

press opinion of Craig, *L. 2. Dieg. 22.* and that the construction put upon that opinion of Craig's, that it referred only to proper feus and not to money, was without foundation, his reasoning in that passage applying to the one as well as to the other.

There was no doubt but the husband was so far fiar, as not only to have the disposal of the money during his life, but that it was also affectable by his creditors. But the question turned upon this, Whether by the words, *their heirs*, were only understood the heirs of the marriage, who alone could be properly called *their heirs*, and that the further substitution of the husband had *per errorem* been neglected, as Craig *dicto loco*; or if the natural force of the words, *their heirs*, in this case, was the same as if the bond had borne, and to the *heirs of the longest liver*? Which last prevailed as above.

Kilkerran, (FIAR.) No 1. p. 189.

1747. November 6.

RIDDELS against SCOTT.

IN the year 1717, Walter Scott of Whitefield, now of Harden, granted bond, bearing him to have borrowed 1200 merks from John Nisbet, writer to the signet, and Agnes Riddel his spouse, and obliging him to repay the same against Whitsunday then next, to the said John Nisbet and Agnes Riddel spouses, and longest liver of them, in conjunct-fee and liferent, their heirs, executors, and assignees; but declaring, that notwithstanding the said conception of the fee of the principal sum, it should still be in the power of the said John Nisbet, and his spouse, to dispose thereof as follows, viz. the fee of 500 merks to be at the disposal of John Nisbet, and the other 700 merks at the disposal of Agnes Riddel, but that it should be noways in the power of John Nisbet to assign or discharge the premises, without the consent of Agnes Riddel.

Agnes, the wife, having survived John the husband, Christian and Jean Nisbets, her executors, brought an action against Harden, for payment of the 1200 merks, with the annualrent thereof resting. His defence was compensation by two bonds, granted by John Nisbet the husband, one for 500 merks, and the other for 200 merks, to both which Harden had obtained assignation after the death of John Nisbet the husband.

So far as related to the 500 merks, the compensation was admitted, as it was plain, that the husband was, by the conception of the bond, to that extent, fiar, to take effect from the wife's death; and higher it could not be pleaded, as the wife, by the conception of the bond, was liferentrix of the whole: But the point disputed was, Whether or not compensation was to be admitted upon the bond for 200 merks, which the pursuers objected to upon this ground, that by the conception of the bond the fee of the 700 merks was in the wife.

But as that general point could not be determined as between the pursuers and the debtor, further than to the effect of sustaining or repelling the compensation, and that in the mean time the heir of the husband appeared for his

No 9.

No 10.

A bond was granted to a man and his wife, and longest liver, in conjunct-fee and liferent. Each was to have power to dispose of a certain proportion of the sum. The husband was not to be entitled to discharge or assign without consent of his wife. Notwithstanding, the debtor was permitted to plead compensation against debts of the husband to him, exceeding the husband's own proportion.

No. 10. interest, the LORDS, before determining upon the compensation, appointed the pursuers, and the heir of the husband, to be heard upon the general point.

And for the heir of the husband, it was *argued*, That by the obligatory clause in the bond, which bears to be payable to husband and wife in conjunct-fee and liferent; the husband was, agreeable to the established construction of such clauses, fiar, and the wife's fee resolved into a liferent: That the posterior clauses allowing each to dispose of certain portions of the money, did not alter the fee established in the husband by the obligatory clause: That they imported no more than a faculty to the wife with respect to 700 merks, which she might have exercised; but did not; and, the power given to the husband to dispose of 500 merks, could only be owing to the inaccuracy of the writer, as he had the power of the whole as fiar, except in so far as his fee was burdened with the faculty to the wife.

Notwithstanding this, the LORDS found the heir of the wife preferable.

And in this they were unanimous, though they gave very different reasons for their opinion.

Some laid their opinion upon the special tenor of the bond, which bears the money to have been received from the husband and wife, and declares, that 500 merks of it should be at his disposal, and 700 merks of it at hers. These they considered as so many pregnant reasons to infer, that the money had originally belonged to the man and wife in those proportions, and so far as the money appeared to have come by the wife, she was to be held fiar.

Others put it upon this, that the husband was indeed fiar, such being the general rule in conjunct-fees to man and wife, but that the wife, as longest liver, came to take as substitute to the husband, and consequently her heirs, as heirs of provision to the husband, agreeable to what the Lords had found in the case, *Fergusson against M'George*, 22d July 1739, No 9. p. 4202.

Others again put it upon a still more general ground of law, namely, that though where a bond is taken to man and wife in conjunct-fee and liferent, the husband is in law constructed fiar, contrary to what obtains in the case where a conjunct-fee is taken to two strangers, between whom it divides; yet, where a bond is taken to man and wife in conjunct-fee, and the longest liver, then the wife being longest liver, becomes fiar by the survivance, and that in her own right, not as by a substitution to her husband, and in that view is not even subject to the husband's debt.

This point being fixed, that the heir of the wife was preferable, the compensation pleaded for the debtor was without further argument repelled; for, as the only argument that remained for the compensation could only lie upon the supposal of the wife's taking as substitute, which but very few of the Court had pointed at, the decision of this point, whether when laid on the particular conception of the bond, or upon the more general ground, did of course determine the point of compensation.

*Fol. Dic. v. 3. p. 207. Kilkerran, (FIAR.) No 3. p. 190.*