

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-

derstood of a bairn surviving, who had possibility to succeed, albeit he had never succeeded; for the father might have sold the lands, albeit the son were living, and so he could not succeed.

No 3.

Act. *Mowat & Stuart.*Alt. *Nicolson & Craig.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 187. Durie, p. 486.*

* * * Auchinleck reports the same case :

IN a contract of marriage betwixt Kaircrows and his daughter on the one part, and Turnbull on the other part, it is provided, that the tocher shall be re-paid at the next term after the decease of the woman, in case there shall be no bairns procreated of their marriage to succeed to the Laird of Turnbull. There is a son procreated of that marriage, who outlives his father and mother by the space of seven years, but was never served heir. After his son's decease, Kaircrows charges for restitution of the tocher, conform to the contract of marriage. Turnbull suspends, that the tocher cannot be restored by virtue of the clause of the contract, because there was a son procreated who outlived the mother, and might have been served heir; and, the meaning of the contract was, that the tocher should only have been re-paid in case there should have been no bairns procreated of the marriage, which may be gathered by the words of the contract, wherein the tocher is ordained to be re-paid at the next term after the decease of the woman; and, seeing her son survived her, it argues plainly the meaning of the contract was the re-payment to have been made in case she deceased without bairns, which the LORDS found relevant, and suspended the letters *simpliciter*, 27th January 1630, and this same disputed 26th July 1630, and decided *ut supra*.

Auchinleck, MS. p. 6.

1630. June 26.

CROMBULL *against* CAIRNORE.

IN contracts of marriage, found that the clause of re-payment of the tocher in case of the decease of the woman without heirs of the marriage, cannot infer payment of the money where there was a bairn procreate, who lived till after the mother's decease, albeit not entered heir nor retoured.

Fol. Dic. v. 1. p. 187. Kerse, MS. fol. 65.

No 4.

Found as above; and seems to be the same case under different names.

1663. January 31.

FORSYTH *against* MORISON.

By contract of marriage betwixt James Morison and Agnes Forsyth, he is obliged to employ 8000 merks to them and the bairns of the marriage; provi-

No 5.
A wife, in her contract of marriage, ha-