in her oath I mentioned the case of Mr William Lyon and his Lady, and the Heiress of Kinfaun's; and as to the proof by witnesses, that was proving a legacy by witnesses above L.100 Scots. However, it carried to sustain the relict's right. *Renit.* President, Strichen, Leven, Shewalton, *et me*, 30th November 1752.—*Vide* 2d January 1753, where by mistake it is again marked, (as follows:)

HUMPHRY BARBOUR having in his testament left his wife about the half of his effects, and several legacies to poor relations, and appointed Barbour and Blackwood his executors, his wife, after his death, intromitted with all his writs, and his executors pursued her in an exhibition and delivery in the Sheriff-Court, and she deponed and exhibited *inter alia* two accepted bills payable to him, and by him indorsed blank one for 156 merks, and the other for 151 merks, and deponed that the defunct, six days before his death, gave her those bills for her own use, and the Sheriff sustained the defence as to those bills, and found her not obliged to deliver them. The cause was brought before me by advocation, and the defender having offered to astruct the quality in her oath by witnesses, I pronounced an act before answer. Only two witnesses were adduced; one proved the fact, but the other swore only that he saw the defunct give her two papers he called bills, and she asked if she should put them with the rest of the papers, and the defunct answered no, lay them by themselves. At advising this proof, the Court was much divided. Some of us thought, though there had been a concurring proof by witnesses, that such proof was not competent, for that it was the proving a legacy, or *donatio mortis causa*, above L.100 Scots by witnesses, which our law does not admit; that a wife's being possessed of her husband's bills or other writings, was no evidence, and far less in this case, where the defender had possessed herself of all his writings; that what is law in this case, would be law in the case of any merchant in Scotland, if the bills had been for L.500 or L.1000 sterling, and possession of his bills indorsed blank could give her no more right to them than the possession of his bank-notes to any value, though the case would be different had he filled up her name in the indorsation, and therefore the whole depended on the proof by witnesses, which neither was a habile means of proof, nor sufficient, because there was but one proving witness. Others thought that the blank indorsation took it out of the case of a nuncupative legacy; that great regard was to be had to her oath in the exhibition, and that the quality was sufficiently astructed. And it carried to sustain her right 30th November last, as then marked (but I had forgot it) and this day we adhered. *Renit.* Minto, Strichen, Woodhall, Kames, *et me*, but it seems both the President and Shewalton had changed their opinions.

LEGITIM.

No. 2. 1737, Nov. 10. MR JAMES JUSTICE *against* MURRAY, &c.

THIS question was, Whether one only child who was both heir and nearest of kin is entitled to a legitim of which his father could not prejudge him by any deed of a testa-

mentary nature. The President, Dun, Arniston, Murkle, and Haining thought that an heir could not claim a legitim, (except in the case of more children that the heir may collate) and that though where there is one only child who is heir and a relict, the relict has but a third, as was found in the case Trotter, 12th January 1681, (DICT. p. 2375) yet the defunct may dispose of the other two-thirds as dead's part, and there there was no deed by the defunct disposing of it, and therefore the only child had the whole two-thirds; but where there is no relict the dead's part is the whole, notwithstanding there be one only child an heir. Others of us thought the heir's legal right to the legitim was a necessary consequence of the right of collation with other children, and of that judgment in 1681, and of the instructions to the Commissaries in 1666, and agreeably to the analogy of law, and consequently if he has a legitim the defunct cannot prejudge it; and upon the question all except those above found that the pursuer had right to his legitim. —N. B. The Justice-Clerk did not vote because he was a creditor of Mr Justice, and said he believed that was the best fund of his payment.

No. 3. 1737, Nov. 18. JEAN BEGG *against* JEAN LAPRAICK.

See Note of No. 1. *voce* FORISFAMILIATION.

No. 4. 1738, July 21. M. CAMPBELL, &c. *against* LADY INVERLIVER.

THE Lords found the renunciation operates in favour of the children and issue of the eldest son as well as of himself. I thought the interlocutor just, since all the dispute was occasioned by the son's neglecting to confirm; but we all agreed that such renunciation would not operate in favour of collaterals. 2dly, I put the question, What if the eldest son had died before his father but leaving children, and the father had made no settlement? and it was agreed that that question would be still more doubtful. 29th July, Adhered unanimously, and refused a bill without answers.

No. 5. 1741, June 30. ANDREW PRINGLE *against* ALISON PRINGLE.

THE question, Whether a discharge by a son to his father of the mother's contract of marriage, legitim, bairns part, and of all that he could ask or crave or claim of his father in his lifetime, or in and through his decease, did cut off the son from the dead's part;— and the Lords found it did not, *nem. con.*

No. 6. 1742, Feb. 3, June 2. ROBERTSON *against* KERR.

ARNISTON and I agreed that the pursuer had no claim on the contract of marriage, both because he had no title as creditor, *i. e.* as heir general to the major, and also because it was implemented to the child; and the substitution did not alter the case as to the pursuer, for had there been no substitution the succession to the moveables would not have gone to heirs but to the child's executors, which would have been an effectual alteration though made on death-bed; 2dly, We also agreed that the pursuer's claim of the child's legitim is good because that was a right not dependant on the father's will, and to which therefore he could not substitute; 3dly, We agreed that the testament was valid though