

plained of be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the respondents the sum of 40l. for their costs in this House.

For Appellant, - *Edw. Northey, John Pratt.*
 For Respondents, *Rob. Raymond, P. King.*

Grace and Rachel Douglas, Daughters of the deceased James Douglas of Earnslaw, for themselves and as Assignees of Mr. Alexander Douglas their Uncle, and Lieut. Robert Douglas their Brother, - *Appellants ;*
 John Montgomerie, Hugh Paterfon, James More, and others, Creditors of the said James Douglas deceased, - - *Respondents.*

Case 27:
 Dalrymple,
 21 & 29
 Nov. 1705.
 Fountain-
 hall,
 29 Nov.
 1705.
 Forbes,
 21 & 29
 Nov. 1705.

18th June 1714.

Fiar.—An estate being settled by an heiress to her husband and herself in conjunct fee and life-rent and the heirs to be procreated between them in fee, whom failing to the husband, his nearest lawful heirs and assignees; the husband was *fiar*.

Donatio non præsumitur.—The fee taken up by a daughter as heir to her father, where a disposition had been made to a son (deceased), upon which investment had followed, but never cloathed with possession nor recorded.

Aljudication.—A charge being given to a son to enter heir to his uncle and mother, and adjudication being led thereon; but the father being afterwards found to be *fiar*, the first adjudication is reduced.

The said son refusing to subject himself to his father's debts, has no title to quarrel the adjudication led of his father's fee.

JOHN GRADEN of Earnslaw, in the county of Berwick, the grandfather of the appellant, executed a disposition of that estate to his son John in fee, with a clause of redemption on payment of a sum of money. Upon this disposition to John the son, *faisin* was taken, but never recorded; and he died before his father, under age and without heirs of his body.

The father dying also, Grace Graden his daughter served herself heir to him as last vest and seised in the estate, and was thereupon invest on the 1st of January 1664. Afterwards, by contract of marriage, dated the 27th of January 1668, between Mr. James Douglas, and the said Grace Graden, in consideration of a marriage intended to be had between them, James Douglas obliged himself, his heirs, &c. to lay out 20,000 merks in lands or other securities, to be settled to himself and the said Grace in conjunct fee and life-rent, and to the heirs of their two bodies: and the said Grace Graden also thereby disposed the said lands of Earnslaw, "To Mr. James Douglas in life-rent and to the
 " heirs to be procreated between the said Grace Graden and him
 " in fee, whom failing to the said Mr. James Douglas, his own

“ nearest heirs and assignees whatsoever, with the provision and
 “ condition of the said Grace Graden her own life-rent.”—In
 the procuratory of resignation and precept of sasine, this destina-
 tion was not verbatim repeated, but these mentioned, that sasine
 was to be given “ To Mr. James Douglas and Grace Graden,
 “ and longest liver of them two, in conjunct fee and life-rent,
 “ and the heirs to be procreated between them, in fee, whom
 “ failing to the said Mr. James, his nearest and lawful heirs and
 “ assignees.” This marriage accordingly took effect, and on the
 28th of February 1668, a crown charter was obtained of the said
 lands of Earnslaw, settling the same in manner as in the said pro-
 curatory of resignation and precept of sasine; and upon this char-
 ter infeftment was taken upon the 17th of April 1670, and the
 instrument of sasine duly recorded. Afterwards on the 1st of
 October 1673 resignation was made by Grace Graden in
 the hands of the crown for a new infeftment to the said James
 Douglas and Grace Graden *in conjunct fee and life-rent*, and
 the heirs to be procreated between them in fee, whom failing to
 the said Mr. James, his nearest and lawful heirs and assignees;
 and in terms thereof a new charter was procured from the crown
 and infeftment taken thereon and also recorded.

James Douglas having contracted considerable debts, which
 came to be vested in the person of one Alexander Paterson, he
 by an assignment, on the 15th of February 1686, made over the
 rents of the said estate to Mr. Paterson, at the then constituted
 rental, (which was inserted therein) for payment of the interest
 of the said debts in the first place, and afterwards towards satis-
 faction of the principal sums; with a power to Paterson to make
 and renew tacks without diminution of the said rental. Paterson
 afterwards brought an action of adjudication against James
 Douglas on several debts which he claimed as due to him; and on
 8th of November 1698 obtained decret therein adjudging the said
 lands to him, and he thereupon also obtained a charter of adjudi-
 cation from the crown.

James Douglas soon after died, leaving issue of the said mar-
 riage a son Robert, and the appellants Grace and Rachael Douglas.
 —The said Mr. Paterson being indebted in considerable sums to
 the respondents, he conveyed his right to the said lands to his
 nephew Robert Anderson, with a proviso for payment of his
 debts. This Robert Anderson was served heir to Mr. Paterson
 after his decease, and obtained a charter of adjudication in his
 own favour on the 1st of March 1700, on which he was infeft;
 and he afterwards conveyed all his right to the said lands, under
 a similar proviso with that above-mentioned to Alexander Anderson
 his brother, and this Alexander was duly infeft therein.

An opposition, however, was now started to the rights of the
 creditors of James Douglas. Robert his son, on the 12th of
 December 1699, granted a bond to Mr. Alexander Douglas his
 uncle for the sum of £2000 sterling. Upon this bond Alexander
 the uncle gave Robert a charge to enter heir in the said lands of
 Earnslaw

Earnslaw to *John Graden his uncle* and Grace Graden his mother; and upon Robert's renunciation, he obtained decree of adjudication in his favour.

And the said Alexander Anderson brought an action before the court of session to reduce this last mentioned adjudication; and in this action he called the said Alexander Douglas and Robert Douglas as defenders. It was contended on the part of these defenders, that by the marriage contract between the said James Douglas and his wife, the lands of Earnslaw were only conveyed to him in life-rent; and consequently that no debts contracted by him, nor any adjudications thereon could affect the estate in prejudice of the heirs of the marriage in whom the fee was vested. After sundry proceedings, the court on the 20th of November 1705 "found, that by the contract of marriage with
" the charters and sasines following thereupon, Mr. James
" Douglas the husband was s'ar of his lands and others contained
" in the said contract."

It was then contended on the part of the defenders, that though by virtue of the marriage contract, the husband might have the fee of the estate, yet his only right being by conveyance from Grace his wife, she herself had no right, for she was only served heir to John Graden her father, but the father had before that time conveyed his estate to his son, who was infeft therein; and this estate was now *in hereditate jacente* of the son, and could not be conveyed by Grace to her husband:—Upon this point the court on the 29th of November 1705 "repelled the defence
" founded on the disposition granted by John Graden to his son,
" with the sasine following thereupon, in respect the same were
" not cloathed with possession, and the sasine not registrate, and
" therefore reduced the said rights, and preferred the pursuer
" Mr. Anderson, and the creditors of Mr. Alexander Paterson." The defenders Messieurs Douglas reclaimed, and insisted further that those claiming under Paterson should count and reckon for their intromissions with the estate:—The court on the 7th of December 1705 "adhered to their two former interlocutors, but
" decerned the said creditors to produce the grounds of their
" debts and adjudications thereupon, and allowed the petitioners
" to see the same, and remitted to the lord ordinary to hear the
" objections against the said adjudications and the allegations
" of payment of the sums contained in Mr. Alexander Paterson's
" adjudications."

Parties having accordingly gone before the ordinary, it was objected, that as the defender's adjudication proceeded upon a charge to enter heir to John and Grace Graden his uncle and mother, the same was void; and that unless the defenders would subject themselves to the payment of James Douglas's debts, or serve themselves heir to him, they had no title to question the rights of the creditors. The Lord Ordinary, on the 22d of February 1706, "found that the defender's adjudication proceeding
" only upon a charge to enter heir to John Graden the defender's

“ uncle, and Grace Graden the defender’s mother, and that the
 “ disposition of John Graden the father to John Graden the son,
 “ the defender’s uncle, and saine thereon being already reduced,
 “ and that the lords have found that the father had right to the
 “ fee of the estate, and not the mother, therefore the defender’s
 “ adjudication fell in consequence; and in regard the defenders
 “ refused to subject themselves to the pursuer’s legal diligences,
 “ and pay off the debts upon this event, therefore reduced the
 “ said adjudication, and decerned that the pursuer had the only
 “ good and undoubted right of property of the said lands of
 “ Earnslaw, and ordained him to be entered into the quiet pos-
 “ session, and receive the rents thereof, and decerned that the
 “ defenders should not receive any of the rents and profits of the
 “ said lands, or any part thereof, they having no right thereto.”
 And the defenders having reclaimed against this interlocutor, the
 same was adhered to by the whole court, and decree was ex-
 tracted on the 22d of February 1706.

The respondents being creditors of Alexander Paterfon and
 Robert Anderson before mentioned, afterwards adjudged the
 said lands of Earnslaw, and procured a charter thereon from the
 crown, upon which they were infeft. They afterwards brought
 an action of ranking and sale, and called the whole creditors of
 James Douglas and of Mr. Paterfon, and all claiming under them:
 And the appellants, as creditors of their father by bond of
 provision, now appeared contending that the respondents by
 receipt of the rents had been fully paid their debts. The
 court granted a joint commission to both the appellants and re-
 spondents, to prove the yearly value of the said lands of Earnslaw
 and others, and how many years purchase the same might be sold
 at, and the deductions therefrom, and allowed the respondents to
 prove the said Mr. James Douglas, Mr. Alexander Paterfon, and
 Mr. Robert Anderson, bankrupts, and ordained the several credi-
 tors to depone to the verity of their respective debts. Several
 witnesses for the respondents were examined, and after sundry
 proceedings the court found “ that the debts exceeded the value
 “ of the estate, and found, that Mr. James Douglas was bank-
 “ rupt in 1578*l.* and that Mr. Alexander Paterfon was bankrupt
 “ in 850*l.* and that Robert Anderson was bankrupt in 500*l.*
 “ beyond the value of their estates, and therefore preferred the
 “ respondents to the appellants, and found the appellants’ right
 “ null.” The preferences of the creditors were afterwards ascer-
 tained, and to these interlocutors the court on several occasions
 adhered when reclaimed against by the appellants: decree was
 extracted on the 23d of February 1711.

In pursuance of these proceedings the said estate was sold, and
 the respondent James Moore purchased the same at a publick sale,
 paid the price to the creditors, and obtained a charter from the
 crown on which he was infeft.

The appeal was brought from “ several interlocutors or decrees
 “ of the Lords of Council and Session, made on the behalf of
 “ James

Entered
 23 April,
 1714.

“ James Moore for himself and as assignee of Hugh Paterfon, and
 “ of others.”

Heads of the Appellants' Argument.

By the marriage contract between James Douglas and Grace Graden, there was no greater estate granted to the said James Douglas than for his life only. By the whole tenor of the said contract, and more especially by the principal or granting clause therein, whereby the grantor's intention is best seen (other collateral clauses being left to the writers who often insert words therein as they think fit) this appears to have been the true intent and meaning of the said Grace Graden the grantor. The debts of the father of the appellants ought not, therefore, to affect the inheritance of the said estate in prejudice of Robert Douglas the heir of the marriage.—*Conjunct fee*, especially where the estate comes by the wife, as this does, in its largest extent signifies nothing but life-rent. Were this otherwise, in the present case, it is explained and qualified by the addition of the words *or life-rent*, and by the subsequent limitations to the heirs of the marriage in fee, and in default of such issue to the heirs of the husband, which were wholly useless, if by the words of the first limitation the husband had an estate in fee. When any doubt exists to whom an estate did first belong, the same is presumed by law to belong to the man; but here it is evident, the estate did first belong to the wife: and a husband may have a conjunct fee of his wife's estate, but not an absolute fee, and at most is only a trustee for the heir of the marriage until he exists. The heir, upon his existing, has a *jus quesitum et proprium* in the inheritance of his mother with the burthen of his father's life-rent, and may force the father to aliment him out of the life-rent; and the heir, after the death of his father and mother, needs only to be served heir of line and provision to his mother as dying last vest and seised in the absolute fee, and could never thereby be made liable to the payment of his father's debts to whom he does not succeed as heir.

With regard to the resignation, charter and sasine in 1673; the wife was certainly denuded of all her right to the inheritance by the marriage contract; and since, pursuant to that contract, resignation, charter and sasine had been made and granted five years before this second resignation, the second resignation was null in itself, being obtained without any consideration from one who had no right.

But even supposing (which is contrary to the fact,) that by the words of the marriage contract an estate in fee might have passed, if the said Grace Graden had been seised of such an estate; yet she herself could not grant any estate to her said husband. She herself had no other estate in the said lands, than what she claimed as heir served to her said father, who had no manner of right therein; for the fee thereof was wholly vested in the said John her brother, who died seised thereof; and as she did not serve herself heir to him, who died last seised her

service to her father was void. And this allegation was supported in the Court of Session, by a decision of their own in another case exactly parallel (a).

(The appellants also state, that Alexander Paterfon had been fully paid his debts, by receipt of rents and profits; they make objections to the rental proved before the Court of Session, and to this decree finding the legal expired, and refusing to give the appellants their option to redeem.)

Heads of the Respondents' Argument.

By the marriage contract, the said lands were conveyed to Mr. Douglas in fee. Even by the dispositive clause in the contract of marriage, if the question had turned upon that clause alone, the husband is clearly made *fiar* of the estate. Though in this clause of the said contract, the lands are at first only conveyed to the said James Douglas in life-rent, yet this clause by limiting these lands, in remainder to the nearest lawful heirs, and assignees of Mr. Douglas, with a reservation to the said Grace of her life-rent, without doubt establishes the fee in him; for she being only life-renter, and the fee remaining in him and his heirs, the estate of inheritance being necessarily somewhere must be in him: and this clause if doubtful is to be explained by the other clauses of the contract.

But though that matter were not so clear, yet the charter under the great seal and *saſine* following thereupon, which are matter of record, having established the fee in Mr. Douglas's person, the creditors were in *bona fide* to lend money to him, since it appeared upon record that the fee of the estate was in him, and he not tied up either from contracting debts, or alienating the lands. Nor had the creditors any notice of the contract of marriage, or of the dispositive clause therein, nor could they since it was not recorded, and of consequence could not be bound by any clause therein contained, though clearly against them, as this clause is not. And Mr. Douglas did during his life grant leases, and exercise all other acts of property as any other in whom the fee of an estate is could do.

Grace Graden being served heir to John Graden her father in 1663, and retoured, as appears upon record, that service cannot now be questioned, since by act of parliament 1617. c. 13., no service or retour is questionable unless within 20 years; and it was more than 40 years before her service was quarrelled. Besides, the disposition by John Graden, the father to his son when under age, with the *saſine* thereon, were revokable at pleasure; and the father notwithstanding thereof continued absolute proprietor of the estate, and granted heritable securities thereon, and leases thereof, and did all other acts of property, even during the son's life, much more after his death, which happened in the father's life-time. So that the son dying before the

(a) Dirleton's Doubts and Decisions, *voce Fiar*, Duke and Duchess of Monmouth.

father,

father, and a minor, and these deeds never being delivered or out of the father's custody, the father notwithstanding of the deed to the son, was *vest and seised* in the property of the estate, and the son's right vanished, and consequently the daughter was in the right to serve heir to her father and take no notice of the son. The Court of Session decreed the same in a case *Rose Fincham*, against *Muirhead of Bradisholm*, which was affirmed upon appeal by the House of Lords. Indeed she could not do otherwise than she did, for she could not know of the disposition to the son, or the sasine thereon, for neither of them were recorded, nor was the son ever in possession, but died under age, and by the act of parliament 1617. c. 16., all sasines are declared void as against third parties, if not registered within sixty days after they are taken. But this sasine never was registered and consequently neither the daughter nor the creditors could know any thing of it; and as she was served heir to her father who died seised and possessed thereof, Mr. Paterfon and the other creditors were *in bona fide* to lend money to Mr. Douglas, who claimed under the said daughter, and stood publicly infest by virtue of a charter under the great seal.

No. 2. of this Collection.

1617, c. 16.

(The respondents also traverse or deny the facts stated by the appellants, with regard to the payment by receipt of rents and as to the proof of the rental.)

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the several interlocutors or decrees therein complained of be affirmed.*

Judgment, 18 June 1714.

For Appellants, *P. King. N. Lechmere.*
 For Respondents, *Rob. Raymond, John Pratt.*

Sir Robert Home, Bart. - - - *Appellant*; Case 28.
 Sir Patrick Home, Bart. - - - *Respondent.*

1st July 1714.

Sequestration.—A sequestration, granted of an estate, where a person was in possession by virtue of a tack from his father for payment of debts, adjudications in his person with expired legals, and a disposition from an elder brother, which, though reduced for fraud and circumvention, was still to stand as a security for the onerous cause thereof.

Presumption.—From circumstances of presumption a person is made to count and reckon for property, which with his content had formerly been conveyed by a weak elder brother to another person.

AFTER the judgment was given in the former appeal (No. 15. of this collection) the parties returned to the Court of Session, and fundry proceedings were had in the action of count and reckoning. On the 24th of February 1713, the Lord Ordinary found Sir Patrick the respondent liable both for the real and personal estate contained in the disposition, and discharge granted to him
 in