

1759. July 4.

The CHILDREN of WILLIAM GRAHAM, &c. against Captain JOHN GRAHAM, &c.

THOMAS GLOVER was proprietor of part of the lands of Baltillie, holding of the Crown. In order to convey the superiority of these lands to Sir Thomas Hope of Craighall, and to continue the property to himself and his heirs, he, in 1678, entered into a contract with Sir Thomas, whereby he disposed to him the lands; and Sir Thomas became bound to get himself infest in the same by the Crown, and then to re-dispose the lands to Glover, and his heirs, to be held of Sir Thomas, and his successors, in feu.

Sir Thomas Hope dying before the contract was implemented, Sir William Hope, his son and heir, in implement thereof, at Glover's desire, granted, in 1694, a feu right and disposition of the lands of Baltillie, 'to Alexander Reid, and Anne Glover, his spouse, eldest lawful daughter to the said Thomas Glover, the longest liver of them two, in conjunct fee and liferent, and the heirs procreated, or to be procreated, betwixt them; which failing, to the said Alexander Reid, his heirs and assignees, heritably and irredeemably.' The deed contained an obligation upon Sir William to infest the said Alexander Reid, and Anne Glover, in the same terms with the above words of the dispositive clause; but the precept of sasine, thrown into the clause of registration, was thus expressed:—'And to the effect the said Alexander Reid, and Anne Glover, his spouse, may be infest and seised, as above written, I desire and require you, &c. my bailies in that part, that, immediately on sight hereof, ye pass to the grounds of the said lands, and there give and deliver liferent state and sasine, with actual, real, and corporal possession of the same, to the said Alexander Reid, and Anne Glover, spouses, or their certain attornies in their names, bearers hereof, by deliverance of earth and stone of the ground,' &c.

Upon this disposition and precept, Alexander Reid, in March 1712, after the death of his wife, Anne Glover, took infestment, in this manner. The instrument recited the tenor of the dispositive clause, and obligation to infest, as above, and afterwards the precept of sasine, *verbatim*. Then it described the act of infestment thus:—'After reading and publishing of the foresaid disposition, and precept of sasine, above written, therein contained, &c. the said bailie gave and delivered liferent state and sasine, corporal, actual, real, and peaceable possession of the samen lands, to the said Alexander Reid, and that by deliverance to him, in his hands, of earth and stone of the ground of the said lands, accepting thereof, as use is, none opposing or contradicting the same, after the form and tenor of the foresaid disposition, and precept of sasine, above written, therein mentioned, in all points.'

The said Alexander Reid and his wife contracted considerable debts. In 1699 they granted an heritable bond on the lands of Baltillie to John Graham,

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A sasine, bearing delivery of liferent state and sasine, though proceeding on a disposition of the fee, vests only the real right of liferent.

No 43. for 550 merks, on which he was infest the same year. In May 1712, Reid granted an heritable bond of corroboration to Thomas Gourlay, for a debt of L. 526 Scots, on which infestment was taken in March 1725. The children of William Graham, and William Seton, writer to the signet, being also considerable creditors, adjudged the lands of Baltillie in 1726; and Captain Graham of Greigston, and James Smith, who came to have right to the above heritable bonds, likewise adjudged.

In a process of ranking and sale, after Reid's death, the other creditors-adjudgers claiming to be ranked *pari passu* with Graham and Smith on their adjudications, the latter insisted to be preferred to them on their infestments in 1699 and 1725.

Objected by the adjudgers, That the real or complete feudal right to the fee of the lands was not vested in Alexander Reid, the common debtor, by his infestment in March 1712, but only the right to the liferent of those lands; and, therefore, he was not in a condition to grant any heritable bond or infestment, to burden or affect the subject beyond the endurance of his own life.

Answered for Graham and Smith, *imo*, It is incontestible, that the property of the lands was disposed by Sir William Hope to Alexander Reid, as it was never doubted, that a conveyance to a husband and wife, in conjunct fee and liferent, and their heirs; whom failing, to the husband's heirs, vests the fee in the husband. Nay, even supposing the dispositive clause had been conceived in favour of the husband and wife, in liferent, and to the heirs to be procreated betwixt them; whom failing, to his heirs and assignees, without the words "conjunct fee," the fee must have been found to be in the husband, descendible to his heirs, and affectable by his creditors; because, it is a principle in our law, that the fee or property of lands cannot be *in pendente*, but must be vested in some person existing at the time; and where lands are so disposed, the liferent is to be constructed an *ususfructus causalis* in the husband, else the fee would be suspended till the succession should devolve on his heirs by his death. Their being called as heirs, shew they are to have no right till that event happen; and they could not succeed as heirs to him, if he had not the property, but only a liferent.—So it has been established by many authorities and decisions; particularly, 25th November, 1735, Creditors of Robert Frog against his Children, No 55. p. 4262. That such must be the construction of the liferent, so provided in the precept of sasine in question, is equally clear; as that precept is only a clause relative to the former parts of the same deed, which shew the undoubted intention of the parties to vest the fee in the husband. Even supposing the precept had been so extended in a separate writing, the import of it would be the same; as it bears to be granted, 'to the effect the said Alexander Reid, and Anne Glover, his spouse, may be infest and seised, as above written.' And it will not be presumed, that a precept, granted for the purpose of implementing the obligation on Sir William Hope

to infest, as therein mentioned, will fall short of its intent, when the words can admit of a meaning agreeable to it. *2do*, The same argument holds as to the instrument of sasine, where the conjunct fee and liferent and substitution are twice repeated, both in the recital of the dispositive clause, and of the obligation to infest, and liferent state and sasine is given, 'after the form and tenor of the foresaid disposition and precept of sasine, in all points;' which could only be by vesting in Alexander Reid the property intended to be given him; and he was accordingly considered to be proprietor by the other creditors themselves, who adjudged from him as such.

Replied for the adjudgers, *imo*, The distinction between the *jus in re* and the *jus ad rem* of the Roman law, has been adopted in ours; and thence is derived the difference between a real and a personal right to lands. The rule, *nulla sasina, nulla terra*, is well understood and established. A disposition, charter, or precept of sasine, may give the grantee a personal right or title to lands, but it is the infestment which vests the complete real right in him. It is admitted, in the present case, that, by the tenor of the dispositive clause, the personal right to the fee, or *usufructus causalis*, was given to Reid; but it is apprehended, the sasine only vested in him the real right to the liferent. A right of fee comprehends a liferent, but not *e contra*; and, therefore, the disposer of the fee certainly might have granted a warrant for infesting, or the disponee have taken infestment in the liferent, distinct from the fee; which appears to have been done in this case. The reference in the precept to the dispositive clause, can be of no stronger effect than it would have been, had the lands by that clause been disposed to Reid singly, his heirs and assignees. A precept subjoined to such an absolute disposition, ordering only liferent state and sasine to be given, could never have authorised an infestment in the fee; because the maxim would have applied, *Quod potuit et voluit, non fecit*. Besides, a liferent was here certainly intended to be given to the husband as well as the wife; and had she been infest, her sasine must have been conceived in the same terms; and, consequently, it may be well supposed, that the real right to be given him was intended to be no broader; especially as the rule, that a fee cannot be *in pendente*, was not so well understood when this disposition was granted, as it is now. *2do*, Had the precept, as well as the dispositive clause, been clearly intended to give the real right of fee, yet, as it is the infestment which vests that real right, the same can be no broader than is *de facto* given by the infestment. Sasines are by law ordered to be recorded, and not the warrants of them, as the right given by the infestment is alone to be regarded by the lieges. Infestments are not made by reference, for nothing is understood in them but what is expressed. Craig, and all our Lawyers, agree, that the utmost precision is requisite in instruments of sasine. Thus, an infestment of annualrent was found null, because it did not bear expressly delivery of the symbols contained in the precept, but only, that

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state and sasine was given, conform to the tenor of the precept, February 1684, Murray against Hope, *voce SASINE*. The words of this infestment, "liferent " state and sasine," are by all our writers on Stiles, and the universal practice of notaries, understood to mean an infestment in the liferent alone, according to the common sense and meaning of those words, and in opposition to heritable state and sasine, which are constantly used to denote an infestment of fee; the other words, actual, real, and peaceable possession, being common to both. *3tio*, In the case of Frog it was indeed found, that a grant of lands to a man in liferent, and to the heirs of his body, in fee, made him fiar; but there the dispute turned upon the import of the destination, not of the infestment, which bore, that the bailie gave *statum et sasinum hæreditariam*; a circumstance which has escaped the Reporter of that case. And, further, the question was there between the creditors of the disponent and his own children, who could, at any rate, only take as heirs to him, and, consequently, be liable in his debts; whereas, here it is between creditors equally onerous, and who cannot be hurt in their present plea, by their having, for some time, mistaken the nature of the right which was in their debtor.

' THE LORDS found, that only the liferent was vested in the person of Alexander Reid, by his infestment; and remitted to the Lord Ordinary to proceed accordingly.'

Reporter, Lord Justice Clerk. For Graham & Smith, D. Graham, Ferguson.

For the Adjudgers, Rae.

Clerk, Kirkpatrick.

Fol. Dic. v. 3. p. 318. Fac. Coll. No 189. p. 337.

D. R.

1761. February 27.

DRUMMOND of Hawthornden against DRUMMOND of Lundin.

No 44.
Form of rectifying an erroneous charter and infestment, after being put upon record.

WILLIAM DRUMMOND of Hawthornden, in the marriage-contract of his eldest son William, became bound 'to infest the said William Drummond younger, and the heirs-male of his body; which failing, the heirs-male of the body of the said William Drummond elder; which failing, the heirs-female of the body of the said William Drummond younger,' &c. By virtue of the procuratory contained in this settlement, resignation was made in the hands of the Barons of Exchequer, and a signature prepared and passed in Exchequer; but, by a blunder in Alexander Pitcairn, clerk to the signet, the charter was made out by him in terms different from its warrant. For, instead of being conceived as in the marriage-contract, in the instrument of resignation, and in the signature, to the heirs above mentioned, it was conceived in the following terms:—'Dedisse, concessisse, et disposuisse, &c. dilecto nostro Gulielmo Drummond, Juniori de Hawthornden, filio natu maximo Gulielmi Drum-