

1663. *July 1.* THOMAS OGILVIE of Trotock, *against* THOMAS BROWN.

THOMAS BROWN, by contract, is bound to give in tocher with his sister, L.1000 to Thomas Ogilvie of Trotock, and he is bound to add another L.1000; which haill sum is provided to the man and woman in liferent, and the heirs of the marriage; which failyieing, the one-half to return to the wife's heirs, and the other to the man's. The wife dying, leaves a bairn, which was never served heir, and thereafter dies. The husband convenes Thomas to pay the sum convened in tocher. ALLEGED, The existence of a bairn, though not served heir, purged the condition of the tailyie; and that *potentia succedendi* was respected in law, and not *actus*; and that *in personalibus* there could be no tailyie. Yet the Lords found the sum tailyied, which was not nullified by the existence of a bairn, he not being served; and that it returned to the wife's heirs; whereas, if the contract had been, in case there were no heirs, it had altered the case. Yet the decision was very hard.

*Act.* Dunmuire and Lockhart. *Alt.* Wallace.

*MS. folio 52.*

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THE business of the recognition pursued by my Lady Carnegie against my Lord Cranburne; and the other action of declarator, at my Lord Stormond's instance, against the Earl of Annandale and his creditors; with the dispute betwixt the burghs royal and of barony; are to be had in the Informations thereof.