ject during the coverture, without the consent of her husband, her legal curator. It seems strange to assert that the fee was in the husband, because he had not the disposal of the subject, and not in the wife, because she had. The effect of this clause may be illustrated from a case mentioned by Lord Stair, p. 228, n. edit., *27th June* 1676, *Earl of Dunfermline*, where an obligation by a man to provide the conquest during the marriage to him and his wife in conjunct fee, and, in case of no children, the one half to be disposed as the wife thought fit, was found to make the conquest divide between his and her heirs, so that the wife had not merely a personal faculty, but a fee in the half. The present case is stronger in favour of the wife: for *here* the subject confessedly flowed from the wife, but *there* the clause related to conquest, which must be presumed to flow from the husband.

On the 5th December 1765, the Lord Strichen, Ordinary, found "that the fee was in the mother and not in the father."

On the 18th January and 5th February 1766, he "adhered."

The Lords, on the 22d July 1766, having advised a petition and answers, "found that the fee was in the father and not in the mother."

Act. William Wallace. *Alt.* A. Rolland.

OPINIONS.

PITFOUR. The decisions are uniform. The principles are, 1*st*, To whose heirs is the fee provided? 2*dly*, Whence did it flow? In this case, Where is the property? Answer, In the husband. Here, both a tocher and the conquest are provided; both are the property of the husband. A tocher, in particular, is given to the husband *ad sustinenda onera matrimonii*. If, after the husband's heirs, the subject is provided to the wife's heirs, as in the case of *Scot of Blair*, an *estate* is settled by the wife, not a *tocher*. Here there is no word of the wife's heirs; how then can the wife have a fee? The conquest is settled in the same way, and conquest must certainly go to the husband's heirs. A man and his wife join their stock to the husband and his wife, and to the heirs of the longest liver. If the wife is the longest liver, her heirs succeed, not to the wife, but as heirs of provision to the husband.

This judgment pronounced without a vote.

1766. *July* 23. JOHN MACDOUGAL, Son to John Macdougal in Ballinaid, *against* WILLIAM OLIPHANT, Gardener in Kelso.

WRIT.

Bill Signed by a Mark.

MACDOUGAL, as executor, *qua* nearest of kin to Daniel Irvine, day-labourer at Peick, in England, and Oliphant, as pretending right by assignation from

Daniel Irvine, both laid claim to a bill for L.26 sterling, granted to Irvine by John and Andrew Gillans. The form of the assignation to this bill is as follows,—being wrote on the back of the bill itself: "*Peick, April* 7, 1759. This bill I grant to James Wright, for debt due to him in my trouble and sickness; and I, Daniel Irvine, give this bill of John Gullan and Andrew Gullan, as just money borrowed of me in my illment,—the sum which is 24 pounds 4 shillings and sixpence: Given this bill before these witnesses, ✕ Daniel Irvine, his mark. Charles Campbell, *witness*, John Brown, *witness*." "Pay the contents of the within, and bill thereto relative, to William Oliphant, gardener in Kelso, or order, for value of him. James Wright."

In a multiplepoinding, raised by the Gullans, debtors in the bill, and called before the Lord Gardenston, Ordinary, Oliphant claimed to be preferred in right of the assignee. Macdougal, the executor, objected, that the deed, by which the bill was said to have been made over to Wright, was not probative; for that it was not wrote upon stamped paper; the sum was in figures, not in writing; the deed did not bear a particular reference to the bill, and it was signed by two cross lines X, whereas the bill itself was signed by Irvine's initials. On the other hand, Oliphant contended that the bill had been assigned to Wright in security of L.24:4:6d. sterling, furnished by him to Irvine, upon death-bed, and that the conveyance was in the form allowed by the law of England.

The Lord Ordinary found the deed on which Oliphant claimed, to be not probative, but found it competent for him to instruct, by the oaths of the subscribing witnesses, that Irvine had adhibited his mark to it, and that Wright had advanced money, or furnished necessaries, to Irvine, to the extent of the sum therein mentioned.

Macdougal, in a representation, pleaded that, by the law of England, the seal of Irvine ought to have been affixed; that a proof of the furnishings by witnesses was prescribed; and that advances in money could not now be proved otherwise than by the writing of the deceased.

To this Oliphant made answer, that Macdougal had acknowledged the justness of the debt due by Irvine to Wright, and had offered his own bill to Oliphant, in lieu of the bill granted by the Gullans. Oliphant required Macdougal to confess or deny those facts by a writing under his hand.

On the 25th June 1766, The Ordinary appointed Macdougal so to confess or deny.

Macdougal again represented, and prayed, "that, as the question was *de facto proprio et recenti*, the Lord Ordinary should ordain Oliphant to refer it simply to his oath; or otherwise, that his confessing or denying should be held equivalent to his oath."

On the 11th July 1766, The Lord Ordinary refused this representation.

Macdougal applied to the Court by reclaiming petition. He therein admitted that, according to the usual forms of procedure, it is competent for either party to require the other to confess or deny facts; but he contended "that form, which is but the handmaid of justice, ought not to be prostituted for the purpose of protracting law-suits;" that he himself is a seafaring man, at present out of the kingdom; and that, if he should be found, and should deny the

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