No 2.
and his elder brother died before the commencement of the process.

exception was admitted to elide the said qualification, notwithstanding it was *replied*, That the elder brother was an idiot declared, and that the defender was his curator; and that he had succeeded to him, and that he was now deceased, so that the appearance of that succession by the elder brother had evanished; and also, that it was *answered*, That the defender had received the price of the land sold by him, and had the same yet in his hands; which all was repelled, and the exception sustained; for the Lords thought, that that land sold by the defender might yet be sought to be adjudged to the pursuer for satisfying of the defunct's debt ~~libelled~~, notwithstanding of the alienation thereof by the defender, seeing the defunct died vfeft therein, and the defender has qualified no right in his person ~~thereto~~ *iunde*

Act. *Baird.* Alt. *Lumsden* Clerk, *Hay.*

Fol. Dic. v. 2. p. 26. Durie, p. 252.

1665. *January* 12. WALLACE *against* WALLACE.

No 3.
What imported by the terms (heirs or bairns,) as regarding liability.

WILLIAM WALLACE, only son and bairn, of the first marriage, procreated betwixt William Wallace his father and his mother, pursues Hugh Wallace, his brother of the second marriage, as executor confirmed to their father, for employing of 5000 merks, which their father received in tocher with his mother, and was obliged, by their contract of marriage, to employ in favours of himself and his wife, and the heirs or bairns to be procreated betwixt them. Compears Margaret Kennedy the second wife, in whose favours the defunct is obliged to employ a sum of money, and to perform certain other obligements contained in her contract of marriage, and *alleges*, That no process can be sustained at the pursuer's instance as bairn, unless he were heir served; and, in that case, he would be obliged to fulfil the second contract of marriage, and be also liable to his father's debt. Likeas, that clause conceived in the pursuer's favours can be interpreted no other ways, than it would have been if his father had employed the sum in his own time, conform to the destination thereof; now, if he had employed the same, by infeftment or otherways, in favours of himself and wife, and the heirs or bairns of the marriage, he himself would have been fiar, and the pursuer behoved to have been served heir of the marriage thereto, and consequently liable *ut supra*. It was *answered*, That the obligement being conceived in favours of the heirs or bairns, it is equivalent as if the word bairns had only been set down; and it is conceived the word bairns is exegetic of the word heirs, and imports no necessary part of a service or retour; for, if there had been more sons of the marriage than one, all of them would not have been heirs, and yet the obligement is in all their favours; and there is a great difference betwixt a personal obligement in these terms, and an employment by an infeftment; for, where there is an infeftment, there is a real right,

to which some must be served heir in special for transmitting the infeftment in the heir's person, either as heir of line, or heir of tailzie and provision; but, in this case, there is no necessity of a service or retour, being only a personal obligement in favours of the heir or bairn, which the heir or bairn may pursue without a service. No 3.

THE LORDS sustained the process at the instance of the bairn as bairn, reserving consideration, in its own due place, how far the pursuer might be liable to creditors; and, in the mean time, found, that the relict should be preferred to the pursuer, as to the liferent of any thing provided to her in liferent, by contract of marriage, but not what she might claim of the moveables *jure relictæ*.

Gilmour, No 126. *p.* 91.

1682. *November* 28.

EARL of MIDDLETON *against* Sir JAMES STANFIELD.

No 4.
An apparent heir was not subjected to the passive title of behaviour, by granting a factory to one to uplift rents of lands, when his father's whole estate was provided to a liferenter, and to the children of a second marriage.

IN the suspension pursued by the Earl of Middleton against Sir James Stanfield, of a decreet recovered at Sir James's instance against the Earl, as lawfully charged to enter heir to his father, the Earl having *alleged*, That the time of the pronouncing of the decreet he was absent *reipublicæ causa*, being Ambassador for the King to the Emperor, and that he produced now a renunciation; it was *replied* for Sir James, That he could not renounce; because he had behaved as heir, by granting a factory to William Cooper, for uplifting the rents of his father's estate the year 1674, and bygones preceding his father's death; and that, accordingly, his factor had uplifted and counted with him, and remitted several sums of money to him by bills. It was *duplied* for the Earl, That the factory produced, being dated in December 1674, his father having deceased before Whitsunday that year, it was only in general terms to uplift the rents of the defender's estate in Scotland, and that the defender had an estate, properly belonging to himself, before his father's decease, *viz.* the lands of Grashe, to which the factory might be applicable: Likeas, the defender could not behave as heir, by granting a factory for uplifting the rents of his father's estate, whereto it was impossible he could have right, as heir of line, seeing his father, in his own time, did resign his whole estate in Scotland, in favour of his second Lady in liferent, and the children of the marriage in fee; whereupon there was a public infeftment, wherethrough the Lady had right to the mails and duties, after her husband's death: Likeas, he had a tack from the Lady, which did commence from the deceased Earl's death: And albeit the same was after the factory, yet seeing the factory before that tack could not be effectual, the granting thereof could not infer a behaviour as heir.—THE LORDS found that allegeance relevant for the Earl, that his father's whole estate was provided in favour of the Lady, and the heirs of that second mar-