

No 7.

behoved to import somewhat beyond bairns; *2do*, Verba non sunt impropria sine necessitate, sed propria 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.; *3tio*, 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. I. 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 *heredes 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

sum of money is provided to heirs of a marriage, the whole children must be entitled to it, as heirs in that subject; *2do*, Whatever be the proper signification of this clause, the father's intention in this circumstantiated case, was certainly to bring in all the children of the marriage equally; for where there could be no possible view of establishing a family, is it credible, that of a small provision of money naturally divisible amongst all the children, the father could intend the whole to any one child, exclusive of all the rest? This cannot be imagined; and if the father's intention is certain, no matter what terms he made use of, proper or improper.

Answered to the first, Heirs indeed is a general term, comprehending both heirs and executors; but heirs of a marriage is not a general term, it can have but one precise meaning, because executors of a marriage is not a *nomen juris*. And here is the error of the pursuer's reasoning; for does it follow, because under the general word, heirs, executors are also comprehended, therefore heirs does always mean the whole children of a marriage, in opposition to the heir strictly so called? To the *second, answered*, Where words are express, as they are certainly in this case, there is no place for conjectural meanings.

"THE LORDS sustained process."

Fol. Dic. v. 2. p. 276. Rem. Dec. v. 1. No 95. p. 188.

1769. December 1.

JOHN and WILLIAM WILSONS, SONS OF ANDREW WILSON of Templelands,
against GEORGE WILSON, eldest Son of the said ANDREW WILSON.

ANDREW WILSON of Templelands, in his contract of marriage with Alison Christie, became bound "to infest and seise the said Alison Christie with himself, and longest liver of them two, in conjunct fee and liferent, and to the heirs and bairns lawfully to be procreated betwixt them in fee; which failing, the said Andrew Wilson, his heirs and assignees whatsoever, heritably and irredeemably, in all and hail the town and lands of Templelands," &c. By another clause, he bound himself to provide a certain sum of money, and to take the rights thereof, to the heirs and bairns of the marriage. By another clause, he provided the conquest of the marriage to be taken in the same way; viz. to himself and spouse in conjunct fee and liferent, and to the heirs and bairns lawfully to be procreated. And it was further declared, "That the provisions above written, conceived in favour of the said children, shall be divided and proportioned amongst them as the said Andrew Wilson shall think fit."

On the dissolution of the marriage there existed five sons; George, James, Andrew, John, and William; and the two last having brought an action

No 8.

No 9.

Meaning of the term "heirs and bairns," or "children" in a contract of marriage.