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-

per import: That there is no necessity, here, of departing from the general meaning of the word *heir*: That, by *heir*, in the marriage-contract, the heir of the marriage, properly so called, was understood; and by *bairns*, the younger children; and that the destination therein did, according to the nature of the subjects, and the rules of law, provide that the heritage should go to the heir of the marriage, who is Walter Lamond, and the moveables to the younger children of the marriage; not, as the pursuer contends, that the heritage should be divided between the only son and heir of the marriage, and one of four daughters who is not forisfamiliated."

But, on the 17th July 1776, "The Lords found that, by the conception of the contract of marriage, the provisions therein stipulated are in favour of the whole children; but found that there remained in the father a power of division; and that the disposition taken by Archibald Lamond the father, to himself and spouse in conjunct-fee and liferent, and to Walter Lamond the son, *nominatim*, must carry the subject thereby disponed to the said Walter the son: and found that Agnes Lamond has right only to her share of the remainder of the estate, after taking therefrom that subject; and remitted to the Lord Ordinary to proceed accordingly;" altering Lord Hailes's interlocutor. And, on the 3d August 1776, "adhered."

Act. G. B. Hepburn. *Alt.* D. Armstrong, A. Crosbie.

1776. *July* 17. THOMAS GIBSON *against* JOHN GIBSON.

BILL OF EXCHANGE.

A donation cannot be constituted by a bill.

[*Supplement to Morison, V.* 392.]

COVINGTON. I doubt as to the principle, that bills must be for value received.

PRESIDENT. This however is established by the practice of 40 years.

GARDENSTON. Bills merely gratuitous are not held good. They are not the instrument proper for such a conveyance.

HAILES. I learned from Lord Elchies, 20 years ago, that, by the law of Scotland, a donation cannot be constituted by accepting a bill.

AUCHINLECK. I considered it as a fixed point, that donations and legacies could not be constituted by bill. This is the more necessary in our times, when every man wants money. If such donations were good by writings so informal, a man has nothing to do but to learn to subscribe another's name.

On the 17th July 1776, "The Lords found that the bill to Thomas Gibson was not sufficiently instructed;" adhering to the interlocutor of the Lord Justice-Clerk.

Act. W. Nairne. *Alt.* A. Crosbie.