

against John Rind, debtor of the sum, by his foresaid bond, for payment thereof to the compriser; in the which pursuit the husband, who was bankrupt, being absent, his wife compearing, and her father, the said Park, payer of the tocher, where they *alleged*, That the sum could not be comprised by the husband's creditors for the husband's debts, seeing the husband was not proprietor of the sum, but only liferenter; for the contract and bond bore, 'the sum to be paid to the husband, and the wife in conjunct-fee, and to their heirs betwixt them heritably; and failing of heirs betwixt them, to the wife's heirs;' whereby it is evident, that the wife is fiar, in respect of the termination of the security so declared, and that all the parties have thereto consented, and that the father has provided the money, and gave it after that manner to his daughter and son-in-law, who might affect it with what condition he pleased to annex thereto; and therefore the most that can be comprised by the husband's creditors, is only his naked liferent, seeing no more right subsisted in his person. And the other creditor contending, That the fee remained in the husband's person, notwithstanding of the destination foresaid, and termination of payment in the wife's heirs, failing of heirs gotten betwixt them; because, if there be bairns gotten betwixt them, (as there are two bairns living betwixt them,) they will ever exclude the wife's heirs; which bairns so gotten, if they were to seek this sum after their parents decease, would seek it not as heirs to their mother, but as heirs to their father, and consequently the right must belong to the husband, and not to the wife; and it were a dangerous preparative, tending to the prejudice of the whole country, if money conditioned to any man in tocher, after this manner, were not at the husband's absolute disposition.—THE LORDS found, That the property of this money pertained to the husband, and that he had full power and right to dispoise thereupon at his pleasure, with reservation only of the liferent thereof to his wife; and consequently, that the creditor Graham, who had comprised the sum, had full right thereto, he always finding caution to make the same furthcoming to the wife, to be used by her for her right of liferent, in case she survive her husband; and found, that the property subsisted not in the wife's person, notwithstanding of the termination thereof foresaid, that it should be paid to her heirs, failing of heirs begotten betwixt her and her husband.

Act. *Advocatus & Stuart.*

Alt. *Nicolson, Baird & Johnston.*

Clerk, *Scot.*

Fol. Dic. v. 1. p. 299. Durie, p. 870.

1667. February 20: CRANSTON against WILKISON.

By contract of marriage betwixt Wilkison and his spouse, he is obliged to infest her in a tenement, expressed therein, and in all the conquest during the marriage; which infestments were to be taken to them, the longest liver of them two in conjunct-fee, and their heirs betwixt them; which failing, to the

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longed to the husband, and was liable to be affected by his creditors, they finding caution to make the same furthcoming to the wife for her liferent, in case she survived her husband.

No 24.

A husband was obliged by contract of marriage, to take a tenement to himself and wife, and

No 24.
the longest
liver of them
two, in con-
junct-fee, and
their heirs be-
twixt them ;
whom failing,
to the heirs
of the hus-
band's body ;
whom all fail-
ing, to the
wife's heirs
whatsoever.
The husband
was found
fiar.

heir's of the man's body ; which failing, to the wife's heirs whatsoever ; after which the husband purchased a piece of land, but took the infeftment thereof to him and his wife, and the heirs betwixt them ; which failing, to his own heirs whatsoever, omitting the wife's heirs. This Cranston obtains himself infeft in this conquest tenement, as heir to the wife, and thereupon obtained decret for mails and duties. Wilkison, as heir to the husband, pursues reduction of the decret upon these grounds ; 1st, That Cranston's infeftment, as heir to the wife, was null, because the wife was not fiar, but liferenter ; 2dly, The wife having accepted of an infeftment, posterior to the contract, without mention of her heirs, that innovates the provision of the contract, and exeludes her heirs.— It was answered, first, That the man and wife being conjunct-fiar, the wife was fiar, and the husband but liferenter ; because the last termination of heirs whatsoever, terminated upon her ; 2dly, Albeit Cranston had taken his infeftment wrong, Wilkison cannot quarrel the same ; because he, as heir to Wilkison, was obliged to infeft him, as heir to the wife ; and to the posterior infeftment, it is contrary to the provision of the contract of marriage, and there does appear no accepting thereof by the wife ; 3dly, Cranston is not obliged to dispute the validity of this right, because he hath been infeft *qualitercunque*, and by virtue of his infeftment hath been seven years in possession, whereby he hath the benefit of a possessory judgment, ay and while his infeftment be reduced.

THE LORDS found, That even by the contract of marriage the husband was fiar, and not the wife ; but that the wife's heirs of line were heirs of provision to the husband, and that if there had been an heir of the marriage, or an heir of the man's body, they could never have been served heirs to the wife ; and that by the deficiency thereof, the condition of the fee cannot change ; and therefore they found that Cranston was wrong infeft ; yet they found the allegiance of his seven years possession relevant to give him the benefit of a possessory judgment, without disputing whether the provision of the contract of marriage, in favour of the wife, was derogated, by the posterior infeftment, omitting her heirs.

Fol. Dic. v. 2. p. 299. Stair, v. 1. p. 444.

No 25.
A bond was
taken payable
to a husband
and wife, and
the heirs be-
twixt them,
or assignees,
whom failing,
to the heirs of
the last liver.
The husband

1668. January 23.

JOHN JUSTICE against MARY STIRLING.

THERE was a bond granted by Stirling of Coldoch, whereby he granted him to have received from umquhile John Justice, and Mary Stirling his spouse, the sum of 1300 merks, and obliged him to pay to the said husband and his spouse, and longest liver of them two, and the heirs gotten between them, or their assignees, which failing, to the heirs of the last liver. The said Mary having survived, did uplift the sum, and now John Justice (as heir of the marriage to his father), pursues his mother to make forthcoming the sum, and employ the same