

medal that had been gifted to her by his father *intuitu matrimonii*, the marriage having followed; albeit it dissolved within year and day by the husband's death. Here was *lis de paupere regno*.

No 386.

Fol. Dic. v. 1. p. 414. Forbes, p. 440.

S E C T. IV.

The birth of a live Child saves the right of the Husband.

1612. Jan. 12.

OGILVIE against RIDDOCH.

IN an action of ejection and spuilzie, pursued by Mrs Catherine Ogilvy, relict of John Riddoch, against William Riddoch, her good father, for ejecting her, after her husband's decease, out of the lands of Mulliegan and Schiells, wherein she was infeft in conjunct fee and for spulziation of the goods, this exception was repelled, that her infeftment could give no action, because her husband died within year and day, in respect of her reply, that the time of this ejection she was with child, six months gane, of which child she parted four months thereafter, and sae her infeftment was in.

No 387.

Fol. Dic. v. 1. p. 415. Kerse MS. fol. 64.

* ** Haddington reports the same case.

Jan. 28. THE husband being slain within the year after his marriage, and his wife being in conjunct possession with him of the lands which were, by their contract of marriage, to be her conjunct fee, if, after the husband's decease, his nearest friends dispossess the relict against her will, she will get action of ejection against them, especially if she be with bairn, albeit she bear it not quick.

Haddington MS. No 2369.

1632. July 20.

IRVIN contra ROBERTSON.

By contract of marriage betwixt one Irvin and Robertson, ——— Irvin, brother to his sister then contracted to be married on Robertson, is obliged to pay to the said Robertson, in name of tocher, the sum of 2000 merks; and they being married, after procreation of a bairn, who died before the parents, but within the space of a year after the marriage; and a space before the expiring of

No 388.

Marriage having dissolved within year and day, and a living child being born, which died within

No 388.
the year, the
Lords found
the tocher
due.

the year, the wife also died, and sicklike the husband; this husband's brother being served heir to him, pursues for registration of the foresaid contract, to the effect that he might have execution, for payment to him of the foresaid sum contracted to be paid to his said umquhile brother, being heritably contracted; wherein the defender compearing and alleging, that in respect the wife and her husband outlived not the year, but that the marriage was dissolved by death within the year, therefore the marriage *quoad omnia hinc inde donata*, was returned, as if it never had been; and that the tocher could not be craved by the husband, albeit he were yet living, and albeit he had not died within the year; neither could the procreation of a bairn, who also died within the year of the parents marriage, make any exception against the common practice, whereby all is restored *hinc inde*, where any of the parties married dies within the year; and the pursuer replying, that the procreation of a bairn once living, albeit both the bairn and parents died within the year, makes the contract to be effectual, and that the tocher should be paid to the husband and his heir, sicklike as the conjunct-fee would have been due to the wife, if she had survived; The LORDS repelled the allegation, and found, seeing there was a bairn born of the marriage, albeit both the bairn and parents died within the year, yet that the tocher was due to the husband, and consequently, after his death, to his heirs, being heritable, as said is.

Act. *Stuart, Mowat, & Davidson.*

Alt. *Nicolson & Russel.*

Clerk, *Scot.*

Fol. Dic. v. 1. p. 415. Durie, p. 648.

. Auchinleck reports the same case.

STEWART, spouse to Jane Douglas, pursues Irving for the sum of 2000 merks, promised by the said Irving, in tocher to the said Jane, his half sister. It is *alleged* by the said Irving, that the said Jane died within year and day after her marriage, and so the tocher should return *et frustra petit cum mox restitutus sit*; to which it was *replied*, That although she lived not year and day, yet she was delivered of a quick child, in which case the tocher belonged to her husband; which reply the LORDS found relevant, and to stand as a practick to be observed in all such cases.

Auchinleck MS. p. 127.

. Spottiswood reports the same case.

IN an action, Stuart against Irving, the husband pursuing for his tocher-good; *alleged*, None due to him, because his wife had died within year and day, leaving no child of the marriage behind her. *Replied*, That ought to be repelled, because she had born a child, albeit it had died before the mother, which was enough to win the tocher. *Duplied*, Not sufficient, unless one of them had outlived the year. The LORDS repelled the exception in respect of the reply.

Spottiswood, p. 159.