pursuers apprehensive of the decision, applied to the Chancellor, and got a warrant to Sir Nicholas Baillie to give then access to the lunatic, to get from him a letter of attorney to Mr Hamilton to sue in his own name, which warrant he granted, and they got the letter of attorney, and insisted on both titles. Excepted, a lunatic could give no attorney, which the pursuers maintained he was; and if he was not lunatic, yet by the petition and warrant it appeared he was used as such and not his own master. I reported the case, and the Lords unanimously found, that neither the Chancellor's commission nor the letter of attorney gave a sufficient title to carry on this sale. But this was reversed by the House of Lords, and the title sustained to maintain action in the appellant Morison's name, 13th February 1750, which was founded on the letter of attorney as I was told.

IMPLIED WILL.

No. 1. 1736, Jan. 7. Mochrie *against* Linn.

The Lords found that a general conveyance of all goods, gear, debts, and sums of money, and others whatsoever that did pertain or should pertain to him at the time of his death, to which a particular enumeration of moveable bonds was subjoined, neither extended to a house nor even to an heritable bond, though no infeftment followed on it. This was unanimous.

No. 2. 1737, Dec. 21. Hew Montgomery *against* R. Montgomery.

The Lords by a narrow majority found that the pursuer must make his election, and either accept or repudiate this disposition. *Renit.* Justice-Clerk, Strichen, Kilkerran, Tinwald, Arniston, *et me.*

No. 3. 1738, Nov. 3, 9. Parkhill *against* Weir.

A question occurred, Whether Parkhill accepting from his wife in her contract of marriage a general disposition *omnium bonorum*, with a reserved faculty to the wife to dispose of 10,000 merks, the husband is liable to the creditors of the wife after her death, otherwise than in so far as he was *lucratus* upon deducting a competent tocher, or which is much the same, if he should have deduction of these debts out of the faculty; or on the other hand, if the husband is liable *in valorem* of the subjects to the whole debts as well as faculty, without regard whether he has a competent tocher or not? This last carried by a great majority, *sed renit.* Arniston, Strichen, and Murkle, who thought that such a general disposition did not at all make the husband liable for any debts, only it might be reduced on the act 1621, so far as exceeded a competent tocher, in the same way as if it were a special disposition, and, if it did not exceed a competent tocher, he was not at all liable after dissolution of the marriage; and if he paid them these, or if he paid

heritable debts even during the marriage he might deduct them out of the faculty. But the Court thought, that as *bona* are counted only *deductis debitis*, the meaning of parties could be none other than that the wife was to give her husband all her estate with the burdens affecting it, or in other words all her free estate, but not the above reserved faculty, and that she could not be thought to mean to give away all her estate, and keep the debts a burden upon herself after giving away the fund of their payment, and that therefore though this was no passive title against the husband, which cannot be while the original debtor is alive, and does not make the husband liable universally for his wife's debts, yet he must be liable *in valorem* of the subjects conveyed and his intromissions with them, both to the wife's debts and reserved faculty, whether any tocher should remain to him or not, since he is presumed to have taken his hazard of that; whereas where a disposition is special of particular subjects there is no place for any deduction, and however prior creditors might reduce it *quoad excessum*, yet the husband or his heirs would have relief against the wife, even her alimentary provision if she survived, or out of her reserved faculty, notwithstanding that the husband should still have a competent to tocher remaining. And Arniston himself owned, that if the subjects here reconveyed exceeded a competent tocher, Parkhill would be liable for the debts without relief out of the reserved faculty. The other point anent the 3000 merks was remitted to the Ordinary to hear the objections against Parkhill's confirmation; but all agreed that if it was sustained, the concourse or compensation must operate from its date.

No. 4. 1745, June 5. SIR LAURENCE MERCER *against* SCOTLAND.

ADAM MERCER disponed his whole estate heritable and moveable to his wife in liferent, and the children to be procreate of his body in fee, which failing to his sister Elizabeth and the children of her body in fee, and not only burdened the disposition, but all persons who should take any benefit by the disposition should be liable to all his debts. He dying without children, Andrew Scotland, the son of Elizabeth, served heir of provision in this deed, and was pursued by a creditor of his uncle's. His defence was, that his service was erroneous and unnecessary, for he needed only a cognition that there were no children, and that his mother Elizabeth was failed. 2dly, As to the burdening clause, that it cannot go beyond the value of the subject. Minto found him liable universally,—and 11th December last we adhered. But 23d January last we altered and found him liable only *in valorem* of the subjects disponed,—and this day we adhered. *Pro* were Drummore, Haining, Strichen, Arniston, Murkle, and Tinwald. *Con.* were Justice-Clerk, Minto, Dun, Balmerino, *et ego*, and the President, but it came not to his vote.

No. 5. 1744, Dec. 7. WALKER *against* WALKER.

ROBERT WALKER disponed his effects to William Walker in 1707 extending to 1800 merks, and in case of William's death without children, ordered him to pay to several persons certain sums of money without saying further. Mary and Janet Walker were two of them, and died before William, and they having left children, the question was, Whether a substitution to them was implied? and we found that it was, agreeably to the decision mentioned, Innes against Innes, I think, in 1670, but especially 21st November 1738, T. Montrose against Robertsons, (No. 3. *voce* WARRANDICE.)