1765. *July* 17. JAMES DOBIE *against* AGNES RICHARDSON.

No 389.
In order to save the *jus mariti* upon the dissolution of a marriage within the year, not sufficient that a child be born alive, unless it also be heard to cry.

DOBIE's wife bore a child about nine months after their marriage, and died in child-bed. Agnes Richardson, her sister, immediately took possession of all her moveable effects. Dobie brought an action against her, concluding for exhibition and delivery, and that she should hold count and reckoning, and divide with him Mrs Dobie's effects, according to the prescription of law.

The defender having alleged that the child was still born, the cause went to proof. It appeared that the child breathed, raised one eye-lid, and expired with the usual convulsive agonies, about half an hour after its birth, but was not heard to cry.

The defender *contended*, That it was essentially requisite that the child should have been heard to cry, upon the following authorities; *Reg. Majest. l.* 2. *c.* 58. § 1.; *Leg. Burg. c.* 44. § 4.; *Balfour's Practics, p.* 100,; *Craig, L.* 2. *Dieg.* 22. § 41. 42.; *Stair, l.* 1. *t.* 4. § 19. *et l.* 2. *t.* 6. § 19.

Answered for Dobie: The object of the law is a living child. This is evident from the nature of the thing, as well as from the authors quoted by the pursuer, who, in general, say only, that it is necessary the child be born alive. Because most children do cry immediately after their birth, an erroneous opinion seems to have obtained, that all children born alive do so; and hence that circumstance has been mentioned as a proof of the child's life; but this is not to be understood so strictly, as absolutely to exclude other proofs by circumstances equally pregnant and certain. In treating of the law of death-bed, most of our authors mention the defunct's going to kirk or market as the only legal proof of his reconvalescence; yet Lord Stair gives it as his opinion, that a proof by equipollent circumstances may be admitted; *l.* 4. *t.* 20. § 45.

To shew how absurd a construction strictly literal were in this case, the *Reg. Majest.* which was, no doubt, the original of all the other authorities quoted, requires that the child should be heard to cry *within the four walls of a house*; but, if a child should chance to be born in the fields, and be heard to cry there, could it be maintained that this should have no effect?

Further, the quotations for the pursuer relate to the courtesy and terce; but the argument from them to the present question is not conclusive, as they and the *jus mariti* stand on a different foot in several respects. The right to those is only created by the birth of a child; the *jus mariti*, on the contrary, takes place immediately upon the marriage, but is resolved by the dissolution of the marriage within the year, without a living child; and there might be some reason for requiring more evidence to create a right, than to save a right already created.

Replied for the defender: Wherever the lawyers treat of the proof of the child's being born alive, they unanimously require it should be heard to cry; and, as the signs of life may often be uncertain and equivocal, there is a mani-

No 389. test expediency in establishing some certain criterion, and not leaving a matter of this kind to the opinion or judgment of witnesses.

The *Regiam Majestatem* does indeed say, that the child must be heard to cry *within the four walls of a house*; but that addition appears only to be descriptive of what usually happens; and besides, there is no occason, in the present question, to canvas whether that be necessary or not.

There is no foundation for distinguishing between this case and that of the courtesy or terce. The lawyers have made no distinction; on the contrary, Balfour and Stair have expressly laid down the law in the same way as to both.

The Lord Ordinary found, "That as Mrs Dobie did not live year and day after her marriage, and as it was not proved, that the child or *fœtus* of which she was delivered was heard cry, the pursuer's claims on account of the marriage were resolved."

Upon a reclaiming bill and answers, "the Lords adhered."

Act. *Armstrong.* Alt. *Montgomery.* Clerk *Kirkpatrick.*

A. R. *Fol. Dic. v.* 3. *p.* 290. *Fac. Col.* No 24. *p.* 40.

SECT. V.

Where the marriage is dissolved through the fault of the parties.

1573. *December* 19. Countess of Argyle *against* Tenants.

No 390.

A tack being let to a man and his wife, and longest liver of them two, the marriage having been afterwards dissolved through the wife's fault, yet it was found, that the tack ought still to subsist; because, although, in that case, all things given to the wife *intuitu matrimonii* must return to the husband and his heirs, yet such a tack let *stante matrimonio* was found not to be granted *intuitu matrimonii.*

Fol. Dic. v. 1. *p.* 415. *Colvil.*

*** See this case No 1. p. 327.