

1705: November 21

The CREDITORS of Earneslaw, *against* MR ALEXANDER and ROBERT DOUGLASES.

THE lands of Earneslaw being adjudged from Mr James Douglas, certain creditors of the adjudger who have now right to that adjudication, pursue a declarator, that the lands adjudged did belong to Mr James Douglas the debtor, and that the legal is expired.

It was *alleged* for Robert Douglas, son to the said Mr James, and for Mr Alexander Douglas, That the said lands did not belong to Mr James, but to Grace Greden, his wife, or John Greden her brother; and that the same did now belong to them, by virtue of an adjudication, led at the instance of the said Mr Alexander, who adjudged from Robert, as specially charged to enter heir to his mother and uncle. And for clearing where the right of fee was lodged, there was produced the contract of marriage betwixt Mr James and Grace Greden, whereby the lands were disposed in favour of Mr James in life-rent, and the heirs of the marriage in fee; which failing, to Mr James, his heirs and assignees, reserving Grace her life-rent; by which contract Mr James the husband had nothing conveyed to him, but the life-rent, and the fee remained with the wife, seeing it could not be conveyed to the heirs of the marriage who were then not-existent.

It was *answered*, The husband was undoubted fiar by the contract, and by the charter and sasine following upon it; and albeit the import of the first clause be dubious, yet the subsequent clauses do clearly determine the fee in favours of the husband; for the obligation to infest is conceived in favour of the husband and wife in conjunct-fee and life-rent, and to the heirs of the marriage; which failing, to her husband's heirs and assignees; and the procuratory of resignation, charter and sasine following thereupon, are in the same terms, still preferring the heirs and assignees of the husband to the heirs of the wife, albeit descending of her body by any other marriage. And the clause of warrandice is yet more clear; for thereby the wife is obliged to warrant the lands disposed in favours of the husband, and his foresaids; which does demonstrate that the husband was the fiar, and his foresaids were his heirs, whether of that marriage, or his extraneous heirs; so that, if there had been no debt contracted by the father, Robert Douglas, the heir of the marriage, would have been heir to his father, and been creditor in that clause of warrandice, and had the benefit of the hail other obligations in favour of his father's heirs. The teinds are also by the same contract disposed to the husband and his heirs; and because the right of the teinds was redeemable, in case of redemption, he is bound to re-employ; and lastly, by the said contract she accepts the life-rent of the teinds, and her conjunct infestment of the lands, in full satisfaction of all life-rent, &c.

No 21.

Provision by a wife to her husband, and heirs of the marriage in fee, reserving the wife's life-rent, found to constitute the husband fiar, the meaning of the contract being cleared by subsequent clauses

No 21.

It was *replied*, The defenders oppone the dispositive clause of the contract, which clearly expresses the husband's right to a liferent, and must regulate and interpret all the subsequent clauses, especially seeing they are capable of a reasonable interpretation consistent with the mother's fee and the father's liferent; for the obligation to infest, and the procuratory of resignation, both in favour of the husband and wife, in conjunct-fee and liferent, does not constitute both fiars, but resolves into a liferent, either in favour of the husband or the wife; and the wife being the original fiar, and having disposed in favour of her husband in liferent, the conjunct-fee resolves in a liferent in favour of the husband, and reserves her own right of it. Neither does it alter the case, that the husband's heirs whatsoever are substitute to the heirs of the marriage preferable to the wife's heirs; because the wife being the fiar, the husband's heirs of line behoved to be heirs of tailzie and provision to the wife, and so represent her and not the husband, in these lands; and the warrandice imports no more than the former clause; and the disposing of the teinds to the husband in fee, in other terms than the lands are disposed, is an argument for the wife's fee of the lands; for why should the style have varied, if the design had been the same in both? And the wife's accepting the liferent of the teinds, and the conjunct infestment of the lands, imports nothing, because she was indeed liferenter of the teinds; and the conjunct infestment of the lands determines not the wife to be the liferenter, but is still to be interpreted by the first and dispositive clause.

It was *duplied*, That the whole tenor of the contract clears the design of parties, which must undoubtedly be the rule of interpretation of the contract; and the subsequent clauses do fully clear the meaning and intention of the first, whereof the sense was only dubious, by the inadvertency or ignorance of the writer, who did not consider that the fee could not be pendent till there were children procreated of the marriage, and that the heirs of the marriage must in due form either succeed to the father or mother; nor had he any thought of contracting debts that might carry away the estate from the marriage; but he frames the dispositive clause so, as both the husband and wife were designed liferenters, and the children fiars; but that error was rectified and corrected by the subsequent clauses, in which there is no regard had to the wife's heirs by any other marriage, but the husband's heirs and assignees substitute to the heirs of that marriage, and she obliged to warrant the lands in favour of the husband and his foresaids; in which clause the heirs of the marriage are comprehended under the husband's heirs. And the disposition of the teinds, in more clear terms than the lands were disposed in favour of the husband, does argue also the inadvertency of the writer; but no imaginable reason could be afforded for disposing the fee of the teinds to the husband if the wife had been designed to be fiar of the lands. And lastly, the procuratory of resignation is the immediate warrant of the real right, and the charter and sasine being conform, creditors and all concerned finding the fee clearly constituted in the husband's person by the infestments, were in *bona fide* to contract; and creditors and pur-

chasers would be left in great uncertainty, if they might not safely deal with persons whose fees were clearly constituted by charters and sasines, and the immediate warrant thereof.

No 21.

'THE LORDS found the husband was fiar.' *Vide* 29th November 1705, *inter eosdem, voce* REGISTRATION.

Fol. Dic. v. 1. p. 298. Dalrymple, No 64. p. 82.

. Forbes reports the same case :

MR ALEXANDER PATERSON having adjudged the estate of Earneslaw from Mr James Douglas, as having right thereto from Grace Greden his spouse, and heiress of that estate ; and Mr Alexander Douglas having adjudged from Robert Douglas, son to the said Mr James and Grace Greden, as charged to enter heir to John Greden younger, his mother's brother, Mr Paterson's creditors raised reduction of Mr Douglas's right, and a declarator of their own.

Alleged for Mr Alexander Douglas, That Mr James was not in the fee of the estate, but only a liferenter, in so far as by contract of marriage betwixt him and Grace Greden, she 'dispones to him in liferent, and the heirs to be pro- created betwixt her and him in fee ; which failing, to the said Mr James, his nearest heirs and assignees whatsoever.'

Replied for the Creditors ; The husband by the contract is clearly provided to the fee ; for although the first words thereof, 'disponing to him in liferent, and to the bairns in fee,' be a little perplexed by the writer ; yet the following words, 'which failing, to him, his own heirs and assignees, reserving her liferent,' clear his title to the fee. In fortification whereof, the obligation to infest, and procuratory of resignation, is to him and her in conjunct-fee and liferent, and to the heirs of the marriage in fee ; which failing, to his own heirs and assignees. The writs are all assigned, and the obligation of warrandice conceived in favour of him, his heirs or assignees ; and he did all acts of property a fiar could do, such as granting infestments and tacks without her consent, and receiving renunciations in her lifetime.

Duplied for the defender ; Though in the procuratory of resignation, the word 'conjunct-fee' is adjected to him and her, and longest liver of them two, yet the dispositive clause bears only to him in liferent ; and a conjunct-fee to man and wife, sometimes importing the fee to be in the husband, and sometimes in the wife, receives various interpretations according to different circumstances. And here the estate coming by the wife, and the dispositive clause mentioning only the liferent in favour of the husband, doth strongly presume the fee to have been retained by the wife ; and that although the clause terminates in the husband's heirs ; for these must be considered as substitute heirs of provision to the wife.

No 21.

THE LORDS declared, That by the contract of marriage, with the charter and sasine following thereon, Mr James was fiar. *Vide* 29th November 1705, *inter eosdem, voce* REGISTRATION.

Forbes, p. 42.

S E C T. III.

Where the Wife's Heirs last in the Institution.

1612. *July 24.*

JAMES RAMSAY of Cockpen *against* JOHN MAXWELL of Conkaith.

No 22.

FOUND, That the heritable right is not ruled by the last termination, but that it pertains to the heir of the first fiar. This found in an infestment taken by Nicol Ramsay of Cockpen, and Elizabeth Rigg his spouse, in conjunct-fee, and to the heirs betwixt them; which failing, to the heirs of his own body; which failing, to the said Elizabeth, and the heirs of her whatsoever.

Fol. Dic. v. 1. p. 299. Kerse, MS. fol. 68.

1639. *January 29.* GRAHAM *against* PARK and GAIRDEN.

No 23.

The wife's tocher in a contract of marriage, was ordained to be paid to the husband and wife in conjunct-fee, and to their children heritably, and failing of heirs betwixt them, to the wife's heirs. There being heirs of the marriage, it was found, that the property of the sum provided be-

By contract of marriage betwixt one Park, daughter to another Park burghess of Edinburgh, and William Gairden her future spouse, the said Park, father to the woman contracted in marriage, is obliged to pay to the said Gairden the sum of 5000 merks in tocher, to which sum the said future husband obliged him to add other 5000 merks of his own money; which whole sum, the husband is obliged by the contract to employ upon land or annualrent to himself, and his said future spouse in conjunct-fee, and to the heirs gotten betwixt them; which failing, the one half to the heirs of the husband, and the other half to the heirs of the wife; according whereto, after the marriage, the father to the wife, having the said 5000 merks promitted in tocher, the same was lent to John Rind, merchant burghess of Edinburgh, who by his obligation was obliged to pay that sum to the said husband, and to the wife, and to their heirs; and failing of them, to the wife's heirs, conform to the contract. This sum being thereafter comprised by one Graham an Englishman, for a debt owing to him by the said Gairden, husband to the wife; and upon this comprising pursuit being moved