1683. *November.* OSWALD *against* MORTIMER.

No 6.

FOUND that *nomina debitorum* were comprehended under a legacy of goods and gear. The like was found *contra* John Thomson in Lanark, *anno* 1692.

Fol. Dic. v. 1. *p.* 339. *Harcarse,* (LEGACIES.) *No* 663. *p.* 189.

*** This case is also reported by Fountainhall:

IN the case of James Oswald in Kirkaldy, *contra* Mortimer, reported by Saline; "THE LORDS found where a man had nominated his wife executrix, and universal intromissatrix, with all his debts, sums of money, goods and gear, and afterwards leaves to ——— a special legacy payable out of his goods and gear; that this legacy extended and affected even a third of the sums of money and debt, though the testator did not so fully enumerate and repeat them in the legacy, as in the institution of the executor, but said only goods and gear; which seemed to contradistinguish them from sums of money mentioned by themselves before." And yet goods and gear, *bona et utensilia* seem to be words of a most general and comprehensive signification.

Fountainhall, v. 1. *p.* 244.

1687. *February.* FAIRHOLME *against* KIRKWOOD.

No 7.
A man granted to his wife, in augmentation of her jointure, an assignation to all goods and gear, debts and sums, lands and heritages. Tho' there were no children of the marriage, the Lords found, that such a disposition only carried right to the moveables and the liferent of the heritage.

JOHN KIRKWOOD merchant, for implement of the contract of marriage betwixt him and Rebecca Fairholme, his wife, and for augmentation thereof, having assigned to her all goods and gear, debts, sums of money, rents of lands, and other heritages, and others whatsomever, as well not named as named, which should happen to pertain and belong to him the time of his decease; providing that he should have a child surviving his wife, that the disposition should be null; and, in case there were no children, then he dispones to her a shop in the Luckenbooths in liferent, and to James Kirkwood, his nephew, in fee. And the said John Kirkwood having deceased without children, Rebecca Fairholme, as having right by the foresaid disposition, pursues a declarator against the said James Kirkwood, the nephew, for declaring that she has right to the property of the shop in the Luckenbooths; and that he, as representing his uncle upon the passive titles, ought to be decerned to obtain himself infeft therein; and, being infeft, to dispone the shop in her favours. *Alleged* for the defender, That this being an assignation *omnium bonorum*, which belonged to the said John Kirkwood the time of his decease, it was a donation *mortis causa*, and so could not be extended to lands and heritages; and, being an assignation only to debts and sums of money, and not conceived by way of disposition, it will only carry the right to the moveables; but cannot

No 7. be understood to comprehend lands which are only conveyed by way of disposition; and being for implement of the contract of marriage, by which she was provided to a liferent of a part of the tenements, cannot be understood to comprehend the fee and property of the tenements; and albeit it bear likewise to be an augmentation of her provision by the contract, yet that could only be understood to be in augmentation of the liferent, but not to carry the fee of the lands; and the last part of the assignation does explain the meaning thereof; because it was provided, that if there were no children, his wife was to have the liferent of the two shops, over and above what she is provided to by her contract of marriage; which clears that there was no more designed, but only that the wife should have the right of liferent. *Answered*, That albeit the assignation be of all the goods, gear, debts, sums of money, rents of lands and others belonging to the husband the time of his decease; yet, the mentioning of his decease does not make *donatio mortis causa*, and to be of the nature of a legacy, but is *donatio inter vivos* to take effect after the granter's decease. And albeit ordinarily assignations are of moveables, and disposition being *verba synonima* are *pares termini in jure*, and have the same effect as to the conveying the property of the thing assigned, and this being a general assignation of all goods and gear, debts, and lands and heritages, it is evident that the husband designed that the pursuer, his wife, should have all that belonged to him, except the fee of the shop, which is provided to his nephew, and his wife was only to have the liferent; and that clause is so far from restricting the preceding general clauses, that it rather explains and confirms them, as being an exception from the general clause, seeing *exceptio firmat regulam in non exceptis*. THE LORDS found the disposition does not carry the right of the moveables and the liferent of the crops, and declare accordingly.

Fol. Dic. v. 1. *p.* 339. *Sir Pat. Home, MS. v.* 2. *No* 868.

*** Harcarse reports the same case:

A HUSBAND having assigned to his wife, all debts, sums of money, goods, gear, lands, tenements, houshold plenishing, gold, silver, &c. he should have, failing children the time of his decease; and, having died without children, his relict claimed right to a tenement of land by virtue of the assignation.

Alleged for the Heir; That the assignation containing no obligement on the defunct or his heir, to dispone, nor any dispositive clause of heritage, the tenement was not conveyed thereby. 2*do*, The words 'lands and heritage,' seem to be inserted *ex stylo*, without any special design; for, in subsequent clauses, goods and gear, and not lands, are particularly repeated; and it is not to be presumed, that the defunct intended to cut off his heir altogether. 3*tio*, The words, 'that he should have, the time of his decease,' import a testamentary deed, whereby no heritage can be conveyed.

No 7.

Answered; Though the deed be not formal, with clauses for conveying heritage, it implies an obligement on the defunct, which his heir cannot quarrel. 2*do*, That the word was industriously inserted, is cleared from a posterior clause, whereby the defunct provides the fee of a shop to the heir, and the liferent of it to his wife, and *exceptio firmat regulam;* for that had been superfluous, had the defunct intended to leave all his heritage to his heir. 3*tio*, These words, 'the time of his decease,' import no testamentary act, but are usual in deeds *inter vivos*, whereby the effect of the obligement is only suspended till then.

"THE LORDS restricted the assignation to the moveable estate, and a liferent of the shop."

Harcarse, (ASSIGNATION.) *No* 519. *p.* 23.

1688. *July* 19. SIR WILLIAM SCOT *against* WILLIAM NISBET.

No 8.
A disposition of all debts, bonds, obligations, and sums of money contained in an inventory, found not to carry money in the repositories of the deceast. Arreats of rent found to be comprehended under the word *debts*.

THE case of Sir William Scot of Harden and his Lady, against William Nisbet of Dirleton, was reported by Stair, (Justice-Clerk,) whether Sir John Nisbet's disposition of all debts, bonds, obligations, and sums of money contained in an inventary, was taxative, or demonstrative, so as to reach and carry the money lying beside him the time of his decease.——THE LORDS found that it did not extend thereto; so the money, which was about 10,000 merks, fell to his daughter as his heir of line, nearest of kin and executor. Then she claimed the bygone rests in the tenants hands, unuplifted or not discharged by him before his death, on this ground, that in a former disposition he had expressed this, and having omitted them here, it must be presumed to be *de industria*, seeing so eminent a lawyer knew the import of these clauses. This being also reported on the 27th July, the LORDS found these rents fell under the general words of debts inserted in the disposition, and so belonged to William Nisbet, the heir of tailzie. Then they debated that she getting the moveables ought to pay the funeral charges, as was found in the Dutchess of Lauderdale's case.*—*Answered*, William's disposition was burdened with the debt.—*Replied*, That must be understood only *in suo ordine* after discussing of the moveables.

Fol. Dic. v. 1. *p.* 339. *Fountainhall, v.* 1. *p.* 512.

1697. *February* 25. MORISON *against* NISBET, and HARDEN.

No 9.
A general disposition of moveables was found not to comprehend a bond granted to the dis-

WILLIAM NISBET of Dirleton granted bond to Dame Jean Morison, his predecessor's Lady, for the sum of 40,000 merks; and after her decease, they entered into a new transaction, by which he gets up the former bond, and grants her a new one for 30,000 merks. She likewise deceasing, the right of this bond falls to William Morison of Prestongrange, her brother; and he craving pay-

* Examine General List of Names.