Act 1762; for Campbell, the custom-house officer, had no authority from the Privy Council.

KAIMES. The powers given to the Privy Council are now at an end. The custom-house officer was not bound to act; he therefore acted at his peril.

KENNET. The Scottish statutes imply an actual importation, and therefore the custom-house officer did wrong, and must pay damages.

PITFOUR. The former part of the Act, 1672, requires actual importation. The after part may go farther, though that is doubtful: but this is of no consequence in the present question, for the extraordinary powers committed to the Privy Council are not now executable: it would be dangerous to find the contrary. The powers formerly vested in the Privy Council, with respect to Jesuits, are, by an Act, *ultimo Annæ*, granted to the Court of Justiciary in place of the Privy Council,—upon this narrative, that the Privy Council has ceased.

COALSTON. The statutes relate to victual actually landed. If the law may be eluded in consequence of this interpretation, the Legislature, not the Judges, must provide the remedy.

PRESIDENT. Meal may be seized by any one: the Act, 1672, gives a share of the seizure to the discoverer: if one lays his boat to shore, this is importing into the country or port of Scotland; but this did not happen in the present case, and the Court cannot extend the words of a revenue law, in order to make it more beneficial to the revenue.

Diss. Justice-Clerk.

See Books of Adjournal 14th June 1672, advocate, Mr Archibald Beath, with the pleadings of Sir John Nisbet, and Sir Geo. Lockhart, therein engrossed; and M'Kenzie's Criminals, title *Murder*, § 18.

1766. *July* 3. AGNES TENNENT, Spouse to Mr Andrew Chatto, Minister of the Gospel at Morebattle, and her Husband, for his interest, *against* Mr WILLIAM BAILLIE, Advocate.

SUCCESSION.

Interpretation of the word "Heirs" in a Settlement.

[*Faculty Collection, IV.* 66; *Dictionary*, 14,941.]

THE competition between Agnes Tennent and William Baillie was concerning the succession to the estate of Stonnipath, in consequence of a settlement made by Mr William Walker, the proprietor. For understanding the nature of this competition, the following genealogical tree is necessary:—

Mr Alexander Walker
of Stonnipath.

Mr William Walker, *sans* issue, 1759.	1. John Tennent.	Isobel Walker,	2. Mr J. Baillie,
	Alexander.	Agnes, Claimant.	William, Claimant.

On the 7th May 1752, Mr William Walker executed a settlement of his estate of Stonnipath and others. Its narrative bears, "For the love, favour, and affection I have and bear to my sister [Isobel Walker,] and her children, after named, upon whom I am resolved to settle my real estate, and to prefer them thereto, next after the issue of my own body, in the order of succession, and in the terms, and under the conditions underwritten." The dispositive clause bears, "to myself in liferent, and to the heirs-male of my body; whom failing, to the heirs-female of my body, in fee; whom failing, to Isobel Walker, my sister, in liferent use allenarly, in case she shall happen to survive me; and, after her decease, to Alexander Tennent, eldest lawful son of my said sister, and procreate betwixt her and the deceased John Tennent, and his heirs or assignees, in fee; whom failing, to William Baillie, eldest lawful son to the said Thomas Baillie, procreate betwixt him and my said sister, his heirs or assignees, also in fee; whom all failing, to my own nearest and lawful heirs and assignees whatsomever." He then mentions the particular lands disponed, and binds himself and his heirs whatsomever to infeft himself, &c., and to resign and surrender, for new infeftment, to the same series of heirs, and in the same order as above mentioned. He next takes the heirs-male or female of his own body; whom failing, his sister and his other heirs of provision above mentioned, bound to pay his debts and fulfil his deeds. He farther reserves to himself full power of altering or revoking this deed, "notwithstanding of the substitution and destination of succession above written," and that without consent of his sister "or her sons above named, or their foresaids, or any of them." The expression, "her sons, above named, and their foresaids," occurs four other times in this deed.

On the 7th May 1752, Mr Walker also executed another deed, being a disposition of moveables, in favour of Isobel Walker his sister. It proceeds upon this narrative:—"Having, by a deed of this date, settled my real estate, failing issue of my own body, upon Isobel Walker, my sister, and her children therein named, in liferent and fee, in manner at length therein set furth." On the same 7th May 1752, Mr Walker executed a bond of provision for £500 sterling, in favour of Agnes Tennent, his niece. The obligation to pay is thus conceived:—"I bind and oblige me and my heirs, as well male as of line, tailyie, conquest, and provision, and all other my heirs, executors, and successors whatsoever, renouncing the benefit of the order of discussion." Mr Walker died in 1759, without issue, whereby the succession to his estate, under the deed 1752, opened to Alexander Tennent, the eldest son of Isobel Walker; bnt, as Isobel Walker had right to the liferent, Alexander Tennent never entered into possession, neither did he make up titles to Mr Walker. He

also died, in 1763, without issue. Upon his death, Agnes Tennent, his sister of full blood, and Mr William Baillie, his brother uterine, took out brieves to be served heirs of provision in the deed 1752: the Lords Auchinleck and Barjarg were appointed assessors to the service before the macers: they heard parties, and took the debate to report.

The competition between the two claimants resolved into this:—Agnes Tennent claimed the estate as being heir of Alexander Tennent, to whom, and his heirs or assignees, Mr Walker had disponed it. Mr Baillie claimed the estate as called *nominatim*, failing Alexander Tennent and his heirs or assignees: and he pleaded, that the term *assignees* was a superfluous word of style, and that the term *heirs*, in this particular case, must be limited to the heirs of the body of Alexander Tennent; and, such heirs having failed, he, the claimant, was entitled to be served in virtue of the *nominatim* substitution.

Argument for Agnes Tennent:—

Alexander Tennent, the son of Mr Walker's sister, by the first marriage, was the *persona prædilecta* in this settlement: Mr Baillie, the son of the second marriage, is only called, failing Alexander Tennent and his heirs. Agnes Tennent is his heir; for he left neither children nor brothers-german, and Agnes Tennent is his only sister-german. If the meaning of the word *heir* be not ascertained in the law of Scotland, it does not appear that there is any word in that law whereof the meaning is ascertained. When there was a former settlement, it has been questioned whether the word *heir* in a latter settlement meant the heir of that settlement or the heir-at-law: but, when there was no former settlement, it has never been disputed that *heir* in a deed meant heir-at-law. Were this to be controverted, then it would follow that there is no legal order of succession established by the law of Scotland. But farther, the testator, for removing all possible ambiguity, has, to the term *heirs*, added the term *assignees*: If the estate was given to Alexander Tennent, his heirs or assignees, how can it be disputed that the estate was given to be at his absolute disposal, and to his heirs at large. No instance can be shown where those words were ever used in such a limited sense as that for which Mr Baillie contends. From other clauses in the same deed, it is evident that the testator understood the words in their full latitude, for that he uses the same words in substituting Mr Baillie, his heirs, or assignees, after which follows the last clause of substitution to the testator's own heirs and assignees whatsoever: Now it is plain that he meant to call the whole of the heirs of Mr Baillie preferably to his own heirs at large, whom he only calls in the last place, with the view of excluding the Crown as *ultimus hæres*. If those words, Mr Baillie's heirs or assignees, comprehend his whole, the very same words, Alexander Tennent's heirs or assignees, cannot be limited to the heirs of his body. It would be most irrational if the same words in the prior substitution of the *persona prædilecta* should receive a more limited construction than they do in the posterior substitution of the person less favoured. That the testator was aware of the difference between heirs and heirs of the body is evident from that clause wherein he calls the heirs-male or female of his own body: Had he meant to call the heirs of Alexander Tennent's body, and no others, he would have repeated the words used in the former clause, instead of varying them.

Thus Mr Baillie's interpretation of the deed is liable to two insuperable objections:—*first*, He makes the same words, *heirs or assignees*, to mean one thing in Alexander Tennent's substitution, another thing in his own substitution. *Secondly*, He makes different words, heirs-male or female of the body in the first clause, and *heirs* simpliciter in the second, to mean the same thing. If, in a deed, the same words may mean different things, and different words the same thing, there remains no certainty whatever in the interpretation of words. In order to obviate the objection that Mr Baillie makes,—the same words mean different things,—he has adventured to maintain that heirs and assignees, in the clause substituting him, does imply heirs of his body. According to this interpretation, if Mr Baillie should succeed, and die without heirs of his body, the heirs-general of the testator, not the younger brother, and Mr Baillie, would be called to the succession. How the testator should thus have preferred the eldest, but not the younger, sons of his sister to his own heirs-general, is hard to conceive. But this interpretation, however strained, removes no more than one objection: it does not remove the other objection, that Mr Baillie supposes the testator to have used heirs, and heirs-male or female, of the body, as synonymous terms. It is true that a settlement to A and his heirs-general, whom failing to B and his heirs-general, gives no more than a distant hope of succession to B, and those called after him: but this is no objection to the claim of Agnes Tennent, whose right is not by a tailyie in the strict sense of the term, wherein clauses prohibitory, irritant, and resolutive, are implied; but by a tailyie wherein nothing more is meant or done than to make a distinction of heirs in a certain series. It matters not that Agnes Tennent, though known to the testator, is not called *nominatim*, while Mr Baillie is: It cannot be pleaded that every one, known to the testator, must be called in special. Alexander Tennent and Mr Baillie were called *nominatim*, as the eldest son of each marriage: a further detail was unnecessary: besides, the testator may not have had in view every event, and may have supposed that his estate was to be enjoyed by Alexander Tennent and the heirs of his body, to the exclusion of collaterals. Although he did not foresee the event which has happened, of Alexander Tennent dying without issue, this will not make the technical term *heirs* less effectual to the heirs-general of Alexander than if they had been expressly and anxiously called by their names, in so far as known to the testator.

Argument for Mr Baillie:—

The whole of the argument for Agnes Tennent, however diversified, resolves into a literal interpretation of the term *heirs*. The term *heirs* is capable, according to circumstances, of a larger or more limited interpretation. Whenever words, by being interpreted in one sense, produce absurdities in the construction of a deed, they must be interpreted in another sense, which may render the deed consistent, and be agreeable to the *voluntas testatoris*. Of this rule there are many examples in the Roman law: the celebrated judgment of Papinian, *l.* 102, *D. de Cond. et Demonstrat.* is well known,—others occur *l.* 57, § 1. *D. ad S. C. Trebel.*, and *l.* 25, § 1. *D. de Lib. et Post.* The general rule is thus laid down,—*l.* 67, *D. de Reg. Juris*, "*Quoties idem sermo duas sententias exprimat, ea notissimum accipiatur quæ rei gerendæ aptior est.*" That the word heir is capable of an interpretation more extensive or more

limited, according to circumstances, cannot be disputed. The term heirs-whatsover is in itself more definitive than that of heirs, and yet that term has been found, according to circumstances, to imply heir-male, heir of investiture, heirs of conquest, and even executor, rather than heir of line. This is well expressed by Lord Stair, *B. 3, Tit. 5,* § 12, where he says, " that the adequate signification of heirs-whatsoever is not heir-general, but heirs-generally." A remarkable example of this occurs in the Statute Book, Act 1685, concerning tailyies, whereby it is declared, that the neglecting to insert the provisions irritant, &c. in the after investitures, shall import a contravention against the contravener " and his heirs, whereby the estate shall, *ipso facto*, devolve to the next heir of tailyie." Here, heirs, it is acknowledged, must imply heirs of the body; for, otherwise, the person contravening would occasion the forfeiture of all the heirs of entail. Wherever there are various branches of substitution in a settlement, the term heirs must be understood of heirs of the body, until it comes to be used in the concluding clause. Thus, a settlement to an eldest son and his heirs, with substitutions, must be limited to heirs of the body; for, otherwise, the first branch of the substitution would comprehend all the rest, which is a contradiction. The reason of this is clearly seen from the following observation, arising from the present case:—Agnes Tennent stands in the same degree of relation to the testator that Mr Baillie stands; she is the daughter, he the son of Mr Walker's sister. But as Agnes Tennent here claims as heir of line to Alexander Tennent, the same claim will be equally competent to all the heirs of line of Alexander Tennent, though standing in no degree of relation to the testator. Thus, the uncle, or other collateral of Alexander Tennent, would be as much his heir of line as Agnes his sister, and yet would be a person wholly extraneous with respect to the testator. The argument of Agnes Tennent does therefore resolve into this: that the testator, while establishing an order of succession among his own relations, did prefer strangers to his blood. Thus much in general; but more particularly, the purpose of the testator may be collected from various clauses in the deeds executed by him. The preamble of the settlement of the heritage in question, bears the *causa donandi* to be " love, favour, and affection to his sister and her children after named." He mentions his two nephews, Alexander Tennent and Mr Baillie; he does not mention his niece Agnes Tennent; yet, according to Agnes Tennent's argument, he prefers, to a nephew whom he named, not only a niece whom he had not named, but all the extraneous heirs of Alexander Tennent. It would have been ludicrous for the testator to have expressed his love, favour, and affection to his nephew Mr Baillie, by providing that the succession should not open to him till all the heirs of Alexander Tennent had failed. As the testator did, at the time of executing this settlement, execute a bond of provision in favour of Agnes Tennent for L.500 sterling, it is certain that he remembered her: if he had meant to prefer her to Mr Baillie, he would have inserted her in the substitution. Thus, again, in the settlement of his executry, the testator repeats the tenor of his settlement as to heritage, upon his sister, " and her children therein named." That the testator distinguishes between heirs and heirs-male or female of his body, and therefore shows that, by heirs, he meant heirs-of-line, is a criticism drawn from a small inaccuracy of the clause referred to by Agnes Tennent. Another inaccuracy occurs in a clause where he transfers his title-deeds from his heirs whatsoever " to the

heirs-male of his body in fee; whom failing, his heirs-female." According to which, if taken in that strictness for which Agnes Tennent contends, he did, in the event of the heirs-male of his body being extinct, transfer his title-deeds from his heirs whatsoever to his heirs whatsoever. The inaccuracy of particular clauses cannot have the effect of overturning the whole general purposes of the testator's settlement.

The question in controversy between the parties is determined by an express text of the civil law, *l.* 17, § 8. *D. ad S. C. Trebel.*, " *Si quis ita fideicommissum reliquerit*, fidei tuæ, fili, committo, ut si sine hærede moriaris, restituas Seio hæreditatem, *videri eum de liberis sensisse, Divus Pius rescripsit, et ideo cum quidem sine liberis decederet, avunculum ab intestato bonorum possessorem habens, extitisse conditionem fideicommissi rescripsit.*" It is true that the text in the civil law is printed thus,—" *si alieno hærede moriaris*" instead of " *si sine hærede moriaris*,"—but for *alieno* the glossators read *sine*, and this alteration is approved of by the elder Gothofred *ad loc.* Of the same opinion is Bartolus, *ad loc.*, and he gives this reason—that, in testamentary settlements, the *conditio fideicommissi* must be such as may or may not take place; that the *conditio si sine hærede*, in the more comprehensive sense of the word *hæres*, is an event so rare as scarcely to be possible, and therefore that the condition must be understood in the more limited sense of the word, *sine hærede de corpore suo*. To the same purpose speak *P.* de Castro. *ad L.* 29. *D. de Lib. et Post.*; Alex. Tartagno, *lib.* 5, *concil.* 125; Mantica, *de Conjectur. Ult. Volunt. lib.* 8, *t.* 14; Wissenbachius, *ad tit. de Verb. Signif. l.* 65. The same rule of interpretation has been received in the law of England. Peere Williams, vol. 1. folio 23, Trinity Term 1700, B. B. *Nottinghame* against *Jenkins*. The case, " J. S. had three sons, A, B, and C, and devised his lands to B, his second son, to hold to him and his heirs for ever, and for want of such heirs, then to his, the testator's right heirs." Chief Justice Holt said, " that the word *heirs* can import nothing more than issue;" and it was determined accordingly; and a like judgment was pronounced in the case of *Webb* against *Herring*, Cro. Jac. 415, Hilary Term, 13, Jac. I. And in the case, *Parker* against *Thacker*, Hil. 33, 34. Car. II. 3 Levin. 71. All those judgments proceeded upon this principle, that the term *heir*, however descriptive of heirs-general in the abstract, must, in settlements, be so limited as to follow the will of the testator. And that, in the present settlement, the testator did, by *heirs*, mean heirs of the body, is evident from the consistency of that interpretation with the nature of his settlement, and from the absurdities attending a contrary interpretation.

Additional Argument for Agnes Tennent:—

The authorities urged by Mr Baillie from the civil law, and the law of England, did not receive an answer in the original information for Agnes Tennent. She afterwards took an opportunity of making answers to them, and the substance of those answers is subjoined under the name of additional argument. She observed in general that the interpretations of Roman lawyers in fideicommissary substitutions are so loose and fanciful that they cannot be applied to the settlements of land estates by the law of Scotland; that the Roman lawyers themselves used a greater latitude in the interpretation of fideicommissary than of direct substitutions. More particularly, she observed that the

passages quoted by Mr Baillie, from the civil law, do not apply to this case. The *l.* 101, *D. de Cond. et Demonstr.* is nothing to the purpose: It proves, however, so much against him, as it gives an example of a condition understood, though not expressed, in favour of the *persona prædilecta*, whereas Mr Baillie contends that words should be interpreted contrary to their natural signification, in prejudice of the *persona prædilecta*. The next authority, *l.* 57, § 1, *D. ad S. C. Trebel.* is as to an expression whereof the meaning was clear: the only question was, whether *uterque* implied *alter*, whether *both* comprehended *either?* This was determined in the affirmative, without doing any violence to the words. The question, *l.* 25, § 1, *D. de Lib. et Post.* is foreign to the purpose, as it turned upon this,—whether the testator knew, or did not know, that his daughter-in-law was delivered of a child. As to the capital authority, *l.* 17, § 8, *D. ad S. C. Trebel.*, Mr Baillie forces it into his service by a violent correction of *si alieno* into *si sine*. Were such corrections admitted, any law in the *corpus juris* might be made to signify any thing. This correction depends upon the authority of the glossators, that is, upon an assemblage of the barbarous commentaries of Accursius: it is not acknowledged by the Florentine MS. nor by any one edition of the Pandects; neither has it been adopted by Cujacius, the later Gothofred, or any other of the *melioris notæ interpretes*. Supposing, then, the received to be the true reading, *si alieno*, the passage makes against Mr Baillie, not for him. It is plain that what made the Emperor suppose that the testator had children in view, was his using the word *alienus;* the emperor therefore decided, that, if the son died without children, the fideicommiss should take place; and this clearly supposes that, if the words had been simply *sine liberis*, the decision would have been different; and the uncle, being undoubtedly an heir, would have succeeded. In a word, the Emperor understood the settlement as if it had been upon the son and the heirs of his body, whom failing, to the fideicommissary; and this very properly, because the expression *alienus hæres*, not *hæres* simply, was used.

N.B. This does not solve the difficulty; for, if the expression had been *si alieno hærede*, there could be no doubt of the fideicommiss taking place. The *avunculus* was not *suus hæres*, and consequently was *alienus:* and it never could have been put as a question for the determination of the Emperor, whether an *avunculus* was *alienus hæres*. It is probable that *sine hærede* was in the text, which some transcriber explained to be *alieno hærede* as tantamount to *sine liberis*, and this explanation has crept into the text. The learned counsel who said that Cujacius could not be produced in support of Mr Baillie's interpretation, knew well that Cujacius was totally silent on the subject. With respect to the precedents from the English law, the counsel for Agnes Tennent confessed that he could not plead upon a law whereof he did not understand the terms; that he could only guess that, in those cases, the settlements were understood to be made upon A and his heirs; whom failing, upon B, who happened to be the nearest heir of A, failing the issue of A; so that, B being called next to A and his heirs, it was plain that, by the heirs of A, the heirs of his body were meant: but this is not the case here, for Mr Baillie, the substitute, is not the heir of Alexander Tennent. Had he been so, there would have arisen no controversy between the parties.

On the 20th June 1766, the Lords, upon report of Lord Barjarg, "found,

that the claimant, Mr Baillie, is preferable, and entitled to be served heir of provision to the deceased Mr William Walker under the settlement 1752,—and remitted to the macers to proceed in the service."

On the 3d July they "adhered."

For Mr Baillie, A. Lockhart. *Alt.* J. Burnet. *Reporter*, Barjarg.

OPINIONS.

The Court was unanimous. The word *heirs* was held to be pliable; the intention of the testator was clear: The only ambiguity arose from a country writer deviating from his style-book. An ingenious reclaiming petition was offered, but on the 3d July was refused without answers. Concerning it the President observed, that the petition took many things for granted, which he apprehended were contrary to the principles of the law of Scotland.

This decision, however, was reversed on appeal.

1766. *July* 4. The INCORPORATION of SHOEMAKERS in Edinburgh *against* WILLIAM MURRAY, Shoemaker in Edinburgh.

[*Kaimes' Select Decisions*, 320, *Dictionary*, 1962.]

BURGH-ROYAL.

It is lawful for a freeman to join stocks with an unfreeman.

THE incorporation of shoemakers in Edinburgh is an ancient incorporation. In 1586 they obtained a seal of cause from the magistrates and town council of Edinburgh. It proceeds upon the narrative, "that our sovereign Lord's lieges are greatly skaithed and defrauded by unsufficient work of ignorant persons, labourers, both in black work and barked leather." It orders, "that no freeman of the said craft, being burgess, pack or peel, can be partner with unfreemen, nor make conventions with them, under the pain of ten pounds, or tinsel of his freedom." This seal of cause was confirmed in 1598 by a charter from King James VI. For the better enforcing thereof, each member at his admission makes oath "that he shall be leal and true in his craft and vocation in serving the lieges, and shall obey the deacon and masters for the time; shall defend the liberty of the craft, conform to equity and the uttermost of his power, and shall keep all the general statutes and ordinances made, or to be made, for utility and welfare of the craft, without revocation therefrom, and shall not colour nor fortify any unfreeman, nor pack and peel with them, &c. under the pain of perjury and defamation."

In February 1764, William Murray was admitted a freeman of the incorporation of shoemakers in Edinburgh. In August 1764, he entered into an agreement with Alexander Learmonth, tanner in Edinburgh, no freeman of the incorporation of shoemakers. By this agreement it was provided that each of them should advance an equal sum of money to be employed in the trade of