

1714. June 2.

CREDITORS of Lieutenant ROBERT PRINGLE *against* JOHN ERSKINE of Balgoronie.

JOHN ERSKINE of Balgoronie, by his bond, dated April 18. 1710, granted him to be justly addebted to Margaret Erskine, his sister-german, and Lieutenant Robert Pringle, the sum of 4000 merks principal, which, with annual-rent to the term of payment, he bound and obliged him, his heirs, &c. to them and longest liver of them two in conjunct-fee and liferent, for their liferent use allenary, and to the heirs and bairns procreated and to be procreated betwixt them in fee; which failing, to the longest liver of the said Margaret Erskine and Lieutenant Robert Pringle, their heirs and assignees whatsoever, at Candlemas 1711 years, with this condition, that it should not be lawful for them, or in their power, or in the power of either of them, to uplift or assign the foresaid principal sum, or any part thereof, without the special advice and consent of two persons named in the bond. Lieutenant Pringle's Creditors arrested the money in Balgoronie's hand, and pursued a furthcoming thereof, as belonging to their debtor, upon this ground, that he was fiar; because, there being no bairns of the marriage, and the money failing them provided to the wife and husband, their heirs and assignees, the heirs of the husband as *dignior persona* are understood and he is fiar *prærogativa sexus*, and the wife is only liferenter, unless the contrary be expressly provided in favour of the wife; which rule of interpretation ought rather to hold in this case, where, by a provision in the bond, the husband is debarred from disposing of the fee, seeing that clause had been superfluous if the husband had no such power.

Answered for the defender; Tho' conjunct-fees to husband and wife do generally resolve but in a liferent to the wife, and make the husband fiar, that rule suffers this exception, that where the right was originally the wife's, she is understood to continue the property in her own person, unless the contrary appear from the tenor of the writ itself; for albeit, *in dubio*, law regards the husband as the *dignior persona* where no other circumstances appear to influence the decision; that cannot hold in this case, where the wife is understood to prefer herself, seeing *nemo præsumitur donare*; and besides, she is first named in all the clauses of the bond. Nor can any thing to the contrary be inferred from the clause restraining the husband's power of uplifting, as if that were unnecessary if he were not fiar; because, *imo*, Any such argument is expressly obviated and taken off by the tenor of the writ itself, declaring, that the money is payable 'for their liferent use allenary.' *2do*, That clause was necessary, though the husband was not fiar, because, *jure mariti*, he had the administration, which is thereby taken away.

Replied for the pursuers; *imo*, It imports not that the money came by the wife, for that was not found to make her fiar, 12th July 1671, Gairns *contra*

No 54.

A bond was granted to a husband and wife in conjunct-fee and liferent, for their liferent use allenary, and to the heirs of their marriage in fee; whom failing, to the longest liver of the spouses, their heirs or assignees, with this condition, that it should not be in the power of either of them to uplift or assign the principal sum, without the consent of trustees named in the bond. The Lords found the husband was not fiar, and that it was not affectable by his creditors.

No 54.

Sandilands, No 26. p. 4230. Nor doth it alter the case, that she is first named in all the clauses of the bond, as was decided, 23d July 1713, Edgar *contra* Sinclair, No 7. p. 4201. *2do*, However the money might originally have belonged to the wife, yet it is presumed to have been a moveable sum, the same being lent out upon security during the marriage, and so belonged to the husband *jure mariti*, conform to the practise, 26th January 1681, Countess of Weems *contra* L. May and M'Kenzie, *voce* SURROGATUM.

Duplied for the defender; *imo*, The decisions cited do not come up to the present case; for, in that betwixt Gairns and Sandilands, the conveyance being in a contract of marriage, where no other tocher was provided, it may be understood as given *nomine dotis*, which is onerous *ad sustinenda onera matrimonii*; and therefore, the fee was justly adjudged to belong to the husband, who is naturally obliged to provide for his family; whereas, in the present case, the sum in bond remained in property with the wife, or was a donation from the brother *suo modo*. As to the other practise betwixt Edgar and Sinclair, the donation there seems not to have been purely gratuitous in the granter, seeing the bond bears, not only 'for love and favour,' but also 'for other onerous causes.' Besides, that there it doth not appear, as in the present case, that the granter expressly designed to exclude the husband from the fee. *2do*, If the money did originally belong to the wife, and was secured to her by bond bearing annualrent, the uplifting and re-employing in these terms, would not make it fall to the husband as moveable, 21st February 1679, Cockburn *contra* Burn, *voce* HUSBAND AND WIFE; so that no argument can be drawn from the case of the Countess of Weems *contra* L. May and M'Kenzie, unless the pursuers can instruct, that if the money did originally belong to the wife, it was not secured by a bond bearing annualrent, which is not probable, the sum being considerable.

THE LORDS found, that the fee of the principal sum contained in that bond, did not belong to the Lieutenant, the common debtor, and therefore cannot be affected by his debtors.

Fol. Dic. v. 1. p. 303. Forbes, MS. p. 43.

1735. November 25.

THE CREDITORS OF ROBERT FROG *against* HIS CHILDREN.

No 55.
A disposition to one in life-rent, and the heirs of his body *nascituri* in fee, found to resolve into a right of fee in the father, who was therefore

THE deceased Bethia Dundas did, for the love and affection she bore to Robert and James Frogs her lawful oyes, sons to the deceased James Frog her eldest son, and the other persons after named, 'Dispone certain houses belonging to her in Edinburgh in favours of the said Robert Frog, her eldest oye in liferent, and to the heirs lawfully to be procreated of his body, in fee; and, failing of him by decease without heirs of his body, to the said James Frog,