of HAMILTON *against* The EARL of SELKIRK.

No 112.

FOUND, that not only irredeemable dispositions, but also adjudications, heritable bonds descendible to the heirs and assignees of the defunct, although no infeftment had followed thereon, descended to the heir of conquest; but that