

1663. February 17. Mr JAMES FORSYTH *against* ARCHIBALD PATOUN.

MR JAMES FORSYTH, as executor confirmed to his sister, pursues the said Archibald Patoun her husband, for payment of her third of his free goods, at the time of her death. The defender *alleged, First*, By the deceased wife's contract of marriage with the defender, she accepted L. 1000 for all she could crave by his decease, in case there were no bairns of the marriage, and albeit there was a bairn surviving her, yet the bairn shortly thereafter died.

THE LORDS repelled this defence, and found that the bairn surviving the mother never so short was enough.

It was further *alleged* absolvitor, because the deceased wife having a child surviving her, her share belonged to that child, as nearest of kin, and the child being dead, belongs to the defender, the child's father, as nearest of kin to the child, and cannot go back to the mother's nearest of kin; because there is no succession of cognates in Scotland. The pursuer *answered*, That if the child had been executor confirmed to the mother *ad eund. hæreditat.* would transmit the same to the father; but, there being no confirmation, *hæreditas mobilium jacebat*, and the goods remain yet still in *bonis defuncti maritis*; and albeit it was found in the case of Bells *contra* Wilkies,\* that it was not necessary to transmit moveables, that the testament were execute; yet, in that case it was a confirmation, which was esteemed an addition. The defender *answered*, That he had done diligence to have it confirmed, but during the child's life, all judicatories were stopped, and he had taken instruments of his desire to be confirmed; and *alleged*, That as bairns surviving would transmit their legitim though they had done no diligence, so this bairn surviving alone was sufficient.

THE LORDS found, That seeing there was no confirmation, the right was not established in the child's person, and that the right could not fall to the father, but fell to the nearest of kin of the mother, and found it was not like a legitim, which is only of the father's means, and not of the mother's, and hath a special privilege in law, to be transmitted by mere superviving. See LEGITIM.

*Fol. Dic. v. I. p. 188. Stair, v. I. p. 180.*

1676. June 27. EARL of DUMFERMLING *against* The EARL of CALLENDAR.

IN April 1633, there is a minute subscribed by the Earl of Callendar, bearing, 'That he being to solemnize the marriage with Margaret Countess of Dumfermling, the minute or contract is to be amplified thereafter, containing these heads, viz. I bind and oblige me, my heirs and assignees, to infest and seise in conjunct fee and liferent, the said dame Margaret in the barony of Livingston, &c. and likewise by these presents, obliges myself, my heirs and as-

No 6.

Found as above; and seems to be the same case under different names.

No 7.

A provision of conquest to a wife 'in case there be no children of the marriage,' was found not executed by

\* See SERVICE and CONFIRMATION.