1776. *December* 20. MAGISTRATES of KILMARNOCK *against* JAMES WILSON and OTHERS.

BURGH-ROYAL.

Powers of the Magistrates in feuing the common good.

[*Supp. V.* 406.]

MONBODDO. Magistrates of boroughs have a right to feu; but this does not apply to the case before us, where the inhabitants have had a constant use of washing and bleaching on the ground sought to be feued.

PRESIDENT. Independent of the general powers of Magistrates, be they greater or be they less, the proposal for feuing, in this case, is improper, and hurtful to the community.

BRAXFIELD. Here the gain is a trifle into the treasury, but the loss to the whole is evident. Magistrates may feu, because feuing may be the most advantageous thing for the community.

KAIMES. It is as necessary to have water to wash and ground to dry clothes on, as it is to be clean; so that what the inhabitants now enjoy is as necessary as houses or streets.

HAILES. It was determined, in the cases of *Irvine* and *Renfrew*, that Magistrates of royal burghs may feu: in the case of *Musselburgh*, the same thing was determined as to a burgh of regality. Whenever a burgh of barony happens to have a territory annexed to it, the same rule will apply to it; but still the power of feuing must be a limited thing, depending on the propriety of the measure; for Magistrates are administrators and guardians, not uncontrolled proprietors. They may feu waste ground, but not ground already occupied to the best advantage. *Here*, for the temptation of a ground rent of 15 shillings *per annum* from each house, they would deprive the whole inhabitants of a green which is at present useful, and which the inhabitants offer, at their own expense, to render more useful. The Magistrates of Glasgow might build the noblest street in Scotland by feuing out the green of Glasgow, and yet the Court would never authorise such a plan.

On the 19th December 1776, "The Lords found that the right of property of the green in question is only vested in the Magistrates as trustees and administrators for the benefit of the community: Found it sufficiently proven by the tack produced, and by the narrative of the act of council, that the manufacturing inhabitants have always had the use of this ground, for the purposes of bleaching, drying, &c.: Found, That the Magistrates may, by fencing the ground, or other proper means, render it more useful for those purposes; and although granting feus may increase the public revenue under the management of governing persons, yet it is neither proper, nor a just act of administration, to alienate this piece of ground, which the inhabitants have always occupied and used for the purposes of industry and manufactures in the village, and therefore suspend the letters *simpliciter*;" adhering to Lord Gardenston's interlocutor.

Act. T. Boswell. *Alt.* Claud Boswell.

There was no vote. Alva doubted. The Court found expenses due, that the opposers of the feu might be indemnified.

1776. *December* 28. RICHARD and MARY DICKS *against* DR ROBERT LINDSAY and OTHERS.

PROVISION TO HEIRS AND CHILDREN.

A, by his marriage-contract, disponed to the children of the marriage his whole heritable and moveable property at his death, under the burden of a provision to his wife. Being displeased with the conduct of his eldest son B, he altered this settlement, leaving only a trifle to B's wife and children. B's wife and children failed in attempting to reduce the deed.

[*Fac. Coll. VII.* 342; *App. No. I, Provision to Heirs, No.* 2.]

KAIMES. I always doubted as to this clause of conquest in marriage-contracts: it is better, as Lord Dirleton says, that children be bound to parents, than parents to children. The only event in which such a clause is proper, is *that* of a second marriage. There is a difference between a general clause of conquest and special provisions: rational deeds will be good, notwithstanding the clause of conquest. *This* deed is rational, and what the parties themselves would have provided for, had the event been foreseen. If we find that a clause of this kind must be necessarily effectual among the lower rank of people, the consequence would be to encourage idleness, disobedience of parents, and debauchery. *Here* a father, under a clause of this kind, has left the subject *intra familiam.*

GARDENSTON. What I have heard from Lord Advocate has much shaken my opinion; yet I still have a doubt: the pursuer is entitled to the character of *heir of the marriage.* When there is nothing but a provision in a contract such as this, the general doctrine of the law applies, that the father cannot totally disinherit, but he may limit, and regulate, and burden; but still the heir of the marriage is a creditor. I do not think that this settlement is altogether rational: the pursuer is not a prodigal,—he is a weak man, but capable of carrying on business; his father was severe and penurious: at the end of many years, the son is L.200 in debt, and is cautioner for as much more; in such circumstances, the father went too far.

ALVA. Certain rational powers are reserved to the father, while the subject is still kept *intra familiam.* If the deed between Dick, the pursuer, and Thomson, his brother-in-law, has the effect of dividing the succession, and of laying the whole burden on the pursuer, it is a worse deed for him than any that his father ever made, and it justifies the father's settlements.

MONBODDO. The question is, Whether a father may give away a succession