and is not holden to re-employ, or find caution for re-employing the same; and therefore decerned against Sir Peter Fraser, the defender, superseding execution until the first of June next, being year and day after the defunct's decease; betwixt and which time, if the defender shall renounce the benefit of the disposition granted to him by his father, and declares he is not liable personally, but prejudice to the pursuer, to proceed and adjudge the lands, and supersedes to give answer to the other point, anent the exhibition, against the relict of Sir Alexander Fraser. No 42.

Sir Pat. Home, v. 1. No 136. p. 212.

*** This case is also reported by Fountainhall:

MADAM BROOMLAY, *alias* FRASER, against Sir Peter Fraser of Doors, her brother.——THE LORDS, on Newton's report, found this following clause in her bond of provision from her father the Doctor, for L. 2000 Sterling, viz. that it should be payable to her, her heirs, executors, and assignees; but in case she should die unmarried or without children, then it should return to the father's heirs of tailzie; did not impede her from uplifting the sum, that substitution being only conditional, and at most but *spes successionis*, and a destination which she might evacuate; and that it was *copulativa oratio*, to the verity whereof both behoved to exist; but *ita est*, one of them had failed already, viz. she was married: And therefore the Lords found that she was not bound either to re-employ, or to find caution to re-employ the said sum in the event of her having no children, and dying unmarried. They superseded to give answer to that point, If Sir Alexander Fraser's relict (who was an English woman, and had never been in Scotland,) can be pursued in an exhibition of writs here, seeing *actor sequitur forum rei*; though the pursuer offered to consent to a commission to examine her on the having these writs at London, and declared she would restrict it to affect the estate and jointure she had in Scotland allenarly.

The clause in her bond resembles something the *jus accrescendi inter collegatarios* in the Roman law, the application whereof may be considered: Of Copulative Speeches, *See* § 11. *Institut. de hæred. instituend.*—*ibique Vinnium*, &c.

Fountainhall, v. 1. p. 172.

1687. *November* 10. DUNCAN SCHAW *against* FORBES of Skellitor. No 43.

In a contract of marriage, a husband was bound to employ a sum in conjunct-fee and liferent, and

GEORGE FORBES of Skellitor being obliged, in his daughter Jean's contract of marriage with Duncan Schaw portioner of Crathenare, to pay 1000 merks of tocher, to which the husband was to add 2000 merks, and employ it to him and her in conjunct-fee and liferent, and to the heirs to be procreated of the marriage

No 43.
to the heirs of the marriage; whom failing, a certain part to belong to the wife and her heirs. Being a qualified fiar, the husband was found liable to find caution on uplifting the money.

after their decease; which failing, 1000 merks to belong to the wife and her heirs; and being obliged to employ and re-employ the 1000 merks of tocher at the sight of his wife's father, it fell out that the wife died, leaving only a daughter, who died also before the husband: The husband then pursued his father-in-law for the tocher.

Alleged for the defender, That by the contract, failing heirs of the marriage, the 1000 merks was to belong to the wife's heirs, and *de facto* that case hath existed.

Answered, The pursuer was fiar, and the wife's heirs were but substitute to him by the clause of succession, 'which failing,' and so had no present interest during his life, and after his death must be liable to his debts contracted, or to be contracted for onerous or rational causes, as in Andrew Bruce's case, No 3. p. 607 and No 27. p. 4232. 2*do*, The condition, 'failing heirs to be procreated,' did not exist, in so far as there was a child procreated, which survived the dissolution of the marriage.

Replied, Such provisions to wives and their heirs being onerous, they cannot be ineffectual; and whether conceived by way of succession, or of a distinct obligement, *perinde est*; for writers of contracts, especially in the Highlands, are not obliged to know these subtleties. 2*do*, The condition, 'failing heirs of the marriage,' doth not fail by the naked existence of heirs; but *quandocunque deficiunt*, there is place for the substitute. 3*tio*, The other clause, 'to employ and re-employ at the defender's sight,' imports a qualified fee in the husband, and an obligement in favour of the wife's heirs designative, and not as heirs substitute to him.

Duplied, That in Andrew Bruce's case, 1st and 21st December 1680, though the obligement to re-employ was included in the contract, yet the Lords found the wife and her heirs to be heirs of provision to the husband.

The Lords found the wife and her heirs to be heirs of provision to the husband, and decerned the wife's father to pay the 1000 merks to the husband, who was conjunct fiar thereof; but ordained the husband to re-employ the same in the terms of the contract of marriage, or to find caution for that effect, he being but a qualified fiar; and found, that the existence of the heir of the marriage did not exclude the substitution. But they did not consider how far the wife's heir would be liable to the husband's creditors, or his deeds for rational causes. And this interlocutor differs somewhat from Andrew Bruce's case, where the Lords did not ordain him to employ either the tocher or the conquest, conform to the contract, though there was an obligement to employ and re-employ the tocher and his stock at the sight of the wife's friends. In the reasoning there was difference made between substitutes for onerous causes, as to the husband or granter's power of burdening them. *See* Substitute and Conditional Institute.

Fol. Dic. v. 1. *p.* 309. *Harcarse*, (Contracts of Marriage.) *No* 386. *p.* 100.

*** Fountainhall reports the same case [illegible].

No 43.

In a case debated in presence between Forbes of Skellitor and Duncan Schaw, the Lords found an assignee to a tocher by the husband had right thereto, but with the burden of the conditions contained in the husband's contract of marriage; and that he behoved to find caution to take it in these terms.

Fountainhall, v. 1. p. 477.

1707. *June* 12.

M'Dowal of Logan and Rosina Agnew his Cedent, *against* Andrew Agnew of Scheuchan.

No 44.

A father granted a bond of provision to his daughter, for her portion-natural, payable after his decease, with this clause, 'that in case 'she died 'without 'heirs of her 'body, the 'same should 'return to 'the granter.' When she was old and had no children, she assigned the bond for onerous causes. The assignee was found entitled to uplift the sum, without finding caution to re-employ.

Peter and Andrew Agnews, elder and younger of Scheuchan having granted to Rosina Agnew daughter to the former, and sister to the latter, a bond bearing for love and favour, and that she might be provided in a competent portion, whereby they bound and obliged them and their's to pay to her, her heirs, executors or assignees, at the first term after her father's decease, the sum of 2500 merks Scots, as for portion-natural she could succeed to by the death of father or mother, with annualrent from the term of payment; with this provision, that if she died without heirs procreated of her own body alive the time of her decease, the money should return to the granters of the bond and their heirs. This bond Rosina Agnew assigned for an equivalent onerous cause to M'Dowal of Logan, who charged Andrew Agnew of Scheuchan for payment, after Peter the father's decease. Scheuchan suspended upon these reasons, 1*mo*, The bond is for love and favour, and for Rosina's portion-natural, which she could succeed to by the death of her father or mother, and besides the sum therein, she got liberally at the death of both. 2*do*, The suspender was only obliged to pay the sum with this provision, that if Rosina died without heirs of her own body, it should return to him and his heirs, which ingrossed quality and condition of returning exists already, she being superannuated without any children; and it doth not alter the case, that the charger is an assignee for an equivalent onerous cause; for he may blame himself that he gave money for so clogged a right.

Answered for the charger, 1*mo*, Albeit the bond be in satisfaction of what the charger's cedent could succeed to by the death of father or mother, that did not exclude their liberality to her in their own lifetime; and all she had from them was but inconsiderable, considering their fortune. 2*do*, The quality in the bond is a substitution, and not a condition either suspensive or resolutive; not a suspensive condition, because the bond provides immediate execution; nor yet a resolutive one, because it neither hinders execution for payment, nor doth annul and make void the obligement upon the non-existence of children; but