1776. *July* 9. GEORGE FRASER *against* JANET SMITH and ROBERT OLIPHANT.

CLAUSE—GENERAL ASSIGNATION.

A banker's promisory-note found not to fall under a general bequest of goods and gear.

[*Fac. Col. VII.* 244; *Dict., App.* 1, *Clause, No.* 2.]

COVINGTON. The oath in the *cessio bonorum* bears heritages, sums of money, *goods and gear*. This shows that *nomina* are comprehended under *goods;* for they are not comprehended under *heritages*, and yet they are within the oath. The proper way of judging, in this case, is to consider, 1*st*, The legal import of the word; and, 2*dly*, Whether any thing in the deed varies that sense. It is plain, from statutes and styles, that *goods and gear* implies *bonds and bills*: besides, if the contrary were understood here, the party would die partly testate and partly intestate; for she revokes all former settlements of her moveable estate. The difficulty, from the enumeration of the household furniture, is removed; for the woman lived in another man's house, and found it necessary to inventory her own furniture, that it might be distinguished from his. She dispones *without prejudice to generality*, which implies that there was something still behind.

GARDENSTON. The words do not comprehend the bill of L.40. The decision, 19*th February* 1745, *Ker* against *Young*, seems in point: the decision in President Dalrymple was, according to the collector, on a *quæstio voluntatis*, not on the mere construction of the words.

HAILES. The decision in President Dalrymple is strong. *That* in 1745 seems to have proceeded on the circumstance, that the leading word was *household furniture;* and hence any mention afterwards made of *moveables*, might have been supposed to refer to things of the same nature with the leading word.

MONBODDO. I have the same difficulties as Lord Gardenston. This is a *quæstio voluntatis: goods and gear*, with an enumeration of certain things, is not sufficient to carry a L.40 bill, of more value than every thing disponed. If the words were clear, I should decide according to them, without inquiring as to the intention, though not without difficulty; for Dirleton, the greatest of our lawyers, is of a different opinion, because of the two inventories in the Commissary Court. *Moveables* seems *taxative*, limiting the sense of *goods*.

Lord Covington's argument, from the improbability of one meaning to die partly testate partly intestate, would be strong, were there here a testament; but, as there is no testament, *that* is an additional reason for proving that the deed comprehended not every thing.

PRESIDENT. There may be body-clothes left to a person, and yet no intention of excluding the nearest in kin. The words, *to take possession*, seem to relate to things in the hands of the disponer.

On the 9th July 1776, "The Lords preferred the nearest in kin to the L.40 bill;" altering Lord Kennet's interlocutor.

Act. G. Buchan Hepburn. *Alt.* H. Erskine.

Diss. Kennet, Stonefield, Hailes, Covington.

1776. *July* 17. AGNES LAMOND *against* WALTER LAMOND.

PROVISION TO HEIRS AND CHILDREN.

Extent and effect of the Father's Power of Division.

[*Fac. Coll. VII.* 262; *App. No.* 1, *Provision to Heirs, No.* 1.]

MONBODDO. If the words had been *heirs* or *bairns*, the case would have been different: *Or* has been found exegetic or explanatory. *Heirs and bairns* are words which admit of a different construction. *Heirs* first, and then *bairns*. When there is no power of division, the law will divide the subjects *applicando singula singulis*: the heritage will be given to the *heir*, and the moveables to the *other children*. The decision *Wilson* was founded entirely on the specialties of the case; for *there* the father had reserved a power of division, and hence it was concluded that he did not mean that the whole heritage should go to the heir.

PRESIDENT. The decision *Wilson* did not proceed on the father's power of division, but on the circumstances of the parties. When there is any purpose of making a representation, the words will be explained favourably to the heir. Such also was the case of *Kemp*, decided some years before. This shoemaker had no intention of establishing a family.

COVINGTON. Failing children of the marriage, the subject divides into thirds; one to the wife's heirs, and two to the husband's heirs. The same construction ought to take place here: the lands bought by the father are taken partly to the son *nominatim*, and partly to heirs in general. The father had a power of distribution: and he has distributed.

KENNET. Lands taken *nominatim* to the son, must go to him. I have some doubt as to the other parcel provided in general to *heirs*.

GARDENSTON. I am surprised to see this clause occur so often, when it has produced so many disputes. The parcel taken to *heirs*, must go according to the sense of the marriage-contract.

"The Lord Hailes, Ordinary, had found, that the pursuer has no interest in the heritable subjects which belonged to her father, in respect that no one of the many decisions quoted by her seems to be in point; but that all of them do relate either to cases concerning the destination of sums of money, or of subjects which were not properly lands, or to cases that were determined in consequence of certain clauses in the deeds themselves, inconsistent with the supposition of the word *heir* being understood according to its strict and pro-