No. 16, *Creditors of Provost Graham;* but it was observed that there the father had only a faculty to *burthen*, not to *sell* and *dispone*, and therefore, in that case, the Lords found, very justly, that the faculty could not be exercised by a personal deed only, and that the son's creditors, making their debts real upon the estate, were preferable to the father's personal creditors by virtue of the faculty. In short, they said, that in that case the father had only a faculty, whereas in this case he has in reality the fee, though nominally it be in the son. *Dissent. tantum* Bankton.

Adhered to this interlocutor, 23d July 1756.

1756. *February* 10. CAPTAIN GRANT *against* ———.

[Kaimes, No. 102; *Fac. Coll.* No. 193.]

CHARLES FARQUHARSON, writer to the signet, in the year 1721, when he was thought to be a-dying, made a general settlement of his affairs, whereby he disponed to his brother, Patrick Farquharson of Inverey, and his heirs whatsoever, all subjects he should be possessed of at the time of his death, heritable and moveable, lands, goods, gear, &c., dispensing with the generality, and declaring that the deed should be good and valid if it should be found by him at the time of his death. It so happened that Charles lived many years after this settlement, and survived his brother Patrick, by whose death the lands of Inverey, which were then settled, and had been for some ages past, upon heirs-male, devolved to Charles, as the nearest heir-male, who accordingly made up titles to them, by taking precepts of *clare constat* from their respective superiors. After this Charles died, and the above-mentioned settlement was found by him at the time of his death; upon which the two daughters of Patrick brought their action against the heir of the investiture of the estate of Inverey, who was James Farquharson, the brother consanguinean of Charles, to have it found and declared that they, as heirs whatsoever of Patrick, had right to this estate, by the settlement 1721, and that the heir of the investiture must denude in their favour.

The Lords were very much divided in opinion upon this case: Lord Kaimes and the majority were for the heir of the investiture, and they put their opinion upon two points,—1*mo*, That it was not the intention of Charles, by this deed 1721, to give to his brother an estate which he was then in possession of, but to give to him all that then belonged to Charles, or should afterwards belong to him, for the aggrandizing of the family, which he had extremely at heart; and the family he considered to be represented by the heirs-male, and not by the daughters. Accordingly he settled an estate which he had acquired himself, viz. the estate of Achlossin, upon the heirs-male of the family, in the year 1739, though that estate he had formerly taken to himself and his heirs-general; from which, therefore, and several other circumstances that might be mentioned, it appears clearly that it was Charles's intention not to take away from the heir-male of the family any estate that such heir would have been otherwise entitled to; but,

on the contrary, to give him as much more as he could. *2do*, Heirs whatsoever is a general word that will apply to every kind of heir, whether heir of line, heir-male, heir of conquest, heir of tailyie or provision, *secundum subjectam materiam*,—nay, it will comprehend executors, or heirs *in mobilibus*; and in this very case the executors of Patrick, by virtue of the disposition 1721, would have been entitled, under the character of heirs whatsomever, to have taken the moveables belonging to Charles at the time of his death. In the same manner a bond of corroboration, taken to a man and his heirs whatsomever, will not alter the succession, either as to the principal sums or annualrents: therefore heirs whatsomever in this case must be understood *secundum subjectam materiam*, and, according to the nature of the case, to be the heir of the investiture, whether that heir be heir-male, heir of provision, or whatever other heir.

On the other side, the PRESIDENT said that such general settlements of a man's affairs in the event of his death were very beneficial, and therefore ought to be so construed as to have their effect: that by means of such settlements men were always prepared for their death when it should happen, and it would be grievous if men should be obliged to make particular destinations of every subject belonging to them: that to overturn such settlements, where the words are clear and unambiguous, upon presumptions and conjectures drawn from events happening which the testator did not foresee, would be very dangerous, and would make such settlements so uncertain that the use of them would, or at least ought to be entirely laid aside, by which means the subjects of this country would be deprived of the privilege of making a testament upon their heritage, which a settlement of this kind in effect is: that if, in the interpretation of men's last wills, the words are departed from, there is no where else to fix,—the wills of men being so arbitrary and capricious, and conjectural reasoning upon them so various and uncertain. *2do*, That the term, heirs whatsomever, in the purchase or acquisition of subaltern or accessory rights from third parties, is frequently understood to be the heir of the investiture; because, when a man is purchasing an heritable debt, an adjudication, right of reversion, teinds, or any other incumbrance upon his property, he does not think it necessary to let the seller know how he has settled his affairs; and therefore he takes the right from him to his heirs whatsomever, which will be understood to be the heirs upon whom he has settled the principal subjects; but when a man is not acquiring any right, but is professedly making a settlement of his estate, and that not of subaltern or accessory subjects, but of all that belonged to him, there can be no reason for departing from the propriety of words, and supposing that a man, by heirs whatsomever, meant heirs-male, especially when he is speaking not of his own heirs, but of the heirs of a third party: for, in all the cases that have been decided concerning the meaning of this word, the question always was about a man's own heirs, not another man's heirs, and about particular subjects purchased in and acquired, not about general settlements of succession: and this was the opinion of the minority. *Dissent. Preside*, Nisbet, Prestongrange.

It was pleaded for the heir-male, that Charles's settlement, in the year 1721, was like a Roman testament, a *donatio mortis causa*, which fell to the ground by the death of the heir or donee before the testator,—nor did these words of style, heirs whatsomever, alter the rule. But the Lords were unanimously of another opinion; and it has been decided in the last resort, that, even in testa-

mentary settlements of moveables, though the first institute die before the testator, the settlement will not thereby be evacuated, but the next substitute will take.

1756. *February* 11. ——— *against* ———.

THE President and the other Lords declared their opinion, that although it was the practice in some places that bailies of burghs of barony and regality granted acts of warding upon their decreets,—yet that was an illegal practice; because such privilege was only competent to the bailies of royal burghs.

1756. *February* 13. BREBNER *against* LAW.

[*Fac. Coll.* No. 187.]

IN this case the Lords allowed the Protestant heir to serve, and found that the Popish heir had forfeited his right, although he could not take the formula precisely in terms of the statute; that is, either before the Lords of his Majesty's Privy Council, or the presbytery of the bounds where the party resided; because there was no Privy Council now in Scotland, and the Popish heir in this case resided abroad.

In this case also, the Lords found that the Protestant heir might serve to a man who had only a right of liferent in his person, having executed a procuratory of resignation, which he had right to, and taken a charter to himself in liferent, and his son, the Popish heir, in fee; so that the Protestant heir, overlooking the infeftment altogether in favour of the Popish heir, as being null and void, might, by a general service, carry the procuratory of resignation as if it had been still unexecuted, and this without any previous declarator of the nullity of the infeftment, only a declarator repeated with brieves of the disability of the Popish heir to succeed. Both these points the Lords determined unanimously.

1756. *February* 13. SIR ROBERT GORDON *against* DUNBAR of Newton.

IN this case it was debated, Whether a verdict pronounced by a jury, upon a remit by the Lords to them to set marches, in terms of the Act of James VI, concerning molestations, could be reviewed by the Court of Session?

The President said, that anciently when questions about the property of conterminous grounds were decided by brieves of perambulation, the verdict of the inquest was then final: but the method directed by the statute of James VI. only regarded the possession in which the verdict of the jury might be final: