

C O N D I T I O N .

SECT. I.

Si Sine Liberis.

1605.

LINLITHGOW *against* CAIRNCROSS.

No 1.

WHERE the bairn was born and died before the mother, (THE LORDS) fand, *quod extitit conditio, et casus restitutionis dotis solutæ.*

Fol. Dic. v. I. p. 187. Kerse, MS. fol. 65.

1624. *March 2.*LO. CURRIEHILL *against* EXECUTORS OF CURRIE.

No 2.

IN an action at the instance of Lord Curriehill, against the executors of umquhile Walter Currie, for payment of the sum contained in a bond, given to the pursuer by the said Walter, whereby he obliged him, for the pains taken by the pursuer in his affairs, and because he had debursed some charges in doing thereof, to pay to him 500 merks, at the term after the said Walter's decease, if before his decease, the said Walter did no other deed, which might be derogatory to the said bond, and if also he died, having no heirs-male gotten of his own body; against this bond and pursuit, the executors compearing, *alleged* that the bond was *donatio mortis causa*; likeas, according to the tenor thereof, it was manifest, and conform thereto, the maker in his testament, had left the pursuer 1000 merks, and ordained the first bond, whereupon this pursuit is founded, to cease and become extinct; and also *alleged*, That Walter Currie had left one daughter only, who was married, and had sons, who behoved to be repute heirs-male gotten of his body, and so the condition of the bond thereby was taken away. These alleigances were repelled, and the bond found not to be *donatio mortis causa*, nor to be revoked by the said posterior testament, seeing it was made for onerous causes, and therefore was not revokeable, nor could

A bond was granted by a man to his lawyer for a sum payable at the first term after the grantor's decease, providing he died having no heirs-male of his own body. It was found, that the heirs-male born of the defunct's daughter, did not purge the condition, which was interpreted of sons begotten immediately by the grantor himself.

No 2.

be altered, or the force thereof prejudged anyways by the maker; and also, it was found, that the heirs-male, born by the daughter of the defunct, purged not the condition of the bond, which ordained the sum to be paid, if the defunct had no heirs-male gotten of his own body, which clause could have no respect to his oyes, but to the sons to be gotten immediately by himself.

Act. Lawtie.

Alt. Nicolson, elder.

Clerk, Scot.

Fol. Dic. v. I. p. 188. Durie, p. 115.

1630. January 27.

TURNBULL against COLMESLIE.

No 3.

The clause in a contract of marriage *si sine liberis*, was found not to take place where there was a son born who survived his mother, but died without being served heir; so that in this case, the tocher was found not reputable, which it was to have been, if the mother had died without children.

By contract of marriage betwixt Turnbull of Barnhills and Colmeslie's daughter, Turnbull being obliged, in case his wife deceased without heirs on life procreate betwixt them, to succeed to his lands of Barnhills, in that case to repay 4000 merks which he had received in tocher, at the next term after his spouse's decease; and there being a son procreate betwixt them, who survived after the mother seven years, and lived that space after her, her husband being also dead, the bairn being dead and never served heir to his father, nor entered to the lands foresaids; it being questioned in the suspension betwixt the parties (that contract being registered by Colmeslie's assignee) if the money was due to be re-paid by the heir of the umquhile husband, against whom the contract was registered, seeing he *alleged*, that the case of the contract had not fallen out, in so far as there was a bairn procreate on life the time of the wife's decease, and who lived after her many years; the LORDS suspended the letters *simpliciter*, it being proven that there was a bairn on life, procreate of that marriage the time when the mother died, and who lived diverse years after her; for the LORDS found, that albeit that bairn was not served heir to his father of that marriage, nor entered to the lands contained in the contract, and so had not succeeded thereto; yet he being the bairn of that marriage, who might have been heir, and was so in blood, that failzie of the contract was purged thereby, seeing these words in the contract, mentioning the heirs of the marriage, and not bearing heirs served and retoured of that marriage, is not to be understood but of bairns of that marriage; for the words, viz. 'heirs procreate,' ought to be so understood, seeing none can be procreate heirs, but they that are procreate bairns, and thereafter served heirs; and the contract obliging the son-in-law to refund the sum at the next term after his wife's decease, could not take effect, seeing the bairn lived seven years after her, and so the charges were suspended.

June 16.—This cause being of new heard again, this decision was followed, and the words of the contract, viz. 'of an heir to succeed to the lands,' was un-