

1680. June 18.

OSWALD against BOYD.

No 9.

A clause in a contract, that a part of the tocher should return to the father, in case his daughter died without children of the marriage, was found to infer the return, though the children were born, but died without issue before their mother.

By contract of marriage betwixt the Laird of Glenhoove and Jean Oswald, it is provided, ' That in case the said Jean depart this life without bairns lawfully ' procreate of the marriage, in that case the husband was obliged to pay 2000 ' merks of the tocher to the father ;' whereupon Oswald, as having right to the sum, pursues Mr Robert Boyd, as representing Glenhoove, to pay the sum, who *alleged* absolvitor, because he offered to prove there were bairns procreate of the marriage.—It was *answered, non relevat*, unless they survived their mother ; this being in effect the common clause, *si sine liberis decesserit*, which takes place if the children survive not ; and albeit in some cases the existence of the children purifies the condition, yet such clauses ought always to be interpreted according to the interest, and the presumed will and design of the contractors, which can be no other in this case, but that the wife's father provided a return to himself of a part of the tocher, if his interest of the family failed by his daughter's having no issue, which holds alike as if there had been no children procreate, or whether they died before their mother ; and though the clause mentions children procreate, yet that is only adjected to restrict the provision to the children of the marriage.

THE LORDS found, That the survivency, and not the existence of children procreate of the marriage, was understood ; and therefore found the same to return, seeing the children procreate died without issue before their mother.

Fol. Dic. v. 1. p. 187. Stair, v. 2. p. 771.

* * Fountainhall reports the same case, giving the defender the name of Somerville :

ONE is pursued to restore 2000 merks of tocher on this ground, that the contract of marriage bore this clause, ' in case the wife should decease without any ' children lawfully procreate of her body, then 2000 merks of the tocher should ' be repaid by her husband and his heirs to the wife's heirs ;' but *ita est*, they subsume she had no children that survived herself ; and so the case existed, and the condition was purified. *Alleged*, There were children procreate of the marriage, and they lived seven years after the dissolution thereof, which happened by the husband's decease, and so she not having died without children, there was no ground for seeking back the said 2000 merks of the tocher. *Replied*, This condition *si sine liberis decesserit, non respicit tempus præteritum*, but only the present time when she deceases ; and seeing she had no children who outlived her, there was clearly place for restitution of the tocher. ' THE LORDS found there was room for returning the said 2000 merks of tocher, since she died without children surviving her.' This was done to confirm Dumfermlin's interlocutor against Lord Almond, upon which the appeal was given in, in Ja-

nuary 1674; though the word in that case was *issue*, and is of a more general signification than the word *children*; for it extends *etiam ad nepotes aliosque posteros*.

No 9.

Fountainball, v. I. p. 102.

1681. November 29.

The LADY KINCARDINE *against* The EARL'S REAL CREDITORS by infestment.

THE Earl of Kincardine having granted a bond for implement of his contract of marriage, for securing of 80,000 gilders on land in favours of his Lady, in case of no children of the marriage, or of their dying before the age of 20, so as they might and did dispose of the same; with a resolute clause making void the infestment, in case of the children's attaining to that age.

No 10.

'THE LORDS found, That the provision irritating the infestment was to be strictly interpreted, and that it took effect by any of the children's attaining to the age of twenty, though they did not dispose of the sum;' and would not supply the words, *so as they may and do dispose*, as an omission, although they were mentioned in the narrative and procuratory and requisition, and the charter; 'and found, That the infestment was not a fiduciary security to the children, but only a security to the Lady of her right in the foresaid event.'

Fol. Dic. v. I. p. 188. Harcarse, (INFESTMENT.) No 583. p. 162.

1686. December 7.

DEACON THOMAS SOMERVILLE *against* CAPTAIN WILLIAM TENANT.

IN the action pursued by Deacon Thomas Somerville taylor in Edinburgh, for the behoof of Somerville of Drum, against Captain William Tenant, skipper in Kirkcaldy, for declaring the disposition granted to him by Tenant of Cairns was altered and revoked by him on death-bed, conform to his faculty, and a new one ordained to be drawn, and he died before that was got done and subscribed; and it being *answered*, That he made no alteration as to Captain Tenant's succeeding him, but only ordained the tailzie to be rectified, that it should only belong to the heirs-male of the substitutes; the LORDS, before answer, allowed a mutual probation on the matter of fact alleged *hinc inde*; and Captain Tenant adducing John Paterson the writer whom Cairns entrusted with the renewing the disposition, Drum gave in sundry objections against him, viz. that he had voluntarily given up the disposition to the Captain, and had instigated him to this plea, and joined with him at consultations, and carried himself

No 11.

Lands were tailzied to heirs-male, with a clause in favour of daughters, *in case there be no heirs-male*. There was an heir-male, but he died before the daughters, and the King succeeded as *ultimus hæres*. The provision to the daughters found to have failed.