

No. 2. or to Mr. John, his son, appointed by the bond to have it after Mr. Andrew's decease? All the Lords found, That Mr. Andrew, in his own life, might have disposed upon the sum, received it, discharged it, assigned it, and that it might have fallen under his escheat, or might have been comprised or arrested for his debt; and therefore, that it was his proper sum, fell in his testament, and belonged to his executor or legatar, and not to his son Mr. John; and declared, that they would observe the like manner of decision in all bonds conceived in the like terms, for many causes and respects proponed by the Lords at the reasoning of the cause. Thereafter, the parties submitted, and the Lords agreed them amicably.

Haddington MS. No. 2781.

1625. *January 18.* WATT *against* DOBIE.

No. 3.
Found the reverse of the above cases.

In an action betwixt Watt and Dobie, for registration of an obligation, made by umquhile Sir Robert Dobie, whereby he was obliged to pay to one Watt a sum of money at a term, and failing of Watt by decease, to pay the same to another person designed in the bond, and to his heirs, with ten for each hundred for the annual-rent thereof, so long as it should be unpaid; which bond being desired to be registrated at the instance of that second person mentioned in the bond, the first person being deceased; the Lords sustained the action at his instance, and found, that the right of the bond, and sum therein contained, pertained to him; albeit it was alleged for the defender, that seeing the first person in the bond lived after the term of payment appointed by the bond, and that the destination of the second person therein contained depended only, and would have taken effect only, in case the first person had died before the term appointed by the bond for payment of the sum, who living thereafter, the right of the sum ought to appertain to his heirs or executors, and not to the alleged second person substituted in the bond, who now pursues: Which allegiance was repelled by the Lords, and the sum found to appertain to the person substituted, as said is.

This decision appears to be directly contrary to the decision in the action betwixt Mr. John Leitch and L. Balnamoon, whereof mention is made 22d February, 1623, No. 2. p. 14845.

Clerk, *Scot.*

Fol. Dic. v. 2. p. 395. Durie, p. 157.

1634. *June 26.* KEITH *against* INNES.

No. 4.
Found again the reverse of No. 1. & 2.

The debtor being obliged to pay a sum to his creditor, at the term contained in the bond, and, in case of failzie, to his son, named in the bond; and the father, who was principal creditor, living divers years after the term of payment,

and receiving the annual-rent of the sum, and thereafter dying, never making any alteration by testament, or any otherwise, concerning that sum, to give or provide the right thereof otherwise to any other; after whose death the son substituted charges the debtor to pay the sum; who suspending, that seeing the principal creditor lived divers years after the term of payment, therefore the clause of substitution, whereby payment was obliged to be made to the son, in case of the father's decease, had not taken effect, and consequently the sum pertained to the defunct's heirs or executors, and ought to be confirmed in testament, and the son could not charge therefor; this reason was not sustained, specially seeing the same was proponed by the debtor, and there was neither any heir or executor of the defunct's, or any of the defunct's creditors, who compeared to claim that sum, and propone the same; so that it was not competent to the debtor to excuse him from payment; and seeing the defunct, albeit he lived after the term, never changed his will, therefore the substituted person was found to have right, as said is.

No. 4.

Clerk, *Hay*.

Fal. Dic. v. 2, p. 395. Durie, p. 721.

1642. February 4. LUTFIT against JOHNSTON.

By contract of marriage, James Johnston is obliged to employ upon land, annual-rent, or merchant-trading, to himself, and Margaret Wauchop, his spouse, and to the longest liver of them two, and to the bairns to be gotten betwixt them, 1600 merks, and failing of bairns betwixt them, 400 merks to the heirs, executors, legatars, and assignees of the said umquhile Margaret; and Marion Wauchop, only sister and heir served to the said umquhile Margaret and John Lutfit, her spouse, having obtained decret against the said James, for the employment of the said sum, conform to the said contract, for the use of the said Marion, (there being no bairn in life gotten of the said marriage), and thereupon charging the said Johnston; the Lords suspended the charges, in respect there was a daughter, who survived the mother, and who was executrix confirmed to her mother, albeit that bairn died within four or five weeks after her mother, seeing, by the existence once of the daughter, albeit shortly thereafter dying, the condition of the contract was purged; for it is sufficient once *habuisse liberos, quamvis statim decesserint*; and the confirming of the bairn executrix to her mother, to whom the benefit of that clause was alleged to pertain, being conceived in favours of the executors, was not much respected, seeing the bairn who was executrix died, this debt not being executed before her decease; so that if that debt fell to the executors, and not the heirs, yet the same would belong to those who would be executors again *de novo* to the relict, who was dead; and this charger was the same, who was served heir, and only would be executor in law;

No. 5.

Anobligation in a contract of marriage, binding the husband to employ a sum to himself, wife, and children, whom failing, to the wife's executors, becomes void, if the children survive the dissolution of the marriage.