KAIMES. The Act, 1555, relates to rural tenements; matters of in-town remain as formerly. Notification by the landlord is sufficient, more especially as this notification was followed with the circumstance of the tenant taking another shop.

GARDENSTON. From the whole circumstances of the case, Sligo is barred, *personali exceptione*, by reason of his fraud.

COALSTON. The warning of the Act, 1555, is not necessary in urban tenements: some warning, however, is necessary: no law has said how that warning shall be; any notification then is sufficient.

HAILES. Sligo has here attempted to revenge himself both on Tait who set the shop, and on Byres who took it: On Tait by sitting still, and exposing Tait to an action of damages, at the instance of Byres; on Byres, by taking possession of his old shop, and debarring him from the new one. Strong evidence of *mala fides*, and an intention to misuse the law on the part of Sligo.

1766. *July* 24. ROBERT BLACKWELL, only Son of the deceased Mr George Blackwell, Minister of the Gospel at Bathgate, *against* HELEN BLACKWELL, Executrix of the deceased Dr John Johnston, Professor of Medicine in the University of Glasgow.

HEIR AND EXECUTOR.

Relief between Heir and Executor.

DR JOHNSTON had a sister, Christian, married to Mr Thomas Blackwell, Principal of the Marischal College at Aberdeen. His settlements, the subject of controversy, were made in favour of her and certain of her descendants. For understanding the relation they bore to the Doctor and each other, the following genealogical tree of the descendants of Christian Johnston is necessary:

Christian Johnston.		Mr Thomas Blackwell.		
Mr Thomas Blackwell. *sans* issue.	Mr G. Blackwell.	Helen.	Christian.	Janet.
	Robert. Margaret.			Christian Hay.

On the 23d November 1747, Dr Johnston executed a deed of settlement, whereby he disponed his lands of Craignaught, &c. to his sister, Christian Johnston, in liferent, and in fee to her son, Mr Thomas Blackwell, his heirs or assignees whatsoever. This settlement contains a general assignation, of all his other heritable subjects which should belong to him at his death, to Mr Thomas Blackwell, and his foresaids, under the burdens, provisions, and reservations therein mentioned. He particularly assigned to him certain adjudications on the estates of Jordanhill and Garnock. Then follows this clause, "Providing always that the said Mr Thomas Blackwell, and the subjects before disponed to him, but not the liferent in favour of my sister, are, and shall be burdened with

the payment of L.200 sterling, to Christian Blackwell, my niece, and of 6000 merks to Christian Hay, my grand-niece, and of the annualrent of the said two sums, and penalties, if incurred; and a farther yearly sum of 100 merks to the said Christian Blackwell, while she remains unmarried, and of the payment of what farther sums I shall think fit, by a writing under my hand at any time in my life, or even on deathbed, to burden the said Thomas Blackwell, and the subject disponed to him." Dr Johnston, moreover, reserved his own liferent, and power to alter. At the same time he executed a bond in favour of Christian Hay, the heirs of her body, and assignees, in a marriage-contract, for 6000 merks, payable the first term after his death, with a proviso, that, in case she levied the money, it should be lent out with the consent of Mr Thomas Blackwell, his heirs, executors, or assignees, &c. "it being my intention that the 6000 merks be preserved, to return entire to my heirs and assignees, in case the said Christian Hay die without issue lawful of her body, or do not make over the same in her contract of marriage." This bond dispenses with delivery, and contains a power of revocation. It is supposed, that, in like manner, for carrying his settlement in execution, he granted to Christian Blackwell a bond for L.200. But she married during the Doctor's life, and he gave her a portion of 3000 merks, and destroyed the bond, if ever granted. In 1754, Dr Johnston granted a bond of annuity for L.15 sterling, to Janet Blackwell, his niece, to commence at the first term after his death. At the same time, or near it, he recovered L.263 sterling, in virtue of his adjudication of the estate of Garnock, and L.80 sterling, in virtue of his adjudication of the estate of Jordanhill.

On the 29th January 1757, Dr Johnston lent L.600 sterling, upon an heritable bond of corroboration, to Mains of Waterhouse. Christian Johnston the liferenter, and Mr Thomas Blackwell the fiar, by the settlement 1747, being both dead, Dr Johnston executed a new settlement on the 8th March 1747. By it he disponed his lands of Craignaught and others, to Helen Blackwell, his niece, in liferent, and also assigned to her all debts heritable or moveable that should be due to him at his death. Then follows this clause, "My said niece being always bound to pay all my just debts, and perform every deed I have come under, or may at any time of my life come under, whether gratuitous or onerous." He took her bound to pay a small legacy to John White, clerk of session, and an annuity of L.20 sterling to Janet Blackwell: and then adds, "And I bind and oblige me, my heirs and successors to me in the lands of Craignaught, &c. to pay to the said Janet Blackwell my niece, after the death of her said sister Helen, the foresaid yearly annuity of L.20 sterling, &c., and I hereby declare that these presents shall be nowise prejudicial to, or derogatory to any former deed granted by me in favour of the said Helen Blackwell, except in so far as hereby altered, and the said Helen Blackwell further burdened, but as a further confirmation and enlargement thereof." After the date of this settlement, Dr Johnston executed several deeds of donation, whereby he created additional burdens on Helen Blackwell, both as to his moveable estate and as to her liferent of the land estate. On the 10th June 1761, he executed a bond of provision, whereby he bound Robert Blackwell *nominatim*, as the person he intended to succeed to him in his land estate, to pay to his sister Margaret L.200 sterling, upon the succession fully opening to him by the death of all the annuitants on it. The Doctor received payment of the L.600 contained in the heritable bond granted by Mains of Westerhouse; so that

sum came to be reckoned in his executry. About the end of 1761, Dr Johnston died. Robert Blackwell, willing to suppose that the settlement 1747 had been innovated, made up titles to Dr Johnston's land estate by special service upon inventory as heir-at-law; and Helen Blackwell confirmed herself executrix to her uncle. Several of the legatees pursued Helen Blackwell before the Commissary Court of Glasgow for payment of their legacies. She removed the cause into the Court of Session by advocation; and also raised a multiplepoinding. In the multiplepoinding Robert Blackwell was called among others: the processes were conjoined. The question between Robert Blackwell and Helen Blackwell resolved into this, Whether Helen Blackwell, the executrix, was entitled to relief out of the land estate, for the 6000 merks left by Dr Johnston to Christian Hay. In the course of the argument each party endeavoured to show that, if the 6000 merks was laid upon him, there would remain little of Dr Johnston's succession. Robert Blackwell contended, that the 6000 merks would well nigh carry off the residue of the land estate: Helen Blackwell that it would well nigh exhaust the executry. But it appeared that these considerations had little weight with the Court, and therefore they shall not be mentioned.

ARGUMENT FOR HELEN BLACKWELL, THE EXECUTRIX:—

Dr Johnston was unlimited proprietor of the estate, and might dispose of it as he thought best. He might have burdened his executrix with his real debts, or the disponee of his estate and the lands themselves with his personal debts; so that, in the question between the heir and the executor, the *voluntas testatoris* must be the rule. Settlements deliberately executed, whereby burdens are imposed, will not be presumed to be altered, unless the alteration be as explicit as the settlement; so that, *in dubio*, the presumption of law must be in favour of the original settlement. By the disposition 1747, Dr Johnston expressly obliged the disponee, personally, by his acceptance of the disposition, to pay 6000 merks to Christian Hay, and as expressly made that sum a burden upon the fee of the lands disponed, with a reservation of his sister's liferent. It follows, that the 6000 merks must remain a burden upon the lands, and upon the disponee taking under that disposition. The after settlement of the personal estate by the deed 1757, and the general clause therein contained, burdening the executrix with the payment of all his debts and performance of his deeds, cannot be understood as a departure from the settlement 1747, upon this plain and known principle, *quod in omni jure generi per speciem derogatur*. The obligation on the executrix might be beneficial to creditors.—It would have been implied, although not expressed; but its generality cannot affect the executrix in a question with the heir specially burdened. The principle here mentioned was established by the civil law, and has been followed in the practice of this Court; see Dictionary, title *Presumption*, head *Presumed Alteration and Revocation*. The application of those principles to the present case is obvious. It does not vary the case, that, in the interval between executing the deed 1747 and the deed 1757, Dr Johnston transacted the adjudications disponed by the deed 1747, and thereby left no heritable subjects to his heir other than the liferented lands; for, if Dr Johnston had meant to relieve his heir of the burden of 6000 merks when he deprived him of the benefit of the adjudications, he would have executed some deed to that effect. By renewing the liferent to Helen Blackwell upon the death of his sister, he showed that he remembered his having executed the deed 1747. By preserving

that deed he showed that he meant it should have effect; and it is impossible to separate the burden from the right itself: if the right subsists, so must the burden. The burden was not imposed upon this or that subject, but upon the whole; so that, as long as any of the subjects to be taken under the disposition remained, so long did the burden remain. The L.200 to Christian Blackwell, and the 6000 merks to Christian Hay, were, by the deed 1747, made burdens upon the lands disponed. The lands were to be liferent, so that the heir could have no access to them for the present; and thus it is clear that Dr Johnston meant to burden his heir with payments, while he had no rents out of which to pay them. If the heir did not choose to borrow money for paying the burdens, he was at liberty to repudiate the succession. Dr Johnston, by the general clause in the deed 1757, burdening his executrix, did not mean that she should relieve his disponee of a special debt: This is against the general rule of law already mentioned. See *24th November* 1710, *Calender;* and, *7th July* 1732, *Strachan* against *Farquharson.* When Dr Johnston created different burdens upon his executrix, he never mentioned the 6000 merks to Christian Hay: this he would have done had he not meant that it should continue as a burden upon his disponee.

ARGUMENT FOR ROBERT BLACKWELL, THE HEIR:—

It is admitted that the present question is a *quæstio voluntatis,*—and that the 6000 merks would have remained a burden upon the heir, without relief, had no deed been executed but that in 1747. But the heir contends that the deed 1747 was altered by the deed 1757, and this, as the latest, must determine the *voluntas testatoris.* The rule *quod generi per speciem derogatur* is a general rule, liable to exceptions, and which must yield to circumstances. The burdening clause in the deed 1757 deserves to be considered: "My said niece being always bound, &c., to pay all my just debts, and perform *every* deed I have come under, or may at any time of my life come under, whether gratuitous or onerous." This clause does not merely import that the executrix should be liable to the diligence of the creditors: it goes farther, it takes her bound to perform every deed of the Doctor's. Had Dr Johnston meant to except the obligation as to the 6000 merks, he would have made that exception. The circumstances of the case show that the Doctor did not mean to make such exceptions; for, to say nothing of the extent of his debts, and the value of his succession, matters disputed, it will be observed, that the 6000 merks was made a burden upon the subjects disponed to Mr Thomas Blackwell in 1747. Part of these subjects was converted into cash, and then into an heritable bond for £600 sterling. This was, by the deed 1757, conveyed to Helen Blackwell. How then can it be supposed that the subject,, which was sufficient for enabling the heir to clear the burden, should be taken from him, and yet the burden itself still left upon him. Further, when Dr Johnston imposed the burden of £200 upon his heir, payable to Margaret Blackwell, and of £20 sterling annually, payable to Janet Blackwell, he made those sums payable upon the ceasing of all the annuities, and no sooner. This shows that he meant that his heir should only be liable to pay when he had a fund of payment. It is no good answer to say, that if the heir does not incline to pay the burdens, he may repudiate the succession—for the will of a testator must be explained rationally whenever the words will

admit of such explanation, and it cannot be supposed that Dr Johnston, in instituting an heir, meant to lay him under such burdens as might constrain him to repudiate the succession. Dr Johnston burdened his heir with £200 to Margaret Blackwell, by a deed in 1761. As, in 1757, he had taken every thing from him but the lands charged with a liferent, and with annuities, it cannot be supposed that he still considered his heir as burdened with the further sum of 6000 merks. No argument arises to Helen Blackwell from the particular burdens laid upon her by the deed 1757. Those burdens were not constituted by any former settlement, and consequently no argument, or presumption, can thence arise that a legacy, constituted by a former deed, was not meant to be laid upon her. As, then, the burdening clause in the deed 1757 is conceived in terms sufficiently explicit to subject Helen Blackwell, and as this construction is natural, and most consistent with a rational settlement of the Doctor's estate, the 6000 merks must be paid by Helen Blackwell, who has funds for paying it; not by the heir, who has none.

On the 7th July 1764, the Lord Auchinleck, Ordinary, "found the defender, Mr Blackwell, as representing the deceased Mr Thomas Blackwell, and claiming under the defunct's disposition to the said Mr Thomas of his land estate, and the land estate itself, is subjected to relieve Helen Blackwell, the executrix, of the 6000 merks provided to Christian Hay, and the interest thereof, and decerned and declared accordingly."

On the 26th February 1765, the Lord Ordinary "found, that, as the deceased Dr Johnston had it in his power to charge any part of his estate he thought fit with his debts, he did in this case, by the terms of the disposition to Mr Thomas Blackwell, sufficiently declare his intention that the fee of his land estate thereby conveyed, and the disponee to it, should be ultimately liable for the 6000 merks, and interest thereof, contained in his bond to Christian Hay, and found the burdening Helen Blackwell with the payment of all his debts, though it gave a security and ready access to his creditors for their payment, does not entitle the heir of Mr Thomas Blackwell to claim relief from her of a debt which the defunct expressly and specially laid upon him."

On the 9th July 1765, the Lord Ordinary "found, that, as Dr Johnston conveyed his land estate to Mr Thomas Blackwell, deceased, and his heirs, declaring the lands should be really burdened with the 6000 merks to Miss Hay, and by no after deed declared his will to disburden the land estate, that the same continues still ultimately to burden the land,—and found that Robert Blackwell, who has right to the land estate, in virtue of the disposition, cannot liberate himself from payment of the aforesaid sum by repudiating the Doctor's disposition made *in liege poustie*, and taking up the estate as heir served to the Doctor."

On the 4th February 1766, the Lords, upon advising petition and answers, "adhered to the Lord Ordinary's interlocutor."

On the 7th March 1766, the Lords "found that Helen Blackwell, the executrix, is not entitled to relief out of the land estate, of the 6000 merks payable to Christian Hay; and remitted to the Lord Ordinary to proceed accordingly."

On the 24th July 1766, the Lords adhered.

For Helen Blackwell, A. Wight. A. Lockhart.
For Robert Blackwell, T. Montgomery. R. M'Queen.

OPINIONS.

The Court gave its opinion at great length when the cause was first advised, so that the opinions which I had occasion to note were few and short.

COALSTON. This provision of 6000 merks was once a burden upon the heir, by the disposition 1747. I think that the special burden 1747 is not derogated from by the general clause 1757,—but I think that the burden of the annualrent provided to Helen Blackwell must lie upon her.

PITFOUR. An alteration by the deed 1757: the lands were burdened with the 6000 merks—but if any burden imposed, it was taken off by the deed 1757.

KENNET. This case is different from any mentioned in the papers. The burdening clause, by the deed 1757, is sufficiently extensive.

Diss. Auchinleck, Coalston, Stonefield, Hailes. *Non liquet*, Strichen.

1766. *July* 24. RODERICK MACLEOD of Cadboll, HUGH ROSE, Younger of Aitroch, WILLIAM FRASER of Ardochy, and JAMES CRAWFURD, Writer in Edinburgh, all standing upon the roll of Freeholders for the County of Cromarty, *against* LEONARD URQUHART, Writer to the Signet.

MEMBER OF PARLIAMENT.

A Complaint under the 16th of Geo. II. for striking a freeholder off the roll cannot, after the death of the original complainer, be wakened and insisted in by other freeholders, whose names did not appear at the original complaint.

THE question between the parties above mentioned, resolved into this, "Whether a complaint, brought in virtue of the statute, 16th George II. for striking off the roll of freeholders a person wrongfully enrolled, can, after the death of the original complainer, be awakened and insisted in by other freeholders, whose names did not appear at the original complaint."

By an Act 16th George II., entitled "an Act to explain and amend the Laws touching Elections," it was provided, "that it shall be lawful for any freeholder, standing upon the roll, to object to the title of any person who stands at present upon the roll last made up; and, for that purpose, at any time before the first day of December, which shall be in the year 1743, by summary complaint to the Court of Session, who shall grant a warrant for summoning such persons, upon thirty days' notice, to answer, and shall proceed in a summary way to hear and determine upon such complaint; and, if no such complaint shall be exhibited within the time aforesaid, then and in that case no