

No 17. then comes to be precisely the same as if the obligation had been taken to the father in liferent, and the children *nominatim* in fee, when the father, beyond dispute, would have been only a naked liferenter.

The trustees could not denude themselves of the trust before the existence of an heir of the marriage. They then became bound to convey the funds in their hands to Hugh Seton in liferent, and the heirs *nominatim* in fee; and so far as Mr Smith had not fulfilled his obligation, to convey it and the *jus exigendi* in the same terms.

The case is the stronger, that the obligation did not flow from the father, but from a third party, who vested nothing in the father, but a right of compelling the trustees to give him the liferent of the subject, they continuing fiars till the heirs of the marriage obliged them to denude in their favour.

The Lord Ordinary reported the cause on memorials.

The Court were unanimously of opinion, that the effect and sole intention of appointing trustees was to prevent the father from being fiar. The subject (it was observed) was vested in the trustees, who held the fee for behoof of the children, and the liferent only for the father. If they had paid the sum to Hugh Seton, they would, as infringing on the trust, have been liable in damages to Archibald,

THE LORDS repelled the objection, and sustained Archibald Seton's claim.

Reporter, *Lord Swinton,*

For Archibald Seton, *Dean of Faculty.*

Act. Solicitor-General, Patison.

Clerk, *Menzies.*

D. D.

Fol. Dic. v. 3. p. 209. Fac. Col. No 44. p. 92.

S E C T. II.

Where the Right flows from the Wife.

No 18.

1611. December 13. KINNAIRD against PITFODDLES.

A reversion being granted to a husband and wife, and their heirs, the wife having been fiar of the lands wadset, was found also to be fiar of the reversion.

THE Laird of Kinnaird of that Ilk, as heir by progress to umquhile Thomas Kinnaird of Culbin, pursued this Laird of Pitfoddles, as heir and successor to umquhile Gilbert Merzies burgess of Aberdeen, to hear and see the half lands of Pitfoddles redeemed by payment of 40 merks, conform to a reversion of the said lands granted by Gilbert to Thomas Kinnaird of that Ilk, Geillis Murray his spouse, and to their heirs. It was *excepted*, that no redemption could be granted upon that reversion, which was dated anno 1428, because it was in effect

taken away by a posterior charter of the said lands granted in anno 1430, by the saids Thomas Kinnaird and Geillis Murray, for greater sums of money; which charter was ratified thereafter by the said Geillis in her widowhood, and the-said ratification confirmed by King James the Second, and ingrossed in his charter under the Great Seal, anno 1440; likeas, there was a precept of sasine direct upon the said posterior charter by the said Thomas and Geillis, with a sasine *in secunda cauda*. To this was *answered*, That the second charter could make no derogation to the reversion, because it was not shewn and produced, neither could the ratification of the wife, ingrossing that charter, supply the not production, nor the King's confirmation of the ratification, because it did not confirm the charter, nor make mention of the production thereof, but only of the ratification, and the precept of sasine might as well agree with the first charter extant as with the second. In respect whereof, the Lords repelled the exception. Thereafter, the defender *alleged*, that the reversion being given to Thomas Kinnaird and Geillis Murray, and their heirs; and giving power to the said Thomas and Geillis to redeem, and obliging Gilbert Menzies to renounce to the said Thomas or Geillis, that Geillis had renounced the reversion which she had power to do. THE LORDS considering, that when reversions were given to the husband and the wife, and their heirs, that it could make no further power to the wife, but to redeem, to the effect she might bruik during her lifetime, the fee returning to the heirs, that it gave not power to the wife to discharge the reversion, and therefore they repelled the exception. It was thereafter offered to be proven, that Geillis Murray was heritrix of the land, and so the reversion being given *aque principaliter* to her of her own heritage wadset, it agreed with law and reason, that, after her husband's decease, she might discharge the reversion; which duply was found relevant. But it was thereafter taken away by allegeance, that the pursuer offered to prove, that long before the discharge of the said reversion, granted in anno 1438, the said Geillis Murray made resignation of the lands in the hands of King James the First, upon the Friday before he was slain in anno 1437, in favour of Allan Kinnaird of that ilk her son, whereupon he obtained infestment under the Great Seal from King James the Second anno 1440; and so she being denuded by resignation in anno 1437, she could not discharge the reversion thereof. In respect of which answer, the LORDS repelled the exception and duply.

Fol. Dic. v. 1. p. 298. Haddington, MS. No 2336.

1623. *March 11.*

DOUGAL *against* HENDERSON.

A SUM being payable to a woman and her husband, and he long surviving her and then deceasing, the LORDS sustained action at the instance of the wife's

No 19.