1757. *December* 16.

GEORGE CAMPBELL of Elister, *against* ARCHIBALD CAMPBELL of Jura.

No 42.
A man, in his daughter's contract of marriage, bound himself to pay a tocher, providing, 'that if the marriage should dissolve within year and day, *or* without heirs procreate and existing,' the tocher was to return to him. A child was born, but died soon after, and the marriage was dissolved by the death of the wife, after about two years. Found, that the tocher did not return.

ARCHIBALD CAMPBELL of Jura became bound, in his daughter's contract of marriage with George Campbell of Elister, to pay the said George Campbell, at Whitsunday 1754, the sum of L. 166 : 13 : 4 Sterling, in name of tocher.

The contract contains this clause: 'Providing and declaring, That if the 'marriage dissolves within year and day after the solemnization thereof, *or without heirs procreate, and existing, of the same*, then the foresaid tocher is to return to the said Archibald Campbell,' &c.

There was a son procreated of this marriage; but he predeceased his mother, who died in October 1754, after the marriage had subsisted two years.

In the year 1755, an action was brought against Archibald Campbell, for payment of the tocher stipulated to be paid by him.

Pleaded for the defender; By the above recited clause in the contract of marriage, the tocher is provided to return, in two cases, *1st*, If the marriage should dissolve within year and day; or, *2dly*, If it should dissolve without heirs procreated, and existing. These are separate and distinct conditions, and the words are clear and express; so that there is no room left for interpretation, or presumptions of the intention of parties. And as the case has happened, that there were no heirs existing at the dissolution of the marriage, the defender is entitled to retain the tocher, which, in that event, was provided to return to him in case it had been paid.

Answered for the pursuer; Although this contract is very inaccurately drawn, yet, from a fair and just construction of this clause, according to what must have been in the view of parties, it is evident, that no more was thereby intended, but that in case of the dissolution of the marriage within year and day, without heirs procreate and existing, the tocher should return. There was no double condition here: And the word *or*, according to the received and known interpretation clearly established in the civil law, may, and, agreeably to circumstances, ought to be construed, not in the disjunctive but conjunctive sense, being only explanatory of the former part of the clause; and imports no more, than that in case the marriage dissolved within year and day, the bare procreation of a child should not preclude the return of the tocher, if the child was not existing at the dissolution of the marriage within year and day. The contrary construction, contended for by the defender, implies manifold absurdities. For, supposing the word *or* to establish two independent conditions, if the marriage had dissolved within year and day, by the husband's death, though there had been a child of the marriage then existing, the wife would have been entitled to her liferent provision, and the tocher must have returned. Again, supposing the marriage to have dissolved within the year, by the wife's predecease, though there had been a child procreated of the marriage then existing, the por-

No 42.

tion must also have returned; because, according to the defender's argument, the procreation and existence of children constituted a separate independent condition, nowise connected with the dissolution of the marriage within year and day: And in the other event, of the marriage dissolving, though at the distance of fifty years, after the procreation of perhaps twenty children, if these children did not exist at the dissolution of the marriage, the tocher was still to return. These, and others that might be mentioned, are so many glaring absurdities attending the defender's construction of this clause, that it is impossible it can be received.

Observed on the Bench; The words of this clause are very strong in favour of the defender. The obvious import of the words is, That *quandocunque* the marriage should be dissolved, if there were no children existing, the tocher should return. But the Court, *ex æquitate*, may reject the express words, and explain their meaning from the intention of parties, which is as clear on the other hand.

THE LORDS 'found, That, in respect it is acknowledged, that the marriage subsisted about two years, and that there was a child procreated of the marriage, who lived for several months, the pursuer was entitled to the wife's tocher, although the said child died before the dissolution of the marriage, by the death of the mother.'

Act. *Lockhart.* Alt. *Mew Dalrymple.*

G. C. *Fol. Dic. v.* 3. *p.* 161. *Fac. Col. No* 72. *p.* 120.

SECT. IV.

Condition, when understood purified.—Condition of "being decerned," includes decerniture by Decree Arbitral.

1672. *June* 21. CARSTAIRS and RAMSAY *against* CARSTAIRS.

No 43.
A daughter pursuing for her provision, which was due to her failing heirs male of the marriage; her claim was repelled,

JOHN CARSTAIRS, in his contract of marriage, having exprest this clause, that in case there were no heirs male of the marriage, so that the daughters would be totally excluded, the estate being all tailzied to heirs male, therefore, and for help and provision to the daughters, and failing heirs male of the marriage, and no otherwise, the said John and his heirs male and of tailzie are obliged, that if there be but one daughter to pay her L. 16,000 at her age of sixteen years; Anna Carstairs, the only daughter of the marriage, pursues for payment upon