

1784. *June 24.* ROBERT STEVENSON *against* MARGARET BARR.

No. 22.

A precept of sasine denotes the conditional institution of the person in whose favour it is granted.

“Failing children,” how interpreted.

John Stevenson, by contract of marriage, provided Margaret Barr, his wife, in a life-rent annuity; in security of which, he disposed to her in life-rent certain heritable subjects, devising the fee of them to the children to be procreated of the marriage. The following farther provision was then subjoined: “Failing children of the said marriage, he hereby disposes and makes over to his said spouse the foresaid tenement;” *i. e.* one of the subjects above mentioned. And, in the precept of sasine, it is to be remarked, he directed that infestment should be given in the last mentioned tenement “to Margaret Barr, and her heirs and assignees.”

A child of the marriage existed, and survived John Stevenson. Its death afterwards gave rise to a competition respecting that tenement, between Margaret Barr and Robert, the brother of John, who claimed it as heir of the child.

Pleaded for Margaret Barr: The destination of fee in favour of the children of the marriage seems to have no other effect, when followed by the expression, “failing them,” than if it had been succeeded by that of “whom failing;” and then, undoubtedly, whether they had failed by non-existence or by predecease, it would have been a matter of indifference. The obvious views of the disposer, too, are equally adverse to any distinction between those two events.

Answered: By the child’s surviving its father, it became vested with the fee; and therefore the mother could not succeed but as a substitute. The terms, however, of the contract, especially in the precept of sasine, refer to a conditional institution alone. Margaret Barr’s infestment under her husband’s precept could be of no avail after the fee had devolved to another person.

A majority of the Court, chiefly influenced, as it seemed, by the precept of sasine’s having been granted to Margaret Barr, considered her as a conditional institute; because, as it was observed, infestment cannot be validly taken by substitutes in settlements, in virtue of the precepts therein contained; though, by the rest of the Judges, who viewed her in the light of a substitute, it was argued, that great weight ought not to be laid on that circumstance, since the practice of giving sasine to *nominatim* substitutes, however erroneous, was yet very frequent.

The Lord Ordinary having found, “That children of the marriage between the said Margaret Barr and the said John Stevenson having failed, by the death of the only child of that marriage, the said Margaret Barr is, by the terms of the contract of marriage, entitled to the fee of the houses specially provided to her, failing children of the marriage,”

The Lords altered that interlocutor, and found, “That Margaret Barr had no right to the fee of the house in question;” to which judgment they adhered, upon advising a reclaiming petition and answers.

Lord Ordinary, *Sawinton.* For Margaret Barr, *Rolland, Currie.* Alt. *Morthland.*
Clerk, *Home.*

S. *Fel. Dic. v. 4. p. 303. Fac. Coll. No. 161. p. 252.*