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 furth 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 infeftment 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.

No 15.

This was somewhat altered on a bill in January thereafter.

Fol. Dic. v. 1. 188. *Fountainhall, v.* 1. 164. 303.

1715. *February* 16.

LORD ROYSTON and LAIRD of FRASERDALE *against* HALIBURTON of PITCUR.

No 16.
A bond being only to subsist failing children betwixt the granter and his wife, was found to be void by exist-

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-

* *See* SUCCESSION.

No 16.
ence of children of the marriage who survived the granter, tho' they died before his wife without issue.

ment of a bond of 6000 merks granted by him to Margaret Haliburton, this Pitcur's sister, and failing her to Pitcur himself, payable at the next term after their attaining ten years of age; but the bond being lacerate in several places, so that some of the clauses and provisions could not be read, though the clause of registration, subscribtions, &c. were entire; and the LORDS having found, in another process, that the bond was not probative, in this new process the same grounds are again insisted on by the lawyers on either side, which nevertheless shall be here past over, because the interlocutor hereto subjoined takes no notice of them. But now, further, Pitcur having produced a declaration under the hand of my Lady Prestonhall, (who was first married to Sir George), importing, that she had procured from Sir George a bond of 10,000 merks in favour of her friends, and that the said bond was to subsist, failing of children of her body, with Sir George; but he having deceased, leaving children, who also deceased before their mother, and without issue,

It was *contended* for the executors; That granting such a declaration was sufficient to make up the lacerate clauses in the bond, yet that the import of it was, that if he had no children by her, then this bond was a kind of *fideicommiss*, whereby his other heirs were to be burdened; but if he had children, then the condition of the *fideicommiss* failing, it was to take no further place. And so it is expressly in l. 114. § 13. ff. *De legat.* 1. *cum quis erat rogatus (si sine liberis decesserit) per fidei commissum restituere, conditio defecisse videbitur, si patri supervixerint liberi.* And l. 17. § 7. ff. *ad Sen. Trebell.* which says, that when a *fideicommiss* is left under that condition, that it is extinguished if the person therewith burdened leave a son, though that son should afterwards die; so that Sir George his son having survived him, *defecit conditio*, and the *fideicommiss* being once extinguished, by no rule in law could it revive.

Answered for Pitcur; That the words of the declaration are to be taken together, viz. X 'I procured from Sir George a bond in favour of my friends,' which, joined with the subsequent words, 'that the said bond was to subsist,' &c. make up the two cases, viz. either that the marriage dissolved without children, or that the children died without issue; for so clauses of this nature have been in our law frequently interpreted; particularly No 9. p. 2948., where the words of the interlocutor are, 'THE LORDS found, that the survivancy, and not the existence, of children procreate of the marriage was understood; and therefore found the sum in question to return, seeing the children procreate died without issue before their mother.' And it was *alleged* Pitcur was in a much stronger case; seeing, by the declaration, it appeared, that Sir George his intent was to prefer the issue of his own body, by his wife, to her relations; but, upon that failure, to prefer his wife's friends for the sums in the bond to his other heirs. 2*do*, That there is a difference between the condition (*si sine liberis*), and that of *(failing children)*; this last being of the nature of a substitution which takes place at any time whenever the institutes fail.

Replied for the executors; That though (*which failing*) do indeed import so much in substitutions, and cannot there be otherwise explained, yet when such words are insert as the condition of a bond, there they must still be understood, so as if the granter should have children surviving him the bond took no place. Nor can it be otherwise understood in the present case without manifest absurdities; for so, if Sir George's descendents had failed after 500 years, this bond, with its whole annualrents, would have been a burden upon his heirs. No 16.

THE LORDS found, that supposing the clause in the lady's declaration, (viz. that the bond was to subsist failing children of her body with Sir George) had been insert in the bond, yet the bond could not be binding in the event which hath happened, by the existing of children in the marriage, who survived Sir George, but died before the Lady without issue.

For Pitcur, *Lord Advocate*. Alt. *Ro. Dundas*. Clerk, *Mackenzie*.

Fol. Dic. v. 1. *p.* 189. *Bruce, No* 68. *p.* 82.

1740. *June* 11.

CAPTAIN ALEXANDER NAPIER, and MARIANA JOHNSTON his Spouse *against* ANNA JOHNSTON.

No 17.
A brother made a provision to his sister, under the condition, that it should return to his heirs, if she should die without leaving children. She assigned this provision to her husband, who pursued for payment. *Pleaded* for the brother's heirs; Caution must be found to repeat, in case the condition take effect. *Answered*; A clause of return excludes only gratuitous deeds. Caution was found necessary.

CAPTAIN JOHNSTON of Kelton made an entail of his estate of Kelton, in favours of Robert Johnston his only son, and the heirs of his body; which failing, to Anna Johnston, his eldest daughter, and the other heirs therein mentioned; but the entail declared Robert free of all the resolutive and irritant clauses to which the other substitutes were liable; likeas the Captain granted a bond of provision to Mariana Johnston, his youngest daughter, for 8000 merks. Upon the Captain's decease Robert ratified the above bond of provision in favour of his sister, and likewise gave her 7000 merks more, payable at the first term, year and day after his decease, and which he therein declared revocable at pleasure, and void, in case of heirs of his body. To this additional provision the following proviso was added, viz. 'That in case the said Mariana Johnston shall 'decease without any child or children, lawfully procreate of her body, and existing at the time of her decease, in that case the said principal sum of 7000 'merks, &c. resting at the time of her decease, shall return and fall due and 'payable to the said Robert, and his heirs representing him in the lands of 'Kelton; with and under which burden these presents are granted and accepted by the said Mariana, and no otherways.' Mariana Johnston having, in her contract of marriage with Captain Napier, assigned this 7000 merks to him, they brought a process for payment thereof against Anna Johnston the eldest sister.

Pleaded; That no decreet could go against the defender unless security were granted, that, in the event of the condition that all the pursuer's children should die before herself, the same should become due and payable to the de-