

## No 51.

A father dis-  
posed his  
lands to his  
son and  
spouse in life-  
rent, and to  
the heirs of  
that marriage,  
whom failing,  
to certain  
persons na-  
med, reserv-  
ing his own  
liferent. The  
son was found  
fiar.

1681. February 4.

THOMSONS against LAWSONS.

UMQUHILE Robert Masterton did dispone some tenements in Edinburgh to James Masterton his son and his spouse, and longest liver of them two in life-rent, and to the heirs of that marriage, which failing to Alison, Jean, and Margaret Thomsons, his oyes by his daughter, 'reserving his own liferent,' whereupon sasine was taken both for Masterton and his spouse, and for the three Thomsons who pursued the tenants for mails and duties. Compearance is made for Janet Lawson, who had right to a liferent of the tenements from Thomson, who had right from these Thomsons, who had right from James Masterton, and alleged preference, because by the foresaid disposition, James Masterton was fiar, and the Thomsons are but heirs of provision substituted, 'failing James's heirs of that marriage,' and therefore their infestment was unwarrantable, but they ought to have been 'retoured heirs of provision to James Masterton,' and whatever their sasine may operate, as to the superior who received them, yet it cannot alter the fee; for, if James Masterton had had heirs of that marriage, they would have excluded the Thomsons, and behoved to have entered heirs to James, for Robert was denuded, and could not be fiar, and his disposition does expressly reserve his liferent; and the Lords have found, in the case of the Children of Moor, No 45. p. 4252. who upon a substitution like this were infest, 'that they were but heirs substituted, and that their father might dispone at his pleasure. It was answered, That if the disposition had been to James Masterton and his spouse in conjunct-fee, the husband behoved to be fiar; but here it is only to them in liferent, which can import no fee, and though it could, yet Thomson being lawful administrator to his children, could not warrantably take a right from Masterton to exclude his children. It was replied, That in the common style of ordinary notaries, conjunct-fee and life-rent, are equiparat terms, unless it bear 'liferent' allenary; but the disposition being to James and his wife, and the heirs between them, doth necessarily import, that they were in conjunct-fee, and the husband fiar, for their children could never be heirs to naked liferenters; and, seeing James was fiar, his heirs of tailzie cannot quarrel his deed, not being upon a mutual contract, and it was his deed in disposing, and not Thomson, the father's, that made the right, which coming to Lawson the wife, a singular successor *ex causa matrimonii*, the same is valid and preferable.

THE LORDS found, by the conception of the disposition, That James Masterton was fiar, and therefore preferred the liferenter deriving right from him.

*Fol. Dic. v. 1. p. 302. Stair, v. 2. p. 854.*