1786. *June* 20.

JANET GIBSON and OTHERS, *against* JOHN CLEARIHUE MACBAIN.

No 11.
A perſon having accepted of a legacy deviſed to him, cannot refuſe effect to a bequeſt contained in the ſame ſettlement, in favour of another.

AMONG the effects belonging to John Clearihue, there was an heritable bond, which devolved at his death to his ſon, who was then in India.

The ſon, however, though informed of his father's death, and though he had given authority to his agents in this country to adopt ſuch meaſures as they thought moſt for his advantage, made up no titles as heir to his father; it being doubted by thoſe who had the management of his concerns, whether he ought to betake himſelf to the heritage, or, after collating it with his father's younger children, to draw a rateable proportion of the whole effects.

In the mean time he executed a latter-will, whereby he bequeathed *his eſtate in India* to John Clearihue Macbain, one of his nephews, and *his eſtate in Scotland* to Janet Gibſon, his mother, and his other relations; expreſsly excluding thoſe who ſucceeded to him in the former, from partaking in any manner of the latter.

A diſpute enſued after his death with regard to the heritable bond. As the ſums thereby ſecured were ſtill *in hæreditate jacente* of the teſtator's father, John Clearihue Macbain, who had taken poſſeſſion of his uncle's India eſtate, *contended*, That theſe did not fall within the words of the deviſe, which were limited to the eſtate belonging to the teſtator; thus endeavouring to diſtinguiſh his caſe from thoſe formerly decided, in which a legacy of a right of lands belonging to a teſtator, was found effectual againſt his heir, who had taken a benefit from the teſtament in which the legacy was given; 17th January 1758, Mary Gainer *contra* Cunningham, No 10. p. 617.

THE LORDS found, 'That John Clearihue Macbain having taken the eſtate or effects acquired by his deceaſed uncle in India, under a ſettlement executed at Calcutta, whereby he ſtood excluded from any dividend of the effects or eſtate, which was, or might become the property of his ſaid uncle in Scotland, is thereby debarred from competing for any part of the ſums in queſtion.'

Lord Ordinary, *Elliock.* Act. *Maclaurin.* Alt. *C. Hay.* Clerk, *Sinclair.*

Fol. Dic. v. 3. *p.* 34. *Fac. Col. No* 273. *p.* 421.

Craigie.

1792. *July* 4.

The VISCOUNT of ARBUTHNOT, *against* The Honourable JOHN, &c. ARBUTHNOTS, and their TUTOR *ad litem.*

No 12.
Whether one ſucceeding to a large perſonal eſtate, be obliged to fulfil his pre-

IN 1733, John, Viſcount of Arbuthnot, executed a deed of entail, in the form of a diſpoſition, reſpecting the lands of Arbuthnot. Failing the heirs-male of his own body, his uncle, and neareſt male relation, John Arbuthnot of Fordoun, and his heirs-male, were called to the ſucceſſion.