

No 14.

1688. July 12. WILLIAM SMEITON *against* THOMAS CUSHNEY.

It being provided in a contract, that the half of the tocher should return to the wife, in case she died without children on life, the LORDS found, That the existence of bairns, who died before the wife, did not evacuate the condition of the return of the tocher, as being *collata in tempus mortis uxoris*.

*Fol. Dic. v. 1. p. 187. Harcarse, (CONTRACT OF MARRIAGE.) No 396. p. 104.*

No 15.

1702. December 8. JOHN WATT *against* DAVID FORREST.

A deed contained this clause, "in case my whole children decease, without heirs of their bodies, I oblige myself to pay a certain sum to my wife." The children died, but one of them had had a son who had predeceased, and had not been served heir. The wife found to have no claim.

MR Robert Lauder of Gunsgreen, in his bond of provision among his children, subjoins a clause, that in case his whole bairns deceased without heirs gotten of their own bodies, then he obliged himself to pay to Anna Congalton, his lady, the sum of 5000 merks, being the tocher he received with her from the Laird of Congalton, her father. The said Anna assigns this obligation to John Watt, and he pursues David Forrest, one of the heirs portioners of the said Mr Robert, and of Major Lauder, his son, on this ground, that the condition had existed, in so far as the whole bairns of the said Mr Robert Lauder were now deceased, without leaving any heirs of their bodies. *Alleged*, Absolvitor from payment of this 5000 merks; because, though now there be no heirs existing of the said Mr Robert's body, yet his daughter Margaret left a son behind her; whereby the condition was extinguished. *Answered*, The bare existence and survivance of that child can never take away the lady's right, unless he had been served heir; and though he had, it would import nothing, because his uncle, Major Lauder, the said Robert's son, outlived him, and then deceased unmarried; and so Mr Robert's succession clearly *devenit in eum casum*, that all his bairns died without heirs gotten of their bodies. *Replied*, In these cases, heirs are to be understood *designative* for bairns, though not actually entered; and so it is taken in the feudal law, Gudelin. *de feudis, part 3. cap. 1.* Joannes a Sande, *decis. Fris. pag. 299*; and so have the Lords interpreted these clauses, No 3. p. 2938., Turnbull *contra* Colmeslie; that though it be spoken of heirs, yet the procreation of a son was enough, though never served: And accordingly the Lords decided here, that the son's surviving his mother was sufficient to extinguish the bond, seeing it could not be said that all Mr Robert's bairns died without heirs, and found that she nor her assignee had no right to the sum, but assolizied the defender.

1705. December 28.—In the cause mentioned 8th December 1702, Watt *contra* Forrest; Watt, as creditor to Major Lauder, insisting against Forrest on the passive titles, as representing the said Major by progress, for payment; he *alleged*, That though he was served heir to his daughter, which daughter was