she should restrict it to the half; and he subsumes there was a child surviving the father. *Answered*, The clause runs, 'children unprovided or unforisfamiliate the time of his death;' but so it is he was the only child of the marriage, and had the fee of the hail, and so could not be interpreted a child unprovided. *Replied*, He had no provision from his father by any destination, and if she liferented all this house, then he had little or nothing in her lifetime. This being reported by Carse, THE LORDS found the existing of one child purifies the condition of the restriction contained in the bond, and therefore that the mother ought to restrict accordingly, notwithstanding of the words 'unprovided, and unforisfamiliate.'

No 12.
ed for a subsistence of the children, who now are dead, and so need none. The Lords found the wife ought to restrict to the half.

Fol. Dic. v. 1. *p.* 188. *Fountainhall, v.* 1. *p.* 481.

1687. *December.* BALLANTYNE of Corhouse *against* JOHN SCOT.

No 13.
A wife being empowered in her contract of marriage, to dispose of 1000 merks of her tocher, failing heirs procreate of the marriage, and there being a child of the marriage, who died before the dissolution of it, the wife disposed of the 1000 merks in favour of her brother, who pursued for it after her decease. The Lords found, that the procreation and existence of the child evacuated the provision, though it died before the dissolution of the marriage.

A WIFE being empowered in her contract of marriage, to dispose of 1000 merks of her tocher, failing heirs procreate of the marriage, and there being a child of the marriage, who died before the dissolution thereof, the wife disposed of the 1000 merks in favours of her brother, who pursued for it after her decease.

Alleged for the husband; That the faculty was but a conditional negative, never purified; for there were heirs procreate, in so far as there was a child of the marriage, who was heir *potestate;* and bairns are not procreate heirs, the sense of the clause being *si liberos non susceperit*, and not *si sine liberos decesserit.* And the LORDS, in Turnbull's case, January 27. 1630, No 3. p. 2938. found the existence of a child, who died before dissolution of the marriage, did evacuate the provision in a clause 'failing heirs procreate to succeed to the 'lands;' and that by 'an heir to succeed,' was understood a child that might have succeeded.

Answered for the pursuer; That the clause bearing *heirs*, and not *bairns*, imported a surviving child. 2. It was the interest of the wife to have power to dispose of a part of her tocher, when it goes to strangers, which the bare existence of a child did not take off; so it was found in Dunfermling's case, June 1676, No 7. p. 2941., and in Oswald's case, June 1680, No 9. p. 2948., that the bare existence of a child, dying before dissolution of the marriage, did not evacuate a provision of this nature.

Replied: The clause in Dumfermling's contract was in case of no issue, and the clause in Oswald's case was in case the wife deceased without bairns procreate of the marriage; both which related to the period of the dissolution of the marriage, and not to the time of procreation.

'THE LORDS found, That the procreation and existence of the child did evacuate the provision, though it died before dissolution of the marriage.'

Fol. Dic. v. 1. 187. *Harcase,* (CONTRACT OF MARRIAGE.) *No* 392. *p.* 103.