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wife's tocher and the hail conquest to be employed for the man and wife in liferent and conjunct fee, and to the heirs to be procreated betwixt them; which failing, the one half to the man's heirs, and the other half to the woman's heirs; and the bairns of the marriage being deceast; was found to constitute the man fiar, and that he was not liable to employ the sum in favours of himself and the wife's heirs, but that he might employ it in favours of a child he had by a second marriage. *Replied*, That the clause being conceived not by way of condition, but a substitution in favours of the wife, failing of heirs of the marriage, the existence of a child doth not evacuate the substitution, as was decided the 18th June 1680, Oswald against Boyd, No 9. p. 2948. And albeit the charger be fiar, yet being provided to be furthcoming to the wife and her heirs, in case there should be children of the marriage, the wife and her heirs are thereby constituted executors, so that the husband could do no voluntary gratuitous deed to evacuate the said provision; and it appears by the conception of the clause, that it has been the meaning of the parties, that after the marriage was dissolved, and that there were no heirs of the marriage, that then the tocher should pertain to the wife's heirs.——The Lords found, that by the conception of the clause, the charger was fiar of the sum, and that Jean Forbes his wife, and her heirs, were only substitute to him, and therefore found the letters orderly proceeded; the charger always employing the sum for the use of the wife's heirs; or otherways, finding caution to make the sum furthcoming to them after the charger's decease. Thereafter the suspender having given in a petition, representing that the clause in the contract being dubious, and therefore craved that the writer and witnesses in the contract, and commissioners, might be examined, for proving that it was *actum et tractatum* amongst the parties, that in case there should be no heirs of the marriage, the tocher should presently return to the wife and her heirs, which was refused.

Fol. Dic. v. 1. p. 299. Sir P. Home, MS. v. 2. No 916.

1697. *January* 19. Laws *against* Tod.

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A man in his first contract of marriage obliged himself to take the securities of a sum of his own, and of lands he got in name of tocher with his wife, to himself and

George Tod, by his first contract of marriage with Mary Law, obliges himself to first take the securities of L. 1000 of his own means, and the ten acres of land he got with his wife *nomine dotis*, to himself and his wife in liferent and conjunct fee, and to the heirs orbairns of the marriage; which failing, the said L. 1000 and ten acres to be equally divided betwixt the man's and wife's heirs. There is one daughter procreated of the marriage, called Sophia; and the mother being dead, the father causes serve the said daughter, when an infant, heir in special to her mother in the half of the foresaid sum and acres; and then the child dying, he

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her in liferent and conjunct fee, and to the children of the marriage, whom failing, the same to be equally divided betwixt her and his heirs. The husband, as *dignior persona*, was found to be fiar of the whole, and that the wife's heirs came in as his heirs of tailzie.

enters into a second marriage, and by the contract provides the whole ten acres to the bairns of that second marriage, of which he has only a daughter called Agnes, whom he also serves heir in special to her consanguinean sister; Sophia and the father dying last of all, a debate anent the succession fell out between the heirs of the husband, viz. his daughter Agnes, and the heirs of the first wife, viz. Isobel and Sophia Laws her sisters, who took out brieves for serving themselves heirs of provision to their sister's daughter, *quoad* the half of both the money and acres; and contended their sister was fiar of that half, and so they came in as heirs of tailzie and provision to her; which they inforced from these arguments: 1*mo*, That person is always repute fiar on whose heirs the last termination devolves, as here it does on the wife *quoad* the half. 2*do*, They *alleged*, homologation on the father's part by serving his first daughter heir to her mother, and then the second heir to her sister. 3*tio*, They founded on a decreet that it was *res judicata*. *Answered*, That rule has many *fallentiæ*; for a conjunct fee to a wife, though the last termination be on her heirs, does not make her fiar, but only liferenter and substitute to the husband, *ob eminentiam sexus*, as has been often found; Durie, 29th January 1639, Graham, No 23. p. 4226.; 20th Feb. 1667, Cranston, No 24. p. 4227.; 12th July 1671, Gairns, No 26. p. 4230. And as to the homologations, his mistake could never give his wife the fee; and the services were only to debar her heirs; and the decreet was opponed to the *res judicata*, *ubi hoc non agebatur* who was the fiar. THE LORDS found, in the conception of such a clause, the husband, as *dignior persona*, was fiar of the whole; and yet that the first wife's heirs came in as heirs of tailzie and provision, not to her, (who was not fiar,) but to the husband, and that the homologation did not take away his fee; and that his providing the same in the second contract of marriage, being but a voluntary deed only, could not evacuate, frustrate, or take away the substitution in the first contract in favours of the wife's heirs *quoad* the half; though it was urged by some of the Lords, that he being fiar, might have sold the acres, and spent them, and his creditors could have affected them by diligenee notwithstanding of the substitution. They also found the substitution took place, albeit there was a child of the first marriage served heir, and that the clause *quibus deficientibus* or whilk failing, was to be understood, *quandocunque* the same came to fail, then there was room to the next branch of the substitutes, and not to evanish on the existence of an heir as the substitutions in the Roman law did. *See* PROVISIONS TO HEIRS AND CHILDREN.—SUBSTITUTE AND CONDITIONAL INSTITUTE.

Reporter, *Fountainhall.*

Fol. Dic. v. 1. *p.* 299. *Fountainhall, v.* 1. *p.* 757.