No 6.

Answered for the younger children; That heirs in a second contract of marriage are understood bairns in a competition among themselves; 2*do*, The clauses in the contract reserving power to the father to divide the sum, and the provision to heirs was rational, that the children might represent the father, and be liable to pay his debt; 3*tio*, The eldest brother being now general heir, upon the decease of the children of the first marriage, he ought to have no share of the L. 20,000.

THE LORDS found, That the children must represent their father, and that the sum divided among them *per capita*, the father having made no division in life, and that the eldest son had one share thereof, and no more.

Fol. Dic. v. 2. *p.* 275. *Harcarse*, (CONTRACTS OF MARRIAGE.) *No* 345. *p.* 93.

1684. *December.* IRVINE *against* M'KITTRICK.

No 7.
Where one was obliged to take rights and securities to himself and spouse in conjunct liferent, and to the heirs and children in fee, the clause found copulative in favour of the children.

A WOMAN in her contract of marriage being obliged to convey to her husband what lands should happen to fall to her during the marriage; and he being obliged to take the rights and securities thereof to himself and her in conjunct fee, and to the heirs and bairns in fee; the bairns pursued the mother to denude in the terms of the provision.

It was *alleged* for the defender; That the clause being copulative in favour of heirs and bairns, the pursuers must serve heir to their father, though the provision would divide amongst them *pro rata*, which the LORDS sustained; though it was *replied*, That oftentimes conjunctive particles are to be interpreted disjunctive.

Fol. Dic. v. 2. *p.* 275. *Harcarse*, (CONTRACTS OF MARRIAGE.) *No* 369. *p.* 95.

*** Fountainhall reports this case:

1684. *November* 28.—ISOBEL IRVINE and Thomas Hay her husband against Bessie Makittrick in Dumfries, is reported by Redford. The case was, Where a clause in a contract matrimonial did provide what conquest should come by the mother to the heirs and bairns of the marriage, in copulative terms, if they might pursue for it *qua* bairns, without being heirs, seeing the clause might be exponded disjunctively, and that the Lords had in such cases found they needed not be formally served heirs. Yet it was *alleged*, Verba in contractibus non debent esse otiosa, sed aliquid operari, and so here the word heirs

No 7.

behoved to import somewhat beyond bairns; 2*do*, Verba non sunt impropriranda sine necessitate, sed propriæ eorum significationi standum est, nisi sensus aliquis inde sequatur absurdus; and so copulative should be taken in its native and genuine signification; et copulata oratio requirit ut verificetur in utroque, et non sufficit adimplere alterutrum, per leg. 129. D. De verb. obligat.; 3*tio*, Subsequent clauses of this contract mention only heirs, and so explain the first part; and, therefore, the pursuer cannot insist till she be served heir. "THE LORDS sustained process at the pursuer's instance; but before extracting of any decreet, ordain Isobel Irvine the pursuer to be served heir." Many of the Lords thought this irregular, and that it was enough she was cognosced a bairn of that marriage without a formal service; and that the word heir was only synonymous and exegetic of bairns.

Fountainhall, v. 1. *p.* 316.

No 8.

A sum of money provided to the heirs of a marriage, found to divide amongst all the children equally.

1727. *February.* ALLAN MACDOUAL *against* Colonel MACDOUAL.

JOHN MACDOUAL of Ardincaple, having a son and other children of a first marriage, did, in his second contract of marriage, make the following provision to the children of the marriage: "And further, the said John Macdoual binds and obliges him, his heirs and successors to his lands and heritages whatsoever, to provide, secure, and make payment and satisfaction to the heirs to be procreated betwixt him and Anna Campbell, of the sum of L. 1000 Scots, and that at the decease of either of the spouses." There being two sons of this marriage, the eldest served himself heir of provision, and uplifted the whole sum of L. 1000, whereupon the second brought a process against him, to account for the half; and the question arose upon this point, whether the foresaid provision of L. 1000, to the heirs of the marriage, did belong to the eldest son as heir of the marriage, or if it must divide amongst all the children?

It was *pleaded* for the pursuer; That the word heirs is a general term, belonging equally to successors in moveables and in heritage, as is plain, because where a sum is provided to heirs and assignees, and executors not mentioned, it will fall to the executors, as *hæredes in mobilibus*. And hence, in consequence of such a clause as that in dispute, the same reason that makes heritage go to the heir properly so called, will carry sums of money to the whole children equally; for where lands are provided to the heirs of the marriage, the heir properly so called is indeed preferred, but not directly from the force of the clause, but because he would have succeeded however in that subject by the provision of law; and nothing appears from the general term of heirs, that can be interpreted to set his right aside. The very same way where a