No 11.

no heirs-male of the marriage, and the estate went to Cairns' other heir-male, then they should pay to the daughter 6000 merks; and subsumed that the heir-male of that marriage having now failzied, that therefore the donatar, who was liable for all debts, may pay that 6000 merks to the daughters. *Answered*, 1*mo*, Ths was not a substitution, but a condition, in case there were no heirs-male of the marriage, which did not exist; for there was a son, who was not only *hæres potestative, et in sanguine per jus apparentiæ*, but also *actu*, by entering on a precept of *clare constat*. 2*do*, The daughters had got portions, and renounced. 3*tio*, They were not excluded by any deed of their father or goodsire, as the clause runs, but by a deed of their brother's, which is not provided against. THE LORDS having advised this debate, upon the 27th July, they found, he having existed and being served heir, the provision to the daughters evanished. The words were, Found that the clause in the contract, in favours of the daughters, being, that in case there be no heirs-male of the marriage, and that the said daughters be secluded from the lands and lairdship of Cairns, by a tailzie made, or to be made, by the said John, or James his son, or either of them; then, and in that case, the heirs-male, and of tailzie, succeeding thereto, shall be holden to content and pay to the daughters of the said marriage, the sum of 6000 merks; and there being an heir male of the marriage who was served and retoured, and lived many years, that the condition of the daughter's provision did fail; and therefore assoilzie.

Fol. Dic. v. 1. *p.* 188. *Fountainhall, v.* 1. *p.* 434. 488. 493. 513.

No 12.
There being a provision in a contract, that in case the husband died before his wife, leaving children, one or more, unprovided, and unforisfamiliate, then she should restrict her jointure to the half; and one child having survived the father, and died within a few months after, the relict was pursued to restrict. Alleged for the defender, The clause of the contract was calculat-

1687. *November* 22. WILLIAM ROBERTSON *against* ELISABETH BINNING.

THERE being a provision in a contract, that in case the husband died before his wife, leaving children, one or more, unprovided, and unforisfamiliate, then she should restrict her jointure to the half; and one child having survived the father, and died within a few months after, the relict was pursued to restrict.

Alleged for the defender; That the deceased surviving child being heir, and having both the fee and some tenements unliferented, cannot be said unprovided. 2. The clause of the contract was calculated for a subsistence of the children, who now are dead, and so need none.

Answered: By children unprovided we are not to understand such as have no legal provision, but such as have no bonds of provision.

'THE LORDS found the wife ought to restrict to the half.'

Fol. Dic. v. 1. *p.* 188. *Harcarse*, (CONTRACT OF MARRIAGE.) *No* 389. *p.* 102.

*** Fountainhall reports the same case:

SHE had a liferent of some houses in Cupar of Fife from her husband, his brother, with this quality, that if there were children at the time of his death,

she should restrict it to the half; and he subsumes there was a child surviving the father. *Answered*, The clause runs, 'children unprovided or unforisfamiliate the time of his death;' but so it is he was the only child of the marriage, and had the fee of the hail, and so could not be interpreted a child unprovided. *Replied*, He had no provision from his father by any destination, and if she liferented all this house, then he had little or nothing in her lifetime. This being reported by Carse, THE LORDS found the existing of one child purifies the condition of the restriction contained in the bond, and therefore that the mother ought to restrict accordingly, notwithstanding of the words 'unprovided, and unforisfamiliate.'

No 12. ed for a subsistence of the children, who now are dead, and so need none. The Lords found the wife ought to restrict to the half.

Fol. Dic. v. 1. *p.* 188. *Fountainhall, v.* 1. *p.* 481.

1687. *December.* BALLANTYNE of Corhouse *against* JOHN SCOT.

No 13. A wife being empowered in her contract of marriage, to dispose of 1000 merks of her tocher, failing heirs procreate of the marriage, and there being a child of the marriage, who died before the dissolution of it, the wife disposed of the 1000 merks in favour of her brother, who pursued for it after her decease. The Lords found, that the procreation and existence of the child evacuated the provision, though it died before the dissolution of the marriage.

A WIFE being empowered in her contract of marriage, to dispose of 1000 merks of her tocher, failing heirs procreate of the marriage, and there being a child of the marriage, who died before the dissolution thereof, the wife disposed of the 1000 merks in favours of her brother, who pursued for it after her decease.

Alleged for the husband; That the faculty was but a conditional negative, never purified; for there were heirs procreate, in so far as there was a child of the marriage, who was heir *potestate;* and bairns are not procreate heirs, the sense of the clause being *si liberos non susceperit*, and not *si sine liberos decesserit*. And the LORDS, in Turnbull's case, January 27. 1630, No 3. p. 2938. found the existence of a child, who died before dissolution of the marriage, did evacuate the provision in a clause 'failing heirs procreate to succeed to the lands;' and that by 'an heir to succeed,' was understood a child that might have succeeded.

Answered for the pursuer; That the clause bearing *heirs*, and not *bairns*, imported a surviving child. 2. It was the interest of the wife to have power to dispose of a part of her tocher, when it goes to strangers, which the bare existence of a child did not take off; so it was found in Dunfermling's case, June 1676, No 7. p. 2941., and in Oswald's case, June 1680, No 9. p. 2948., that the bare existence of a child, dying before dissolution of the marriage, did not evacuate a provision of this nature.

Replied: The clause in Dumfermling's contract was in case of no issue, and the clause in Oswald's case was in case the wife deceased without bairns procreate of the marriage; both which related to the period of the dissolution of the marriage, and not to the time of procreation.

'THE LORDS found, That the procreation and existence of the child did evacuate the provision, though it died before dissolution of the marriage.'

Fol. Dic. v. 1. 187. *Harcase*, (CONTRACT OF MARRIAGE.) *No* 392. *p.* 103.