facts, Oliphant would require his oath, and many yeaars might intervene before he could be found again to make oath.

On the 23d July 1766, The Lords " refused the desire of this petition, and adhered to the interlocutor of the Lord Ordinary."

For the Petitioner, R. Campbell.

OPINIONS.

PITFOUR. In a declarator of trust between Sir James Reid and the Earl of Northesk this very question was agitated, and determined agreeable to the Lord Ordinary's interlocutor.

1766. *July* 23. JOHN ROBERTSON, Son of the deceased Paul Robertson of Pittagowan, *against* JANET ROBERTSON, daughter of the deceased Donald Robertson of Pittagowan.

PROVISION TO HEIRS AND CHILDREN.

A Sum of Money " provided to the Heirs-male or Female of a Marriage," and Payable on *their* obtaining Majority, or being Married, found to divide among all the Children equally.

PAUL Robertson was twice married. By his first wife he had issue Donald, who had only one child, Janet the defender: By his second, he had issue John Robertson, the pursuer, and two daughters. By marriage-contract between Paul Robertson and his second wife, to which his father, John, is a party, " the said Paul and John Robertsons bind and oblige us, our heirs, and executors, to pay to the heirs-male or female of the said marriage, the sum of 1000 merks, by advice of friends, at their attaining to majority, or sooner, if they be married before then, and in the meantime to entertain them," &c. In the event of the decease of the heirs of Paul's first marriage, without heirs of their bodies, Paul and John became bound to secure the lands of Pittagowan to the heirs-male of this marriage. John Robertson insisted, in an action against his niece Janet, as representing the obligants in this marriage-contract, for payment of the 1000 merks, with interest. Many defences were proponed by Janet, which were first sustained by Lord Barjarg, Ordinary, and afterwards repelled by the Court: they relate to matters of fact, and do not deserve to be recited. At length she moved a partial defence in the following terms:—Of Paul's second marriage there existed, besides the pursuer, two daughters. By the conception of the contract, to the heirs-male or female of the marriage, all the children have an equal right to the 1000 merks. Where mean people provide so pitiful a sum as 1000 merks to the heirs-male or female of a second marriage, children, whether male or female, must be understood. It could not have been the intention to give the whole to one son, and leave all the other

children destitute—nor could there be any purpose of establishing an heir-male, properly so called, for perpetuating a family descended from a second marriage of Paul Robertson. Upon these principles the Court found that L.1000 Scots, settled in a second marriage-contract to the heirs of the marriage, did divide among all the children equally, *February* 1727, *M'Doual* against *M'Doual*; and a like construction was put upon a clause in a marriage contract, where the words *heirs-whatsoever* occurred, *13th June* 1760, *Watson, &c.* against *The Younger Children of Robert Scott.* That such was the intention of parties in this case appears from the term of payment being "on their attaining" to majority or marriage. This plainly relates to all the children of the marriage, and cannot be limited to the *heir*, properly so called, of the marriage. The pursuer therefore can have action for no more than one third of the sum in the obligation: the other two-thirds are exigible by his sisters.

It was ANSWERED for the PURSUER,—That the provision to the heirs-male or female of the marriage is plainly taxative to heirs-male, if any such should exist; and, failing heirs-male, to the heirs-female. Had the intention been that all the children should inherit this provision, it would have been conceived to the heirs-whatsoever, or bairns of the marriage, as in the case of *Watson*, or to the heirs of the marriage, as in the case of *M'Doual.* The limitative distinction of heirs-male and heirs-female is inconsistent with such construction.

On the 23d July 1766, "The Lords, in regard there were two other children of the marriage, besides the pursuer, found the defender liable in no more than one-third of the 1000 merks, with interest."

Act. W. Nairne. *Alt.* W. Mackenzie.

OPINIONS.

KENNET. The clause in the marriage-contract gives no more than one-third to the pursuer. When the whole of the clause is taken together, it appears that *or* means *and.*

PITFOUR. Of the same opinion: When the strict meaning of words occasions an ambiguity, the clause must be explained from circumstances. *Or* and *and* imply the same thing, and mean the children, whether male or female.

1766. *July* 23. ANDREW TAIT, Organist in Aberdeen, *against* JOHN SLIGO, Merchant in Aberdeen.

REMOVING.

Not necessary to raise an Action of Removing, or use formal warning 40 days before term of removing, from tenements within borough.

[*Faculty Collection, IV.* 76; *Dictionary* 13,864.]

JOHN Sligo possessed a shop in Aberdeen belonging to Andrew Tait.