No 37. *L.* 55. *D. De Oblig. et Act. L.* 10. *D. De Donat.* See also *Voet ad d. tit. num.* 11.; *Perez. ad d. tit. C.* § 23.; *Sande dec. Fris. l.* 5. *tit.* 1. *def.* 1.

Nor is this rule rejected by the law of Scotland: The quotation from Lord Bankton does not prove the defender's doctrine; for, taking the whole passage together, the meaning is clear, that donations do not become effectual without acceptance, unless in the special case where delivery is made to a third party for behoof of the donee.

The authority of Sir James Stewart is still less applicable. He does not say, that a donation is effectual without acceptance; but, in treating of the nature of implied acceptance, he lays it down that a donee who does not repudiate, is held to accept, which must proceed upon the supposition that the donee is in the knowledge of the gift, else he can neither repudiate nor accept.

In the present case, there was no delivery to the donee, or to a third party for his behoof. The bill therefore remained in the power of Dr Alves, who was intitled to dispose of it in his last will, or otherwise. Indeed it was the duty of the bearer of the letter to have restored it to the Doctor, when he found that his father was dead; and his accidentally or improperly giving it out of his hand, cannot make any alteration upon the matter of right.

"THE LORDS, in respect that Andrew Alves died within a few weeks after the bill was indorsed, and sent to him from Calcutta in the East Indies, and that thereby the said bill was never received by Andrew Alves in his lifetime, and that the indorsation appears to have been intended as a present, and that Dr Alves, after hearing of his father's death, by his letters to Richard Cockburn, his factor, desires him to receive the money due by the said bill, find that the money due by said bill belongs to the pursuer as executor to Dr Alves."

Act. *Solicitor Dundas.* Alt. *Wight.* Reporter, *Kennet.*

A. E. *Fac. Col. No* 105. *p.* 363.

SECT. VII.

A final Settlement frustrated in some particulars, how far effectual as to the remainder.

No 38. A person disponed his whole

1671. *February* 1. PRINGLE *against* PRINGLE.

PRINGLE of Soutray having only three daughters, does in his testament, done upon death-bed, dispone his whole lands to his eldest daughter, and constitute

No 38.
lands to his eldest daughter, with provisions to his younger daughters. The disposition having been reduced, as granted on death-bed; the provisions to the younger children were also reduced.

her universal legatar, with this provision, that she pay 10,000 merks to the other two daughters. The disposition as to the lands being reduced, as being in testament and on death-bed; the universal legacy was sustained, to give the eldest daughter the right of the dead's part; whereupon it was *alleged* for the other two daughters, that if the eldest insisted for the universal legacy, she behoved to have it with the burden of the ten thousand merks, which was a burden both upon the land and moveables, and doth no more relate to the one than the other; so that albeit the right of the land be evicted, the moveables remain burdened; as if a father should dispone certain lands to a son, with the burden of portions to the other children, albeit a part of the lands were evicted, the portions would be wholly due without abatement. It was *answered* for the eldest daughter, that in latter wills, the mind of the defunct is chiefly regarded, not only as to what is expressed, but to what is implied or presumed; and here it is evident, that the mind of the defunct was, that his two younger daughters should only have ten thousand merks in satisfaction of all rights of lands or moveables: Now, seeing they have gotten two third parts of the land, which is much better than ten thousand merks, it cannot be thought to be his meaning to give them any share of his moveables also, but that the half thereof, which was at his disposal, should belong to the eldest daughter without burden.

Which the LORDS found relevant, and declared the same to belong to the eldest daughter, without burden of the provisions.

Fol. Dic. v. 1. p. 426. Stair, v. 1. p. 713.

*** Gosford reports the same case:

1670. *July* 13.

IN a reduction and improbation of a testament testamentar, made by Robert Pringle of Soutray, wherein he did nominate Agnes, his eldest daughter, his sole executrix and universal legatrix to him, in his whole lands, moveables, and estate, whereas to that part it was blank, when the defunct died, and filled up after his death, by a notary; it was *answered*, That it was offered to be proved, that the defunct did truly so order it to be done before he died, by the writer and witnesses inserted in the testament. THE LORDS, notwithstanding of the answer, did sustain the reduction as to the nomination of the executors, and that particular clause which was confessed to be filled up after the defunct's decease, in respect that nuncupative testaments are not sustained by our law; but as to the rest of the testament, they did sustain the same, as a ——— legacy, reserving to both parties to be heard upon the particulars, if they were testable, and how far they were affected with any conditions or provisions.

1671. *February* 1.

IN the foresaid reduction, at Margaret Pringle's instance, against her eldest sister, the testament, as to the disposition of the lands, being found null, and

No 38. that notwithstanding thereof, all the sisters should succeed as heirs portioners, yet that the said testament should be looked upon as a codicil; whereupon it was *alleged* for the eldest sister, That she ought to have right to the whole moveables, albeit as to the nomination of her as sole executrix, the testament was null. It was *anwered* for the younger sister, that albeit her right were sustained to that universal legacy, yet it ought to be burdened with 10,000 merks left to the younger sister for her provision, which being a debt most favourable, ought to be first paid, and then if there be any superplus, they ought to have the half thereof as their portion natural, and the eldest could only have the defunct's part. To this it was *replied*, That the eldest sister's right was only burdened with the sum of 10,000 merks of provisions, in contemplation of the whole estate, both heritable and moveable, left to her wholly; and now her right as to the lands and heritage being reduced, and her younger sisters being co-heirs with her, they can have no right to the moveables, neither can they be burdened with the said provisions, seeing that can never have been thought to have been the mind of the defunct; for thereby the younger sisters should be in a far better condition than the eldest, having an equal division with her as to the lands and heritage; and besides burdening the moveables with 10,000 merks, it would exhaust the whole moveables and value thereof, and take away the portion natural due to the eldest, and all that she could crave out of the defunct's part. THE LORDS found, That the will of the defunct being so express and clear, that the eldest should have the whole estate, heritable and moveable, with the burden only of 10,000 merks; that her right as to the heritage being reduced, the provision as to the moveables ought not wholly to affect the same; and therefore decerned, that the three sisters should have each of them their portion natural out of the half of the inventory, and that the eldest, by virtue of the codicil and legacy, should have right to the defunct's half of the free goods.

Gosford, MS. No 302. *p.* 131. No 327. *p.* 147.

1688. *February.*

STEWART KETTLESTON's Three Daughters *against* JAMES HAY.

No 39. A person to whom John Suttie had disponed a considerable real and personal estate to the value of L. 5000 Sterling, with the burden of L. 1000 Sterling to another, being pursued for the legacy, *alleged*, That the said legacy was left with a view that the defender was to get the whole fortune, whereas the real estate, which is the greatest part, was evicted by the heir in a reduction *ex capite lecti*; and, therefore, the legacy ought to suffer a proportionable abatement, as being in so far *legatum rei alienæ;* and as the defender was preferred to the legatar in getting the disposition, it is to be presumed the defunct intended the greatest share of the estate for him, who was obliged to