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.

MONBODDO. The quotations from the civil law are properly applied. The law is not so invidious as to prevent the husband from becoming richer when the wife does not become poorer: here the wife did not become poorer, for she had no antecedent right to the subject.

COALSTON. The law strikes at all donations between man and wife, whether direct or indirect. I admit that the wife was not a creditor in a clear obligation; but she was understood to be creditor in a natural obligation. The other children considered themselves as bound to fulfil the intentions of the father. It is no matter whether the claim be good or not. If the wife discharges a doubtful claim, and that is conveyed to the husband, it will be held a donation, and the Court will not examine into the merits of the claim.

GARDENSTON. If the father had made the addition to the daughter's provision, then the husband would have had it. The children have done what the father might have done, and granted the money to the husband. How can we invert this, and grant it to the wife?

JUSTICE-CLERK. From considering the contract of the 20th March 1758, I doubt as to the interlocutor. It is the same thing as if the children had previously agreed to make up the sum to Mrs Watson, and that she had agreed that it should be transferred to her husband. The quotations from the civil law do not apply; for there the act of donation proceeded from the testator, and therefore *nihil defuit* to the wife. My opinion does not go to the bill for L.85 granted by the mother; for she was under no natural obligation, and was not a party to the transaction, 20th March 1758.

KAIMES. There seems nothing in law or in equity against the interlocutor. I should admit that a claim which the wife had, if conveyed to the husband, might be held a donation; but that is not the case here. There was no natural obligation in favour of Mrs Watson: she had *ab ante* discharged her. Thomas Foggo thought there was no natural obligation, for he would not accede to it: the youngest sister thought there was no natural obligation, for she revoked her consent. This was no more than a present made. We cannot alter the nature and terms of the present, and give to Mrs Watson what her own family voluntarily gave to Mr Watson.

BARJARG. It does not appear that the husband's heir is taking any thing by the deed of the wife: the discharge was unnecessary on the part of Mrs Watson, for there was no previous obligation to be the subject of a discharge.

PRESIDENT. The case seems plain, and there is no hardship in it. It was understood by the parties, that the addition should go in the same way with the original tocher; and as they understood, so they executed.

On the 1st December, 1769, the Lords found, "That, as the pursuer and her husband, in their contract of marriage, accepted of the tocher therein contracted for by the pursuer's father, in full of all that they could ask of him, the father, the grant made by some of the pursuer's sisters and brothers, and by Mrs Foggo, though devised in form of a contract between them and the pursuer and her husband,—in fact was no other than a donation upon the part of the mother and younger children: and as they made it directly in favour of Mr Watson, the husband, so that he owed it entirely to their generosity and the regard, it would appear, they had for him; and did not owe it to the pursuer,

though her being Mr Watson's wife was probably the origin of the connexion; and therefore sustained the defences, and assoilyied the defender;" adhering to Lord Auchinleck's interlocutor.

Act. W. Nairne. *Alt.* R. Blair, H. Dundas.

Diss. Justice-Clerk, Coalston.

Non liquet, Pitfour.

1769. *December 5.* The Earl of Hyndford, and Others, *against* David Dickson of Kilbucko.

SEQUESTRATION.

Sequestration of Rents awarded upon the application of the Trustees of the proprietor of the estate, deceased, though opposed by the Heir, who had brought a reduction of the trust-deed.

[*Faculty Collection, V. p.* 14; *Dictionary,* 14,847.]

Monboddo. An heir cannot enter into possession of a subject conveyed by his predecessor to a disponee. In such circumstances the apparent heir is considered as a stranger. This is so much the case, that, when there is a deathbed disposition to a stranger, the apparent heir may not serve, and therefore is allowed to reduce without service.

Justice-Clerk. It is strange if, in consequence of the maxim, *hæres est eadem persona cum defuncto,* an heir should be allowed to counteract the most solemn deed of the defunct. The maxim is totally misapplied.

Pitfour. If the disposition is not liable to any objection, I do not see why the trustees should have any occasion to apply for a sequestration. David Dickson may say, I will not allow you to load the trust-right, and consequently me and mine, with the expense of a factor;—levy the rents yourselves, as the trust-right authorises you. In the case of *Forglen,* a deed, excluding the heir, and liable to exceptions, was found not to bar the possession of the heir: the same thing occurred in the *Annandale* case. I would allow David Dickson to continue in possession, upon finding caution.

Coalston. It was formerly doubted who entitled to possession,—the disponee or the apparent heir? Decisions formerly were not uniform. Later practice prefers the disponee where there is no objection *ex facie.* I would sequestrate the heritable estate, and inquire farther into the state of the rights to the moveables.

Kaimes. John Dickson was infeft in some lands, not in others. The property of the lands, in which John Dickson was not infeft, was not conveyed to the trustees; consequently as to them the apparent heir must possess: But, as the trustees have a personal right, he must find caution.