

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

heir served to the Major, and so he may be thought to represent him by progress, yet he can never be liable on that service, it being *ipso jure* null, and done *per errorem*, in so far as he was not *proximior hæres* to his daughter at the time of the service, because his wife was with child at the time, and afterwards brought forth a daughter, who being nearer heir to her sister, clearly excluded him; and before that second daughter died, his wife was with child of a son, who is still alive, and is served heir to his sister, so his service as heir to his daughter, was preposterous and null; for *posthumus in utero habetur, pro jam nato*, so that he can never be heir, nor made liable to the hereditary debts; but if you would fix and constitute a debt, you must pursue his son, who is the true heir; and if he renounce, you must adjudge the *hæreditas jacens*. *Vid. 22. D. de adeund. et om. hæredit*;—*l. 12. C. de petit. hæredit*; and in the case of David Melvill now Earl of Leven, and the Duke of Rothes, in 1678, the Lords thought a remoter heir (though nearest *pro tempore*) could not serve while there was the hope and probability of the existence of a nearer*. *Answered*, His service was not null; for then *tractu temporis* it could not reconvalesce, but only was quarrellable and reducible at the instance of the nearer heir, when he came to exist, who might pursue him to denude in his favour, with the burden of the debts affecting the heritage; and Forrest could never quarrel his own service, on the pretence of a nearer, seeing he had procured both his own service and theirs; so he was excluded *personali exceptione doli*. The Lords thought if the lands wherein he was served heir to his daughter were adjudged by his creditors for his own debt, his son could reduce his service, and so *resoluto jure dantis*, his creditors diligence would fall in consequence, their author being found to have no right; and though formerly they found he could not impugn his own service and infestment as heir, yet this day they altered that interlocutor, and found his service null, and so he was not liable except *in quantum* he had intromitted, as tutor and administrator to his son, the true heir; even as if a second son should serve heir to his father, and if afterwards his elder brother, then abroad, comes home, the first service becomes *ipso jure* null.

This was somewhat altered on a bill in January thereafter.

Fol. Dic. v. I. 188. Fountainball, v. I. 164. 303.

1715. February 16.

LORD ROYSTON and LAIRD OF FRASERDALE against HALIBURTON OF PITCUR.

THE Lord Royston and Fraserdale having wakened a process against Pitcur, wherein, as having right by progress from Sir George Mackenzie, they insist for payment of the annualrents of a bond due by the late Pitcur to Sir George, (the principal sum being payable to his heir of tailzie) Pitcur intents another process against them, as being executors by progress to the said Sir George, for pay-

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* See SUCCESSION.

No 15.

No 16.

A bond being only to subsist failing children betwixt the granter and his wife, was found to be void by exist-