As to the contract between Sir Robert and Mr. Fletcher of Salton, the only thing given to the other substitutes in this settlement was a *spes successionis*, alterable at pleasure. Sir Robert renouncing his reserved powers in favour of Mrs. Fletcher and her issue, was not an act favourable to Lady Cunyngham, but against her and her children, as it meant to take from Sir Robert the power which he otherwise had of settling the estate upon her in preference to her elder sister Mrs. Fletcher. And on the whole matter, regarding the original contract of marriage as the contract itself, Sir Robert had a right to chuse his heir among his own daughters, no reason can be assigned why that right and power should not extend to the children of his daughter. No. 1.

It was answered, on the part of the pursuer, that the cases quoted by the defender were exceedingly different from the present. In the case of Tilliewhillie, the heir was insane. In the case of Pitferran, the heir was a natural ideot. In the case of Thomson of Cumberhead, the heir was a prodigal and bankrupt, and it depended, besides, upon other circumstances. In favour of his own plea, the pursuer, on this point of the cause, referred to the case of Stewart of Phisgill, 9th June, 1743, No. 132. p. 13010. and the case of Ker of Abbotrule, 23d January, 1747, No. 116. p. 12987.

As to the special clause in the marriage contract, by which Sir Robert, failing heirs male, reserved a power of preferring any of his daughters, nothing further was in view by it than to give him an option of chusing a younger daughter in place of an elder; and this reserved power was favourable to Lady Cunyngham, whom he might have preferred. This condition, however, was discharged upon the marriage of his second daughter, Mrs. Fletcher, and matters were put into the same situation as if the marriage contract had been conceived in the usual form, upon the daughters *seriatim* in the order of their seniority. In this way, by the death of the other daughters, the estate devolved upon Lady Cunyngham, and of consequence upon the pursuer her heir at law.

The Court pronounced the following interlocutor: "On report of Lord "Alva, and having advised the informations given in for either party, and "heard parties procurators, the Lords sustain the reasons of reduction, and "find, reduce, decern, and declare, in terms of the libel."

To this interlocutor the Court adhered, upon advising a reclaiming petition and answers.

Lord Reporter, *Alva.* Act. *M'Queen, Hay Campbell.* Alt. *Rae, Blair.*

D. C.

*** These interlocutors were affirmed upon appeal. See No. 139. p. 13024.

1776. July 9.

GEORGE FRAZER *against* JANET SMITH, and ROBERT OLIPHANT her Husband.

No. 2.
A banker's promissory note found not to fall

AGNES FRAZER, relict of the deceased George Smith, merchant in Leith, a few days before her death, disponed "to and in favour of Janet Smith, at "and after her decease, all and hail *her moveable goods and gear*, whole body

No. 2. under a general bequest of goods and gear.

See No. 59. p. 2322.

" clothes and wearing apparel, all her linens that are marked with her name, " *and all other moveable goods and gear*, which do at present belong or shall be- " long to her at the time of her decease, of whatever kind or denomination the " same may be, and particularly without prejudice of the generality foresaid, " the following articles," &c. Afterward follows a particular list of her household furniture and apparel; and in the close of the deed, she grants to the said Janet Smith power to *take possession of her whole goods and gear thereby disponed*; and, lastly, she revokes all former settlements made with regard to her *moveable estate*.

The bulk of Agnes Frazer's moveable estate, consisted of a promissory note of Messrs. Mansfield, Hunter, and Co. for £40. Sterling, concerning which there arose a competition betwixt George Frazer, who had been decerned executor *qua* nearest of kin to the deceased, and Janet Smith, who claimed this note as falling under the goods and gear assigned to her by the above disposition.

Lord Kennet Ordinary " Preferred Janet Smith and her husband to the sum " of £40. due by Messrs. Mansfield, Hunter, and Co.'s promissory note." Upon which the executor reclaimed to the Court, and contended,

That there appears to be no intention of the defunct to convey more than what is generally understood, in common language, by the words moveable goods and gear, viz. household furniture, wearing apparel, and other articles of a corporeal nature. And it is likewise entirely improbable that a poor woman, in making her last will and settlement, should *nominatim* dispone the minutest article of household furniture or wearing apparel, and yet leave so great a sum as £40. Sterling to pass by implication, under the general description of *goods and gear*. That the articles condescended on are explanatory of what is meant by goods and gear, and must limit the extent of that clause to these articles. But, besides, in this disposition there is no clause granting a power to uplift and receive, which is always necessary when debts are conveyed, and which must therefore shew that the granter never meant to convey any debts. Neither does the deed contain any nomination of executors, which it would undoubtedly have done had it been the intention of the granter to institute another in the room of her nearest of kin and lawful executor.

But supposing that the intention of the granter was not so evident, the executor might insist that the very words of the disposition, when taken in their proper legal sense, are not sufficient to convey the £.40 in question, or any thing more than the *ipsa corpora* of the particulars therein specified. Thus, though the words *goods and gear*, without further enumeration, might convey every moveable corporeal substance, such as household furniture and the like, yet they can never be extended to comprehend debts or *nomina debitorum*, which are purely *jura incorporalia*, and must therefore be disponed under their own proper designation, or by a special conveyance of the particular claims on which they are founded as " bonds, bills, accompts, tickets," &c.

In support of this principle, Dirleton expressly says, " Bonds come not un- " der the general of goods and gear, which import a *corpus et quantitas*." And

Lord Bankton lays it down that moveable goods comprehend only the *ipsa corpora* or species of goods, but not *nomina* or debts. Erskine also supports the same opinion upon the case collected by Falconer, 19th February 1745, Kerr against Young, No. 29. p. 2274. where the question was, whether such *nomina* as fall under the communion of man and wife, were due, in consequence of a clause of a contract of marriage, disponing "insight plenishing, household furniture, and other moveable goods;" and the Court found the *nomina* not comprehended. No. 2.

The disponee answered, That according to the general practice of the law of Scotland, "moveable goods and gear" comprehend every moveable subject. Thus in two cases collected by Harcarse, "The Court found, that *nomina debitorum* were comprehended under a legacy of goods and gear. One of these causes was determined in 1783, and the other in 1692. In another case, also, collected by President Dalrymple, the question seems to have been fully discussed; and it being shown, that in several of our acts of parliament the terms "Goods," "Gear," "Goods and Gear," expressly signify all kinds of moveables whatever; the Lords found that the words goods and gear were not to be understood in their restricted meaning, but that the same did extend as well to bonds bearing annual rent, and other debts, as to *corpora* or other species of moveables.

That although Dirleton, and other writers, have formed to themselves abstract ideas, rather inconsistent with the principles maintained by the disponee, yet as these seem to have been contradicted by practice, they can merit no attention whatever: That the maxim in the Roman law, *testatus pro parte nemo pro parte intestatus decedere potest*, is founded on the common sense and experience of mankind; for when a person sits down to make a settlement, he would certainly dispose of his whole moveable estate, and if he meant to give any part of it to his heir at law, he would certainly say so in that settlement: That the distinction betwixt *nomina debitorum* and corporeal subjects certainly was unknown to the granter of this disposition, and therefore ought to have no effect upon the interpretation of it. But, lastly, the disponee thinks herself entitled to contend, that as promissory notes, bills, and bank notes, are to be considered just as so much money lying by the testator at the time of her death, so, as it is not disputed that this disposition would have carried any cash in the repositories of the testator, it must also carry this promissory note, which cannot properly be included under *nomina debitorum*.

The Court considered this as a *quæstio voluntatis*, and that the case mentioned by President Dalrymple was also decided upon the same principle: And as it is common for people of the rank of the defunct to give donations of furniture and body clothes to favourites, without an intention to disinherit their nearest of kin;

They altered the Ordinary's interlocutor, and found the executor entitled to the promissory note.

Lord Ordinary, *Kennet*. For Executor, *H. Erskine*. For Disponee, *Buchan Hepburn*.