No 27. fect of the destination, yet having many children of a second marriage, and none of the first, he may lawfully employ his means, though conquest in the first marriage, for providing the children of the second marriage.

The Lords found, that the clauses of this contract did infer only the wife to be liferenter, and that there being no children of the first marriage, that the husband might employ the sums that he had acquired in that marriage, to provide the children of the second marriage. *See* Provisions to Heirs and Children. *See* No 3. p. 607.

Fol. Dic. v. 1. *p.* 299. *Stair, v.* 2. *p.* 808.

1682. *December* 20. Mr Thomas Ramsay *against* Helen Ramsay.

No 28.
Found in conformity with Gairns against Sandilands, No 26. p. 4230.

1000 merks being payable by a wife's father to her husband as tocher, and to the heirs of the marriage; which failing to the wife's nearest heirs, it was *contended*, That, by the last termination on the wife's heirs, she was fiar; but The Lords found, that there being no restriction as to the husbaud, that he was fiar, and that the heirs of the marriage, and the wife's heirs, were but heirs substitute to the husband; and the wife having never been institute in the conjunct fee, the termination could not give a fee, which clears only which of more persons institute is the fiar.

In this process The Lords found, that the term of payment of annualrent, and not the term of payment of the principal sum, did regulate a bond as to the quality of moveable or heritable, when the party dies, *ante terminum*. *See* Heritable and Moveable.

Fol. Dic. v. 1. *p.* 299. *Harcarse*, (Contracts of Marriage.) *No* 348. *p.* 85.

*** Fountainhall reports the same case:

The debate Helen Ramsay and Alexander Aikenhead apothecary, her spouse against Alexander Brown in Eyemouth, and Mr Thomas Ramsay minister at Mordington, being reported by Redfoord: 'The Lords found, that by the conception of the bond, the husband, Alexander Brown, was fiar of the 1000 merks given in tocher; and found albeit the term of payment of the principal sum was suspended during the wife's mother's life, yet the term of payment of the annualrent being past before his wife's death, the said principal sum was not moveable, nor fell under the communion of goods, but was heritable *quoad fiscum et relictam*, so could not belong to the wife's executors; and that there being children surviving the dissolution of the marriage by their mother's decease, albeit there was no confirmation during their lifetime, yet the testament must be tripartite and not bipartite, and the wife's and her executor's part is only a third of the annualrents then owing.' *See* Durie, 4th February 1642, Lutfoot, *voce* Substitute and Conditional Institute. A

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

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.

No 29.
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.

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 whatsomever; 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, Baillie Anderson contra Bruce, No 27. p. 4232., where a clause in a contract of marriage, providing the husband's present means and the