PITFOUR. The case of *Buchan* was as to assignation among creditors, in order to adjust their own preferences. The question did not arise from the obligation itself.

COALSTON. If a debtor refuses payment between terms, he is only liable in annualrent and penalty, not in damages: the right of the debtor can never be stronger than the right of the creditor. If a creditor can be obliged to receive, he can only be liable in the expense bestowed in obliging him to receive.

ELLIOCK. Sheuchan could not see that Donald was the principal debtor; he might only have been cautioner, and then the assignation would have been unjust.

AUCHINLECK. A creditor may be compelled to assign; but the question here is,—Is he to forfeit his debt because he hesitates upon a point of law? The Court *here* is divided in opinion: Shall we punish a country gentleman for doubting?

On the 19th November 1771, "The Lords repelled the reasons of suspension." 5th December 1771, adhered.

Act. Ilay Campbell. *Alt.* A. Wight.

Reporter, Auchinleck.

1771. *November* 20. JAMES SINCLAIR *against* ROBERT ANDERSON and OTHERS.

FIAR.

Where an heritable subject was destined, in a marriage-contract, to the husband and wife in conjunct fee and liferent, and to the heirs of the marriage; whom failing, to the heirs of the wife:—The fee found to be in the wife, though the provision was not gratuitous, but reciprocal, and though nothing else was given in the name of tocher.

[*Fac. Coll.*, *V.* 328; *Dictionary*, 4,241.]

MONBODDO. The fee was in the wife. There was a land estate in her *in dubio*: it is not to be presumed that she meant to convey it to her husband. Circumstances may create a different presumption, as in the case of *Watson*, 1766. *Here* both the first and the last terminations are to the friends of the wife.

PITFOUR. Both the criteria occur here,—the termination and the original property of the subject. The decisions are not irreconcilable, although the subject proceeds from the wife. The husband is fiar if a sum of money *nomine dotis*, expressly or by implication, the husband being *dominus dotis*. *Here* there is another *dos*; all the father-in-law's goods and gear are given to the husband as a *dos*.

JUSTICE-CLERK. I cannot rest my judgment upon that; for, in effect, there were no such *goods* and *gear*. There is no more than a clause of style.

On the 20th November 1771, the Lords "found that the fee was in the wife, and removed the sequestration upon an incidental petition."

Act. J. Scott. *Alt.* Cosmo Gordon.

1771. *July* 31. ALEXANDER SPENCE *against* THOMAS SMITH.

PROCESS.

A summons, it being sanctioned by the practice, may be called upon the last day of compearance.

[*Faculty Collection, V.* 367; *Dictionary,* 12,001.]

COALSTON. The objection is not relevant. To reduce the adjudication altogether would restrict it to security: here is an obvious irregularity. After the interlocutor was put up in the minute-book, it was not in the power of the Ordinary to touch it. An application ought to have been made to the Court for rectifying this error.

PITFOUR. Lord Milton ought to have signed a note setting forth the *res gesta.*

PRESIDENT. I do not like the putting hands to interlocutors; neither is the second one regular. The day of compearance ought to have elapsed before calling. See FOUNTAINHALL, vol. I., p. 72.

MONBODDO. The day must be past in judicial proceedings, as well as in pursuit for payment of a bond.

AUCHINLECK. The enrolment before Lord Milton was null, and there was no occasion for having it declared null. Interlocutors erroneously signed by one Ordinary, when pronounced by another, are scored daily.

PRESIDENT. That may be the practice; but surely not when the interlocutor is once put up in the minute-book.

On the 31st July 1771, the Lords "sustained the (first) objection, and annulled the adjudication *in totum;*" altering Lord Auchinleck's interlocutor.

Act. G. Wallace. *Alt.* D. Armstrong.

November 21.—PITFOUR. The adjudication is good. Lord Milton's interlocutor was pronounced *per incuriam.* I suppose that Lord Milton scored it upon hearing the mistake. It was pronounced *a non suo judice,* because the defender was not in Court, the days not being run. Although the interlocutor had not been scored, the proceedings would have been unexceptionable. Suppose a case were remitted to Lord Kennet, and yet brought to me to sign his interlocutor, whether I score this interlocutor erroneously signed by me, or leave it unscored by me, it matters not; for my interlocutor is just so much