

1771. November 20.

JAMES SINCLAIR Writer in Edinburgh, pursuer, *against* ROBERT ANDERSON, and Others, Creditors of the deceased James Fraser, defenders.

JAMES FRASER having, in the year 1705, entered into a marriage with Margaret Torry the pursuer's grandmother, a contract was entered into by the parties; in which the husband became bound to make the following provisions:

1<sup>st</sup>, To secure 3000 merks to himself and spouse, and the longest liver in conjunct fee and liferent, and to the heirs to be procreated; which failing, to the husband's other heirs and assignees. And for her farther security, he became bound to infest himself and her, and the heirs as above noticed, in certain heritable subjects, valued at 1400 merks.

2<sup>d</sup>, He obliged himself to provide the one half of the conquest to himself and spouse, and the longest liver in conjunct fee and liferent, and to the heirs to be procreated; which failing, to his other nearest heirs; the other half was provided to himself and the heirs of the marriage; which failing, to his own other heirs.

3<sup>d</sup>, He provided her to one third of the plenishing if there were children of the marriage, and to one half if there were none.

The contract contained a clause, by which the above provisions, 'together with the liferent reserved of all the lands underwritten pertaining to the said Margaret Torry herself,' were accepted of by her, 'in full contentation and satisfaction of all conjunct fee, terce, executry, &c.'

Margaret Torry was possessed of an heritable subject; and she accordingly became bound 'to infest and seise the said James Fraser and herself therein, the longest liver of them two in conjunct fee and liferent, and the heirs whatsoever of their body to be procreate betwixt them; which failing, to the heirs whatsoever to be lawfully procreate of the said Margaret Torry her body in any other marriage; which failing, to the children lawfully procreate or to be procreated betwixt Robert Anderson and Margaret Smith her mother, and their nearest heirs and assignees whatsoever, heritably and irredeemably.' The contract contained a procuratory in the same terms, and thereafter a clause, constituting 'the said James Fraser in *liferent*, her assignee, to the mails and profits immediately after her decease, in case he survive her, and yearly and termly during his lifetime.' And she farther constituted her husband, and the heirs to be procreated betwixt them, her cessioners and assignees, to all goods, debts, and sums of money, falling to her through the decease of her father.

The heritable subject, conveyed by this contract, having been attached by the husband's creditors, and he having died, the pursuer, as in the right of Margaret Torry, by disposition from Margaret Fraser his mother, the only sur-

No 33.

Where an heritable subject was destined in a marriage contract to the husband and wife in conjunct fee and liferent, and to the heirs of the marriage, whom failing, to the heirs of the wife; the fee found to be in the wife, tho' the provision was not gratuitous but reciprocal, and tho' nothing else was given in name of tocher.

No 33. living child of Margáret Torry, challenged the right of the creditors; so that the question came to be, Whether, by the conception of the contract 1705, the fee of the subjects was vested in the husband or the wife? Upon this point,

The pursuer *pleaded*;

*1mo*, The decision of the question, as to who was fiar in provisions of this nature, depended upon certain legal distinctions, *1st*, Whether the subject flowed from the wife or her friends? *2dly*, Whether it was conveyed to the husband gratuitously, or for an onerous cause? and if conveyed onerously, Whether it was conveyed *nomine dotis*? *3dly*, Whether the heirs, first called in the substitution after the heirs of the marriage, were the husband's or the wife's?

When the present case was judged of, according to these rules, the conclusion was obvious. The subject flowed from the wife herself. Though it had not been given gratuitously, it had not been given *nomine dotis*; in the *first* place, as it was heritage, where the presumption did not hold; *2dly*, As there was another tocher stipulated, *viz.* the moveable succession, to which she had right by her father's death; and as to the last criterion, not only were her heirs called immediately after the heirs of the marriage, but a series of her heirs and friends were substituted to these, and the husband's heirs nowhere called at all.

A number of authorities were referred to. 18th December 1611, Lord Kinaird *contra* Lord Pitfoddles. No 18. p. 4220. Stair, b. 3. t. 5. § 51. Stair, 12th July 1671, Gairns *contra* Sandilands, No 26. p. 4230. July 1720, Creditors of Elliot, No 35. p. 4244. Angus *contra* Ninian, No 36. p. 4244. 24th July 1612, Ramsay *contra* Maxwell, No 22. p. 4226. Stair, 20th February 1667, Cranston *contra* Wilkison, No 24. p. 4227. Forbes, 21st November 1705, Creditors of Earnslaw *contra* Douglas, No 21. p. 4223. 4th February 1709, Fead *contra* Maxwell, No 32. p. 4240. June 1727, Edgar *contra* Edgar, No 8. p. 4202.

*2do*, Independent of the conclusive inference to be drawn from the legal distinctions noticed, the after clauses of the deed were sufficiently explanatory, as to whom the fee was vested in. In the provision made by the husband, the destination was to his heirs and assignees whatsoever; while, in the provision by the wife, it was to her heirs, &c.; a difference of termination, which evidently indicated that the parties meant to distinguish betwixt the effects of the two. The terms of the assignation to the mails and duties, which were conveyed to the husband in liferent, yearly and termly during his lifetime, were, in like manner, perfectly decisive of the meaning of the parties.

Robert Anderson, and the other creditors, *answered*;

*1mo*, It was generally understood, that clauses of conjunct fee and liferent to husband and wife, vested the fee in the husband as the *dignior persona*, unless

there was a restriction of the husband's right; which was done by expressing it to be for his liferent use allenary. Though this general rule had, in some cases, been departed from, where the settlement was gratuitous, and where the subject devised flowed from the wife, or was made to terminate on her heirs; yet, when the settlement was executed for an onerous cause, as in view of reciprocal provisions by the husband, or where it was given as a tocher, whether expressly said to be so or not, the same rule, in favour of the husband as fiar, was observed.

In the present instance, there was no restriction of the husband's right. The settlement was not gratuitous, the reciprocal provisions by the husband being fully adequate. The wife had no other tocher than this subject; nor was any thing else mentioned upon her part in the contract of marriage. The intention of parties was also evident from the contract: it was provided, that the liferent provision, 'together with the liferent reserved of the lands under written, pertaining to the said Margaret Torry,' were accepted of 'in full satisfaction of all other conjunct fee, terce, &c.;' which shewed that the interest received by the wife was only a liferent, and that the conjunct fee in the settlement imported no more.

The following authorities were referred to. Stair, 227, 502. Bankton, v. 2. p. 336. 29th January 1639, Graham *contra* Park, No 23. p. 4226. July 1720, Elliot, No 35. p. 4244. Stair, 12th July 1671, Cairns *contra* Sandilands, No 26. p. 4230. Fac. Col. 30th July 1766, Watson *contra* Johnston, Div. 3. b. i.

*2do*, It would be contrary to the rules of sound construction to interpret the clause assigning the mails and duties, in contradiction to every other clause in the deed; and if it had been the intention of parties to restrict the husband's interest, it would have been done in the dispositive clause, which was the proper place.

1771. November 20.—THE COURT was unanimous that the fee, in this case, was vested in the wife; it was therefore found, 'That the subject belonged to James Sinclair; and it was ordained to be struck out of the sale accordingly.'

Lord Ordinary, \_\_\_\_\_  
Clerk, Pringle.

For Sinclair, Jo. Scott.

For Anderson, &c. Cosmo Gordon.

R. H.

Fac. Col. No 109. p. 328.