

parallel decision on the 5th January 1670, Innes *contra* Innes, No. 60. p. 4272, No 28. was also cited.

1683. February 27.

THE case of Helen Ramsay against Mr Thomas Ramsay her brother (mentioned the 20th December 1682) being reported by Redford, 'THE LORDS' found no need of her transferring, though James Aikenhead her husband was newly dead; seeing it was but a naked office of executry in her person, and not yet a *jus fixum* to fall under his *jus mariti*.'

Fountainhall, v. 1. p. 202. & 223.

1687. June.

SHAW *against* FORBES.

BY contract of marriage betwixt Duncan Shaw and Joan Forbes, daughter to George Forbes of Skelliter, the said George being obliged to pay 1000 merks tocher with his daughter, and Duncan Shaw was obliged to add 2000 merks, and to employ the hail 3000 merks upon sufficient land annualrent, or other security, to him and the said Jean Forbes in liferent and conjunct fee, the longest liver of them two, and after their decease, the heirs procreate betwixt them; which failing, the 1000 merks of tocher to be furthcoming to the said Joan Forbes, her nearest heirs or assignees whatsoever; and Skelliter being charged for payment of the 1000 merks, he suspended, upon this reason, that the contract of the 1000 merks of tocher being provided to be made furthcoming to the wife, her heirs, and assignees, failing of heirs of the marriage, and she being deceased without children, the sum doth return to the suspender. The father, as nearest of kin to her, *answered*, That the sum being payable to the charger, the husband, and the heirs of the marriage, and there being a child born of the marriage that survived the mother, albeit now deceased, yet the existence of a child purifies the condition, and evacuates the substitution that is in favours of the wife and her heirs; and albeit the existence of the child should not evacuate the substitution, yet, by the conception of the contract, the husband being fiar of the sum, he may uplift and dispose of the same at his pleasure, as was decided the 23d January 1668, Justice *contra* Stirling, No 25. p. 4228. where a clause in a bond, bearing a sum to be borrowed from the husband and wife, and payable to the longest liver of them two in conjunct-fee, and to the heirs betwixt them, or their assignees, which failing, to the heirs or assignees of the last liver, was found to constitute the husband fiar, and the wife liferenter, albeit she was last liver, and the heirs by the last clause were but heirs of provision to the husband in case the heirs of the marriage failed; 1st December 1680, Baillic Anderson *contra* Bruce, No 27. p. 4232., where a clause in a contract of marriage, providing the husband's present means and the

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In a contract of marriage there was a clause, that failing heirs of the marriage, the tocher should be furthcoming to the wife's heirs or assignees; and the marriage being dissolved by her death, she leaving a child who soon thereafter died, it was found, that even after the child's death, the husband was fiar of the tocher, and that the wife and her heirs were only substitute to him; but he was ordained to employ and re-employ the sum for the use of the wife's heirs, or to find caution to make it furthcoming to them at his death.

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wife's tocher and the hail conquest to be employed for the man and wife in life-
 rent 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 con-
 dition, 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 con-
 stituted 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 dissolv-
 ed, 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 pro-
 ceeded; 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, repre-
 senting that the clause in the contract being dubious, and therefore craved that
 the writer and witnesses in the contract, and commissioners, might be examin-
 ed, 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.

No 30.

A man in
 his first
 contract of
 marriage ob-
 liged 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

1697. January 19.

LAWS against Tod.

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 life-
 rent and conjunct fee, and to the heirs or bairns 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