

Pleaded for Anne Turnbull, in a reclaiming petition; The provision to the children of Janet was a provision *liberis nascituris*, as well as to her children then existing. But, as the fee of the subject could not remain *in pendente*, Janet was, in the construction of law, fiar; and the eventual fee provided to the children imported nothing more than a *spes successionis*, or substitution, to take effect after their mother's death; Children of Frog *contra* his Creditors, 25th November 1735, No 55. p. 4262.; Lillie *contra* Riddell, 1741, No 56. p. 4267.; If the fee was in Janet, the petitioner, as her nearest of kin, must be entitled to take up the succession.

No 41.

THE COURT refused the petition, without answers. See LEGACY.

Act. Blair.

Alt. G. Wallace.

Eol. Dic. v. 3. p. 213. Fac. Col. No 38. p. 66.

S E C T. II.

Both parent and children named fiars.

1665. December 12. MR JOHN PEARSON *against* MARTIN and his SONS.

MR JOHN PEARSON, by his contract with Eupham Martin, did conceive the clause of his tocher in these terms, that it should be payable to him and her, the longest liver of them two, in conjunct-fee and liferent, and to the heirs of the marriage in fee; which failing, to return to the wife's heirs. By a second contract betwixt the husband and his wife, it was agreed that that clause should be altered; and that, failing the heirs of the marriage, it should return to the man's heirs, who thereupon pursue declarator of right by virtue of the second contract. The defender being absent.

THE LORDS advised the cause, wherein the difficulty appeared to be, that the tocher was provided to the bairns in fee, so that the husband and wife could not alter the succession, being both liferenters, because that the clause bears to them in liferent, and to the bairns in fee; yet the Lords sustained the declarator, seeing the husband and wife were named conjunct-fuars, so that either of them behoved to be fiar, and the adjection of 'and liferent,' could only be understood of the persons that were liferenters, and albeit it was exprest to be the bairns in fee, yet that could be but of a substitution, seeing there were no bairns then existent.

No 42.

A clause in these terms, 'Payable to the husband and wife in conjunct-fee and liferent, and to the heirs of the marriage in fee,' makes the husband fiar, and the heirs only substitutes.

Eol. Dic. v. 1. p. 301. Stair, v. 1. p. 325.

* * Newbyth mentions the same case :

No 42.

IN an innovation of a contract of marriage, sustained at the instance of Mr John Pearson against his own Son, procreated betwixt him and Euphan Martin, Euphan being dead, and who after the marriage did innovate the former contract conceived in her favours, and to the prejudice of her husband ; but it was sustained, in regard there was no compearance, and without prejudice of the heir of the marriage his right, conform to the tenor of the contract.

Newbyth, MS. p. 45.

No 43.

A bride's father became bound to pay a certain sum in name of tocher, and the husband obliged himself to add as much to it, and to take the whole to himself and his wife in conjunct-fee and liferent, and to the children of the marriage in fee. The husband having assigned the tocher, the Lords found the father was fiar, and that the children could not challenge the assignation.

1710. February 24. The EARL OF BUTE against MACLEA.

By contract of marriage betwixt John Ochiltree, merchant in Rothsay, and Katharine Maclea, the bride's father obliges him to pay in 400 merks of tocher, and Ochiltree the husband is bound to lay as much against it, and to take the whole 800 merks to himself and his wife in liferent and conjunct-fee, and to the bairns of the marriage in fee. Ochiltree, as tenant to my Lord Bute, owing some rents, he assigns him to the 400 merks of tocher, and Maclea being pursued for it, his defence was, it is expressly provided to my daughter in liferent, and her bairns in fee, which destination the husband could not disappoint nor invert. *Answered*, The husband was fiar, and had the power and disposal ; and if a creditor of his had arrested it, he would have got a decreet of furthcoming, notwithstanding this quality ; and he, as being assignee for an onerous cause, may do the same. THE ORDINARY found the children could not quarrel the assignation, and that the father was full fiar *quoad* them ; but, as to the wife's liferent, she had an interest, not indeed to retain the sum from the assignee, but, on his receiving it, that he should find caution to make the annualrent of the sums assigned furthcoming to her in the event of her out-living the husband. The Earl having reclaimed against this interlocutor by a bill, he *urged*, that it was a mere personal provision, noways affecting the money, and he was full proprietor ; and it might exceedingly retard commerce if such an embargo were laid upon it, for, amongst the commons, their great design was to trade with the tocher, by which they may triple their annualrent, and not to lie as a dead stock.—THE LORDS considered the interlocutor did not stop uplifting, but only secured the liferent to the wife in case of the husband's predecease ; and being in a contract of marriage, they refused the bill, and adhered.

Fol. Dic. v. 1. p. 301. Fountainhall, v. 2. p. 572.