No 26.

she did intromit with the mails and duties *animo gerendi se pro hærede*. But this seems very hard, it being not only the opinion of Craig, who makes the fee to subsist in the person of the wife or husband, in whose heirs the substitution does terminate, but also the general opinion of most lawyers; as likewise, because the practique seems to differ in this, that in that decision the conquest was to be made by the husband, and to flow from him on the terms foresaid; whereas, in this case, the tenements of land did flow from the wife's father. But that which moved the Lords was, that the tenement was disponed as a tocher to the husband, and so it could not in reason be thought but he and his heirs had the greatest interest.

Gosford, MS. No 377. p. 185.

1680. *December* 1. ANDERSON *against* BRUCE.

No 27.
By contract of marriage it was agreed, that 3000 merks, which was the husband's stock, and 4000, which was the wife's, should be employed upon security to him and her in conjunct fee, and to the heirs of the marriage, whom failing, the one half to his heirs, and the other half to her heirs. The wife was found to be only liferentrix.

By contract of marriage betwixt Andrew Bruce and Elizabeth Callender his first spouse, it is agreed that 3000 merks, which was his stock, and 4000 merks which was hers, should be employed upon security to him and her in conjunct fee, and to the heirs of the marriage; which failzieing, the one half to his heirs, and the other half to her heirs of any other marriage; which failzieing, to

Bickerton and her heirs whatsomever, and the conquest during the marriage is provided the same way. There were several bairns of the marriage who survived the mother, but died young without issue, neither being entered heirs, nor executors confirmed to her; and her mother being also dead, Major Bickerton, her brother, assigned his right to Baillie Anderson his sister's son, who had also right from his mother, whereupon he pursues a declarator against Andrew Bruce, that the half of the 7000 merks, and the half of the conquest, did belong to Agnes Callender, and to Major Bickerton, as heir substitute to Agnes by the contract, and that Andrew Bruce ought to employ the same for himself in liferent, and for the pursuer as assignee by Bickerton in fee. The defender *alledged* absolvitor; because, by the clause of the contract, Andrew Bruce himself is fiar, even though the securities had been taken according to the destination thereof; for a conjunct fee between man and wife doth always import the man to be fiar, and the wife to be liferenter; and now his first wife and children being dead, his being substitute heir, could not compel Andrew to employ it, seeing he, as fiar, might dispose of his whole means at his pleasure, which the substitute heirs, being his heirs, would be obliged to perform, and therefore cannot oblige him to employ, or re-employ. It was *answered*, 1*mo*, That this clause of destination must have the same effect, as if it had been performed, and Andrew's estate had been employed upon land in the terms thereof, in which case his wife would have been fiar of the half; but though *in dubio* conjunct fees are interpreted to make the man fiar, and the wife liferenter, yet

sometimes it will be contrary, as, if a wife's heritable right be employed for her husband and her, and the heirs between them, which failing, to his heirs, the wife will thereby be fiar, and the husband liferenter; so in these clauses where the estate divides by express paction between the husband and wife, and their heirs, failing heirs of the marriage, there, both husband and wife are equally fiars, and the survivor hath the liferent of the whole; so that though there had been heirs of the marriage, they behoved to have been served heirs to their father in the one half, and to their mother in the other; and so it was found between the Earl of Callender and the Earl of Dumfermline, No 7. p. 2941, where the deceast Earl of Callender's conquest being provided to be employed to them in conjunct fee, and that if there were no heirs of the marriage, the Lady should have power to dispose upon the one half of the conjunct fee, 'It 'was found to make them both equal fiars; and though she did not dispone in 'her life, yet the Earl of Dumfermline, her heir, was found to have right to the 'half of Callender's conquest.' 2*do*, Albeit this clause would infer that Andrew were fiar, and that his wife's heirs were but substitute heirs of provision to him, yet he cannot dispose nor alter that substitution *ad arbitrium*, seeing it is not an arbitrary tailzie, but is founded upon the wife's interest, and so doth not only import a substitution, but an obligation not to alter it, at least *ad arbitrium*, but for necessary and rational causes; and therefore as mere gratuitous obligations would not affect the means employed in this destination, but would be held as fraudulent against the just interest of the wife and her successors, so the LORDS in several cases have so determined; and it is a general interest among the bairns of several marriages, especially amongst burgesses, that the father cannot apply what is destinate to the bairns of the first marriage, in favours of the bairns of the second marriage, or in favours of the wife. It is true in the case of Littlejohn's second wife, No 11. p. 3190, 'Her liferent was sustain-'ed, though the whole conquest was provided to the bairns of the first marriage,' and moderate portions to the children of the second marriages, have been found to affect the estate and conquest of the first marriage, though wholly provided to the children of the first marriage, both these being just acts, without fraud, arising from the obligation to provide wives and children, but can never be extended to arbitrary acts, which can be interpreted fraudulent, and which would unhinge the whole securities of children of several marriages. The defender *replied*, That in conjunct fees the husband is ever interpreted the fiar; and as to Dumfermline's case, there was no mention of any heirs, but only a conjunct fee provided, with a power to the wife to dispone upon the half, which was found to make her fiar of that half, which is not in this case. 2*do*, As to the husband's power of disposal, where that is intended, it bears that he shall not alter, or at least that he shall employ or re-employ so oft as he lifts; but in this case, though Andrew be obliged to employ the 7000 merks, yet he is not to re-employ it, but to employ it; and albeit he could not *ad arbitrium* alter the ef-

No 27.

No 27. fect of the destination, yet having many children of a second marriage, and none of the first, he may lawfully employ his means, though conquest in the first marriage, for providing the children of the second marriage.

The Lords found, that the clauses of this contract did infer only the wife to be liferenter, and that there being no children of the first marriage, that the husband might employ the sums that he had acquired in that marriage, to provide the children of the second marriage. *See* Provisions to Heirs and Children. *See* No 3. p. 607.

Fol. Dic. v. 1. *p.* 299. *Stair, v.* 2. *p.* 808.

1682. *December* 20. Mr Thomas Ramsay *against* Helen Ramsay.

No 28.
Found in conformity with Gairns against Sandilands, No 26. p. 4230.

1000 merks being payable by a wife's father to her husband as tocher, and to the heirs of the marriage; which failing to the wife's nearest heirs, it was *contended*, That, by the last termination on the wife's heirs, she was fiar; but The Lords found, that there being no restriction as to the husbaud, that he was fiar, and that the heirs of the marriage, and the wife's heirs, were but heirs substitute to the husband; and the wife having never been institute in the conjunct fee, the termination could not give a fee, which clears only which of more persons institute is the fiar.

In this process The Lords found, that the term of payment of annualrent, and not the term of payment of the principal sum, did regulate a bond as to the quality of moveable or heritable, when the party dies, *ante terminum*. *See* Heritable and Moveable.

Fol. Dic. v. 1. *p.* 299. *Harcarse*, (Contracts of Marriage.) *No* 348. *p.* 85.

*** Fountainhall reports the same case:

The debate Helen Ramsay and Alexander Aikenhead apothecary, her spouse against Alexander Brown in Eyemouth, and Mr Thomas Ramsay minister at Mordington, being reported by Redfoord: 'The Lords found, that by the conception of the bond, the husband, Alexander Brown, was fiar of the 1000 merks given in tocher; and found albeit the term of payment of the principal sum was suspended during the wife's mother's life, yet the term of payment of the annualrent being past before his wife's death, the said principal sum was not moveable, nor fell under the communion of goods, but was heritable *quoad fiscum et relictam*, so could not belong to the wife's executors; and that there being children surviving the dissolution of the marriage by their mother's decease, albeit there was no confirmation during their lifetime, yet the testament must be tripartite and not bipartite, and the wife's and her executor's part is only a third of the annualrents then owing.' *See* Durie, 4th February 1642, Lutfoot, *voce* Substitute and Conditional Institute. A