

decemable upon payment of a thousand pound, made by the defender to the pursuer ; whereupon he did grant a renunciation thereof, the said tenement of land, falling now to the pursuer by virtue of the tailyie, the tack ought to revive ; seeing the renunciation thereof, in law ought to be interpreted in favours of the defender and his wife, who paid the sum contained in the redemption ; considering, that now the pursuer hath succeeded as heir of the tailyie, and that the tack was only granted to him for security of the said sum, as being due by his sister, the only heir of the first marriage, who was then only fiar of the land : and, by contract of marriage made by her and her father, the same was disposed to the defender, as her portion, in contemplation whereof he did provide her to a jointure, and to the conquest during the marriage.

It was ANSWERED, That, by the renunciation, the tack was *funditus* taken away and extinguished ; and the defender, who subscribed the same, and took burden for his wife, can never found any defence thereupon ; the renunciation being simple, without any provision or condition, that, in case of succession by the tailyie, it should revive and become effectual.

The Lords having considered the renunciation, that it was not only simple, but likewise did bear an obligation to remove, did repel the defence founded thereupon ; but did reserve to the defender any action competent to him, which could only be personal, for repayment of the thousand pounds, paid to the pursuer upon the redemption of the tack.

Page 479.

1675. July 7.

TROTTER *against* CRAW.

By contract of marriage betwixt ———— Craw, and Trotter, his wife ; there being a special provision, that, in case there should be no children of the marriage, the half of five thousand merks, to which she was provided in life-rent, should return to her and her heirs ; her husband being dead, she did thereupon pursue his heir, for payment of the half of the foresaid sum.

It was ALLEGED, That the pursuit could not be sustained upon that provision, because it could only be interpreted to take effect in case she had died before her husband, without heirs of the marriage.

It was REPLIED, That the provision not being in these terms, but simply failing heirs of the marriage, the same being now dissolved, the pursuer ought to have the benefit thereof, being now an impossibility that there can be any heirs.

The Lords did sustain the pursuit, and repelled the defence, in respect of the conception of the return of the provision, which was simply failing of heirs : but, in respect that she was liferenter of the whole five thousand merks, whereof the half was only her tocher, they did decern the heir to be only liable in payment after her decease, to any should represent her, or to her assignees.

Page 480.

1675. July 9.

CAPTAIN HAY *against* CROMBIE.

In a competition betwixt the said parties, for preference,—it was ALLEGED for