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 *simplicieter*, 27th January 1630, and this same disputed 26th July 1630, and decided *ut supra.*

Auchinleck, MS. p. 6.

1630. *June* 26. CROMBULL *against* CAIRNORE.

No 4.
Found as above; and seems to be the same case under different names.

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.

1663. *January* 31. FORSYTH *against* MORISON.

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

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.
ving accepted a certain sum, for all she could crave by her husband's decease, in case there were no issue of the marriage, the restriction was found not to take place, as there was one child who survived the mother.

ding, that if it shall happen Agnes to die before her husband, having no bairns on life, James is obliged to refund L. 1000 of her tocher to her or her executor in satisfaction of his moveables; and which provision, she for her and them, accepts in satisfaction foresaid. Agnes dies, having a child, and thereafter both child and father dies, and Mr James Forsyth, brother and executor to his sister Agnes, pursues Archibald Morison, as executor to his brother James, for a third of James's moveables, there being bairns of a former marriage. It was *alleged*, The pursuer could not have a third, because his sister had accepted L. 1000 in contentation, *&c.* It was *answered*, The clause was conditional, in case there should be no bairns. *Replied*, Though the words of the condition be only 'in case there should be no bairns,' yet the intention of the parties *et quoad actum est* certain has been, whether bairns or not; because, her interest in his moveables was more favourable, having no bairns, than having bairns; and therefore, the clause limiting her in case of no bairns, should *multo magis* limit her having bairns; the sense of which clause ought to be extended *ex præsumptiva voluntate contrahentium*, though the words be omitted by the writer; for which also, certain passages were adduced from the civil law in the matter of wills *institutione*, and substitution of heirs vulgar and pupilar. *Duplied*, That conditions in contracts are *stricti juris*, *secus in ultimis voluntatibus;* that the words were clear, without ambiguity; that the case was favourable for the relict's executor, seeing she was craving no more than what the law would have given her, if the contract had not been; that nothing could take from her the benefit of the law, but her own express paction, and no pretended tacit presumption could do it; and yet, against that presumption it may be thought, and not improbably, that she intended less to herself, having no children, than having children; because, having children, it may be thought, she was careful to have the larger portion for their provision. 2*do*, It was *alleged* absolvitor for the whole, because there was a son living after the mother, who, if he had been confirmed executor, her third would have appertained to him, and consequently to his executors the nearest of kin on the father's side: Now, that he was not confirmed executor, was not his fault, and it ought not to prejudge his executor, because he did what he could for the time; but then, there was no commisariot courts, and instruments and protestations were taken for him, of his willingness to confirm, *&c.* So, that there being a surcease of justice, *impedimentum juris quod non potest provideri ne remederi impedito non debet nocere. Answered*, That such impediments cannot hinder the ordinary course of law, no more in succession of moveables than of heritage: Now, though an heir had been served and retoured; yea, though he had charged the superior to infeft, yet, unless he had been actually *vestitus et sasitus*, the heritage does fall, as if he had never been served; even so in moveables, and in confirmation of testaments; and such an impediment being *casus fortuitus*, it must have its own hazard and event as to the interest of parties, but not to alter the course of law.

THE LORDS repelled both the allegeances.

Fol. Dic. v. 1. *p.* 188. *Gilmour, No* 78. *p.* 57.