cond wife's decease; and in case there were children of the second marriage, and that there were no children of the first marriage, then the children of the second marriage were to have the half of the fee of their father's estate; and the wife being deceased, and there being no children of the marriage, Kinsman the husband pursues a declarator against John Scott, for declaring that the clauses in the contract of marriage, in favours of the wife's heirs, did import only a substitution and destination of succession, and that, notwithstanding thereof, he was still fiar, and might dispose of his estate as he pleased. *Answered;* That the termination of the fee being to the wife's heirs, the husband cannot, by any voluntary gratuitous deed, alter or evacuate the same, especially he being limited by the subsequent clause in the contract, by which it is provided, that, in case of his second marriage, he might provide his wife in liferent, to the half of his estate, without prejudice to the first wife's heirs, to succeed to the fee, after the second wife's decease; and that if there were children of the second marriage, they only should have right to the fee, in case there were no children of the first marriage. THE LORDS sustained the allegeance proponed against the declarator, in respect the husband's fee is qualified by the posterior clause of the contract, and therefore assoilzied the defender from the declarator.

Sir P. Home, MS. v. 3.

No 107.

1693. *December* 20. YORKSTON *against* SIMPSON.

No 108.

IN a pursuit betwixt Yorkston and Simpson, the LORDS having considered the contract of marriage between Yorkston and Simpson's sister, whereby he was obliged to provide 5000 merks of his own means, with her 5000 merks of tocher, to himself and her in liferent, and to the bairns in fee, and, failing bairns, 5000 merks of it to return to the wife's heirs; they found this more than a naked destination; and seeing he was married again, and had given large provisions in his second contract, they would not oblige him to find caution to secure the 10,000 merks to the child of the first marriage, and his substitute *quoad* the half of it, because he had liberty to trade with it; but they inclined to cause him grant his own personal bond for the said sum, that it might redd marches between his children of the second marriage, and might be forthcoming to the substitute in case the child died, reserving his own liferent of it, and the term of payment being after his decease; for he was not fiar of the sum, (as these conjunct fees and liferents imply, when inserted in bonds,) yet might dispose of it for necessary causes, if he were reduced to necessity and straits. The like was decided, 14th February 1678, Carnegy against Mauld, See APPENDIX.

Fountainhall, v. 1. *p.* 581.