

libel ; but this could not be done directly, because the charge was for the penalty, not for performance, although the parties had joined issue upon the merits of the sale.]

Act. Ilay Campbell. *Alt.* R. Cullen. *Rep.* Auchinleck.

1769. December 1. JOHN and WILLIAM WILSON *against* GEORGE WILSON.

CLAUSE—PROVISION TO HEIRS AND CHILDREN.

Meaning of the term “Heirs and Bairns,” or “Children,” in a contract of marriage.

[*Fac. Coll.*, V. 12 ; *Dictionary*, 12,845.]

MONBODDO. Setting the case of *Kemp* aside, of which I know not the circumstances, I doubt as to the interlocutor. The expression is, “heirs and bairns.” When a testator departs from ordinary words of style, I must suppose that he meant something more than heirs. This is confirmed by the clause of division, where he speaks of children, referring to the former clauses.

PRESIDENT. The expression, *heirs and bairns*, may mean as in the interlocutor, when there are no interpreting words : such was the case of *Kemp*. But there may be interpreting words. The clause, as to the provision of 4000 merks, affords evidence that, by heirs and bairns, the testator meant children : for the provision in that clause might chance to be heritage as well as moveables. If it was heritage, then, according to the principles of the interlocutor, the eldest son gets every thing, and the younger children are disinherited altogether.

PITFOUR. What is now stated is new. I supposed that the provisions in the second clause were simply as to moveables. My rule of interpreting was this : *Non tantum Atreidæ uxores suas amant*. Small heritors are as fond of their paternal estates as great ones. A provision of an estate to heirs and bairns, is therefore limited to the eldest son. When a clause of conquest is to heirs and bairns of the marriage, it is to be interpreted *applicando singula singulis*, heritable to heirs, moveable to younger children ; the intention is to provide *stirpi*, not for any particular child. It is not new, in the interpreting a deed, to make the same word bear different meanings. This happened in the case as to the succession of the *Earl of Selkirk*, where heirs and assignees whatsoever was found to imply both the heir of line and the heir of conquest. In the appeal, the judgment of the Court of Session was burlesqued, and it was said “that the law of Scotland must be a very strange law, which in the same deed interpreted the same words different ways.”

PRESIDENT. I admit that the law is rightly laid down by Lord Pitfour ; but still the difficulty recurs, May not a man affix his own meaning on words ; and is that not the case here ?

KAIMES. In the interpretation of a testament, the English lawyers produced fifty authorities to support the words against the probable sense. Lord Mansfield said, "All this is well; but will you show me that the testator ever heard of one of those fifty authorities?" I can never imagine that a plain country farmer used the same word in two senses so opposite, as by the one to exclude, and by the other to include younger children.

JUSTICE-CLERK. In forming my opinion, I do it upon this principle, that here is entirely a *questio voluntatis*. Taking all the clauses together, I think that heirs and bairns uniformly mean children. In the case *Rankin against Rankin*, 1736, the conquest was provided to heirs and bairns. The conquest came to consist of heritage as well as moveables: it was found to divide *per capita*. That decision is the more apposite, because it was pronounced among people of the same rank with the Johnstones. To all this I add the last clause concerning dividing the provisions to said children. There is nothing limiting the word provision to the subjects different from the little land estate; and the word children comprehends both the heir and the younger children.

PITFOUR. I think that the lands were provided to the heir of the marriage in the same way as they had descended to the disponent from his predecessors. I also think that the 4000 merks were provided to the children of the marriage. The chief rule of construction is from the meaning of the testator. We ought to lay more stress upon what he saw and knew, than upon what he did not know and was a future contingent event. He knew that the land estate had come from his ancestors; he did not know what his issue would be, nor what his conquest would be. Let me suppose that the word *bairns* had been omitted, and that the provision both of the heritage and the moveable estate had been to the heirs of the marriage, the former would certainly have gone to the heir, the latter to the younger children. Dirleton thinks that, in a merchant's succession, houses and heritable bonds will divide among children when provided to heirs and bairns;—and rightly, for that those subjects are divisible, whereas it is difficult to divide an estate, as was seen in the case of *Carnock*. When a land estate is provided to heirs and bairns of the marriage, the provision means, to such of the bairns as shall be heirs *suo ordine*. This is laid down by Lord Bankton; and so also determined in the case of *Kemp*;—so understood in the case of *Strang against Strang*, 17th July 1751. The old decisions do not affect this case. 1st, They relate to moveable subjects and tenements; 2d, They relate to clauses where there was mention of bairns without heirs. Lord Mansfield's opinion is well founded, (as quoted by Lord Kaimes,) and confirms the opinion which I give. Wilson must not be supposed to have thought of legal niceties of interpretation; but he knew that he got his estate from his father, and it was natural for him to transmit it to his heir. This was natural, and this he must be presumed to have done. I do not think that the case of *Rankine* applies. There, there was no provision of a proper land estate. As to the clause of division among children, it does not relate to the settlement of the land estate. The settlement was direct. The provision was only what gave a ground of action; so that the dividing clause does not relate to the land estate.

PRESIDENT. None of the decisions urged by Lord Pitfour are applicable to this case; because in none of them were there any collateral circumstances ex-

plaining intention. I do not dispute the principle, that heirs and bairns may mean heir, or may mean all the children, according to the nature of the subjects provided; but what I say is, that the testator appears to have understood the phrase in the simple uniform sense of children.

COALSTON. In heritage, a provision to heirs and bairns is the same as a provision to heirs. A provision of moveable subjects to heirs and bairns will be to all the children. What moves me to alter the interlocutor, is, that, in the dividing clause, children are mentioned, and no distinction made between one part of the provisions and another.

AUCHINLECK. I understand it to be fixed in law, that a provision, made to heirs and bairns, has the same meaning as a provision to heirs; and particularly when a provision is made to heirs and bairns of a marriage: If of an estate, it will go to the eldest son of the marriage, unless otherwise provided. As to the case of *Rankin*, I was lawyer in it, along with Mr Robert Craigie, afterwards President, and we both thought that such provision was only meant to tie up the father from disappointing the children. I think that the power of division, in the present case, related to the land estate as well as to the rest; so that the expression of children will not vary the argument.

COALSTON. If the provision of the 4000 merks had proved to be heritable, and the conquest proved to be moveable, the nearest of kin might, according to the clause in question, have divided: if so, where is the impropriety in supposing that the power of division related also to the estate?

On the 1st December 1769, "The Lords found, in respect of the circumstances of the case, and conception of the deed, that the provision to heirs and bairns was to all the children;" altering the interlocutor of Lord Pitfour.

On the 31st January, 1770, adhered.

Act. A. Crosbie. *Alt.* D. Græme.

Diss. Pitfour, Auchinleck, Stonefield.

At second hearing, also, Gardenston, Strichen.

1769. December 1. ANNA FOGGO against ADAM WATSON.

HUSBAND AND WIFE.

Donation by a Wife's Relations to the Husband, not revocable by her.

[*Faculty Collection, IV. p. 152; Dictionary, 6,102.*]

HAILES. Of the opinion of the interlocutor. I do not see how there could be a donation, here, of what did not belong to the pursuer. Her right, according to her own account of it, was nothing more than what she calls a "good claim of good will,"—which is not a right known in law.