No 48.
A husband disponed to his second wife an annualrent out of his lands, and to the children of that marriage in fee. He afterwards sold the lands, and a son of that marriage, as fiar, competing with the purchaser, the Lords found the sale effectual.

1630. *July* 9. VEITCH *against* ROBERTSON.

AN husband giving infeftment to his second wife in liferent, and to the heirs to be begotten of that marriage, of an annualrent out of his lands, which lands the husband thereafter disponed, divers years after the procreation of a son in that marriage, and which son of the said second marriage being served heir of that marriage, and infeft in that annualrent, dispones the same to another, who pursues poinding of the ground therefor against the heritor of the land, who had acquired the right from the father, as said is, after the said sasine of the annualrent, and whereby he *alleged*, that the pursuer nor his author, as being the heir of that marriage, had no right to the said annualrent, the father remaining still fiar, who disponed the land, and which disposition absorbed the said annualrent; and the pursuer *answering*, That after there was sasine given to the wife in liferent, and to the heirs of that marriage in fee, of the annualrent libelled, the bairns of that marriage became fiars thereof, how soon they were born; so that thereafter, albeit the father remained fiar of the heritable right of the lands, yet his right was affected with the burden of that annualrent, so that the father could never thereafter valiably dispone the heritable right of the lands, but with the burden foresaid, and wherewith the said disposition behoved to remain affected, even as if his eldest son of the first marriage, who was universal heir, if the said disposition had not been made by the father, as said is, would have succeeded to the right of the lands, but ever with the said burden; even so must the said disposition be affected therewith.——THE LORDS found the disposition made by the father sufficient to exclude this pursuit, and that the fee of the said annualrent subsisted in the father's person, notwithstanding of the sasine given to the wife, and heirs of that marriage, and consequently that the father's disposition of the land was not affected with the burden thereof; so that albeit the heir might have been compelled to warrant that annualrent personally as heir, yet it was not alike in a singular successor to affect the ground against him.

Act. *Stuart.* Alt. *Advocatus & Taylor.* Clerk, *Gibson.*
*Fol. Dic. v.* 1. *p.* 302. *Durie, p.* 528.

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No 49.
An heritable bond to a man and his wife in liferent, and to the children of the marriage in fee,

1663. *January.* LAIRD of DAIRSEY *against* HAY.

SIR GEORGE MORISON of Dairsey gives a bond to umquhile John Bell and Margaret Hay his spouse in liferent, and to the children of the marriage in fee, for L. 1000, whereupon infeftment follows. Margaret, with consent of her children, and their curators, pursues for payment. It was *alleged*, That the relict is only liferenter, and the bairns not infeft, so that a renunciation cannot be

granted till some be infeft as fiars. It was *answered*, That the conception of the bond being in favours of the bairns as fiars, they with the mother may well renounce; and it is against form, that the parents being but liferenters, the bairns can be infeft as heirs to a liferenter. It was *duplied*, That though the bond was conceived in favours of the longest liver of the two parents, yet seeing the children are not infeft, nor can be infeft under the general name of children, and children might have failed, and may fail to be more or fewer of the marriage, as providence disposeth, it is just alike as if the bond had been conceived in favours of the heirs of the marriage; but with this difference, that if it had been in favour of the heirs, the right of sonship would have been preferred. Now, if it had been so conceived, no question the heirs of the marriage would have been infeft as heirs to their father; consequently the bairns, whether sons or daughters, or both, must be served as heirs of provision to the father; and in this case the word liferent must resolve in a conjunct-fee.

No 49. the parents being infeft, cannot be renounced by the children till they are infeft as heirs of provision to their father.

THE LORDS found that the bairns should be infeft as heirs of provision to their father, and renounce.

*Fol. Dic. v.* 1. *p.* 302. *Gilmour, No* 73. *p.* 54.

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1672. *February* 10.
JAMES WEMYSS, and BALNEMOON his Assignee *against* JOHN MACINTOSH.

No 50. A sum being payable to a husband in name of tocher, to be employed to himself and his wife in liferent, and to the heirs of the marriage, was found assignable to, or arrestable by, his creditors, as being fiar thereof.

BALNEMOON being assignee to 2000 merks which Macintosh was obliged to pay to James Wemyss in name of tocher with his daughter, did pursue Macintosh for payment thereof. It was *alleged* for the defender, That the cedent, James Wemyss, was obliged to employ the said tocher, and other 3000 merks, to himself and his wife in liferent, and to the heirs of the marriage, which he never having done, cannot crave payment, but upon re-employment, and the assignee Balnemoon can have no right thereto. It was *replied*, That Wemyss the cedent being only obliged to employ the said tocher to himself in liferent, and to the heirs of the marriage, albeit it were so employed, he remained fiar thereof, and might assign the same, seeing the tocher was to be employed to himself and his heirs of the marriage, and not bairns, and that heirs could not be interpreted bairns, it being Wemyss' first contract of marriage; whereas, if it had been to the heirs of a second marriage, it might have altered the case, there being a general heir of a first marriage.

*Fol. Dic. v.* 1. *p.* 302. *Gosford, MS. No* 471. *p.* 244.