No 26.
In a contract of marriage, a tenement was disponed in name of tocher to the husband and wife in conjunct-fee and liferent, and the heirs betwixt them; whom failing, the wife's heirs and assignees whatsoever. The husband was found fiar.

1671. *July* 12. ADAM GAIRNS *against* ISOBEL SANDILANDS.

ADAM GAIRNS pursues Isobel Sandilands, as representing her father, to pay a debt of his, and specially as behaving as heir, by uplifting the mails and duties of a tenement, wherein the father died infeft, as of fee, in so far as by contract of marriage betwixt Thomas Sandilands her father, and John Burn, and Isobel Burn his daughter, the said John Burn provided the said tenement in these terms, viz. after the obligements upon the husband's part, it follows thus, "for the which cause, the said John Burn binds and obliges him to infeft Thomas Sandilands, and the said Isobel Burn, the longest liver of them two, in conjunct-fee or liferent, and the heirs between them, which failing, the said Isobel her heirs and assignees whatsomever," by which provision her father being fiar and infeft, the defender is liable. The defender *alleged* absolvitor; because, by this provision of the conjunct-fee of this tenement, Isobel Burn, the defender's mother, was fiar, and her father was but liferenter, in respect the termination of the succession is to the mother's heirs, yea, and to her assignees, which necessarily imports, that she had power to dispone. And it is a general rule in succession of conjunct-fiars, that that person is fiar upon whose heirs the last termination of the tailzie or provision ended, especially in this case, where the right of the tenement flows from the woman's father; so that, if there were any doubtfulness, it must be presumed, that the father's meaning was to give the fee to his daughter, having no other children; neither is this land disponed *nomine dotis*. And the defender stands infeft by precept of favour, as heir to her mother, and thereby bruiks *bona fide*, and her infeftment must defend her till it be reduced. The pursuer *answered*, That by the provision, the husband was fiar, and the wife was only liferenter, because though the last termination doth ordinarily rule the fee, yet this is as favourable a rule, that in conjunct provisions, *potior est conditio masculi*, and though the termination be upon the wife's heirs whatsomever, yet they are but heirs of provision to the husband, and he might have disponed, and his creditors may affect the land, which holds in all cases, except the lands had been disponed by the wife herself, without a cause onerous. But here the husband is first named, and it is but a small parcel of land, beside which there is no tocher; so that though it be not disponed, *nomine dotis*, yet being disponed "for the which causes" it is equivalent; and, in the same contract, the husband is obliged to provide all lands that he shall acquire, or succeed to, to himself and his wife, the longest liver of them two in conjunct fee or liferent, and to the heirs between them; which failing, the one half to the husband's heirs, and the other half to the wife's heirs and their assignees; and, it cannot be imagined, that the meaning of these clauses was, that the fee of the man's conquest and succession, should not be all constituted in himself, but that the wife should be fiar of the half. And in like manner, the father's meaning is clear, because the clause bears not only in contemplation of the marriage, but for sums of money received by the

father, which albeit left blank in the contract, yet it cannot be thought, that in such a narrative, he intended to make his daughter fiar. And as for the adjection of her assignees, it is only *ex stilo*, for assignees is ever added after the last termination of heirs, and does always relate to all the fiars, and would extend to the heirs of the marriage, their assignees, as well as to the wife's heirs failing them. Likeas, assignees is in the same way adjected to the clause of conquest, wherein there is no ground to imagine that the wife is fiar, and both bear the husband and wife to be infeft in conjunct-fee or liferent. No 26.

THE LORDS found that by this provision, and infeftment thereon, the husband was fiar, and the wife only liferenter, and found no necessity to reduce the defender's infeftment, as heir to her mother, not proceeding upon a retour, but a precept of favour; but they found, that the dubiousness of the case was sufficient to free her from the passive title of behaviour, but only for making forthcoming her intromission, *quoad valorem;* but, it was not debated nor considered, whether as *bonæ fidei* possessor by a colourable title, being infeft as heir to her mother, she would be free of the bygones, before this pursuit.

Fol. Dic. v. 1. *p.* 299. *Stair, v.* 1. *p.* 753.

*** Gosford reports the same case:

THE said Isobel being pursued at Gairns's instance for payment of L. 500, as representing her father, Thomas Sandilands, upon this passive title, That she had intromitted with the mails and duties of a tenement of land, wherein her father died infeft and seased; it was *alleged* for the defender, That she was infeft in the said tenement as heir to her mother Isobel Burn, whose father was infeft in the saids lands, and did dispone the same, by contract of marriage, to her father and mother in liferent, and their heirs in fee, which failing, to the defender's mother and her heirs whatsoever; so that the termination of the heirs being to the mother's heirs, she was fiar of the said tenement; and, the defender being infeft as her heir, could not be liable to her father's debt. It was *replied*, That the disposition of the tenement being to the father and mother in liferent or conjunct-fee, and to their heirs, which failing, to the wife's heirs; the husband was fiar as being *persona dignior*, and the daughter could not have right but as heir to the father, as was decided by the Lords in a case, Graham against Park and Garden, No 23. p. 4226, where the conquest to be made was provided by the contract of marriage, and conceived in the same terms whereof this disposition is. THE LORDS did find the daughter was liable to this debt pursued for, but only in so far as the said tenement did amount to, in respect that her infeftment was only as heir to her mother, and that dispositions so conceived were most disputable in law to whom the fee should belong, and therefore, that the daughter was in *probabili ignorantia*, and that it could not be presumed that

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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