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poned for the which causes, that is, for the mutual provisions by the husband ; as was found 12th July 1671, Gairns against Sandilands, No 26. p. 4230 ; and 29th January 1639, Graham against Park and Garden, No 23. p. 4226 ; a husband being bound to lay out so much of his own money, together with the tocher, in conjunct fee and liferent to themselves, and the children in fee ; which failing, to their heirs equally, was found fiar ; and 23d January 1668, Justice against Stirling, No 25. p. 4228 ; a bond to a husband and wife, and the heirs betwixt them, which failing, to the heirs of the longest liver, was found to belong to the husband. It is not the last termination of heirs which settles the fee ; but where there are degrees of substitution, the person's heirs who succeed first, Dirleton, word Fiar. Here the intention of the parties appears ; for a bond was taken from Robert Robertson and Margaret Sampson, to pay L. 50 Sterling to John Sampson's other daughter : As he was bound to pay this sum he behoved to get the subject ; and the obligation was ineffectual as to her.

*Replied,* The subjects are not disposed *nomine dotis* ; and there was a further tocher of 200 merks Scots given, which was agreeable to the quality of the parties. In the case of Graham against Park, the money was given as tocher ; in that of Justice against Stirling, it was money lent by a husband during the marriage ; and in that of Garden against Sandilands there was no other tocher. Mackenzie, b. 3. t. 8. § 20. says the husband is fiar, because of the prerogative of the sex ; and he is fiar on whom the last termination falls : And Stewart, in his answers to Dirleton, word Fee, says, the last termination determines the fee, contrary to Dirleton's opinion, cited by the respondent ; which, however, applies not here, as the destination is first to the heirs of both, whom failing, to those of the wife : And it was found, 22d June 1739, Fergusson against Macgeorge, No 9. p. 4202, that a bond to a husband and wife, and the longest liver, their heirs, &c. belonged to the wife, as the longest liver. The intention of the parties cannot be gathered from the bond, as the wife is taken bound, and was believed so to be ; and it is not necessary now to argue whether it could be made effectual against her or not.

THE LORDS found the fee belonged to the wife.

Act. *J. Grant.*

Alt. *Scrymgeour.*

*Fol. Dic. v. 3. p. 207. D. Falconer, v. 2. No 150. p. 174.*

1759. *March 6.*

GEORGE WILSON, Mason in Edinburgh *against* JOHN FORREST and ALEXANDER MAXWELL, Merchants in Edinburgh.

IN 1754, Messrs Forrest and Maxwell granted bond for L. 900 Sterling, payable at Candlemas 1755, ' to George Wilson and Elizabeth Ramage, spouses, ' or longest liver of them two, in conjunct fee and liferent, and to the children

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A bond was granted to a husband and wife, and

longest liver of them, in conjunct fee

‘lawfully procreate or to be procreate betwixt them, and to the heirs and executors of the said children, in fee,’ with annualrent and penalty as usual : *Proviso*, ‘That it should be leisom and lawful to the said George Wilson and Elizabeth Ramage, spouses, jointly, by themselves alone, without consent of their said children, to uplift, discharge, assign, or otherwise settle and dispose of the foresaid sums of money, in whole, or in part, at their pleasure, notwithstanding of the above substitution.’

At the time the money was lent, and this bond granted, there were a son and daughter of George Wilson and his said spouse existing. Elizabeth Ramage died before the debt was uplifted, or any alteration made upon the destination of the bond. Wilson afterwards insisted for recovering payment of the whole debt, without concurrence of either the son or daughter, who were still living.

Forrest and Maxwell suspended on this ground, that they were not in safety to pay to Wilson the charger, in respect that by the bond the fee of the money was vested in the children, under a reserved power to the father and mother, jointly, of uplifting the debt ; and as, during the life of the mother, the money could not have been taken up without her consent, so, since her death, it having become impossible to obtain such consent, the charger could not singly uplift or effectually discharge this debt.

*Answered* for the charger ; That it is clear, from the conception of the bond, that he, the father, is fiar of the sum. Had this money been so provided in a contract of marriage, there would have been no doubt of the father’s powers to uplift and dispose of it for onerous causes, though a restraint might have been implied from the nature of the covenant against gratuitous deeds ; but where a man voluntarily lays out his own money in this way during the marriage, without any previous obligation, no restraint whatever is to be implied, nor is any here expressed in the bond. The clause bearing, that the charger and his wife jointly might uplift the sum without consent of the children, was truly superfluous ; seeing there is no fee provided to the children that could make their consent necessary ; and it was never thought, that a clause declaring a fiar to have the powers he would have without it, could have the effect to deprive him of any of the powers inherent in his fee, and competent to him by the general construction of the deed ; as it is a rule, that every man shall have the full exercise of his property, in so far as he is not restrained. The clause would not be sufficient even to tie him down to require his wife’s consent, were she alive ; and could it be strained so far as to import an interdiction in favour of his wife, while she lived, yet that interdiction must fly off by her death.

‘THE LORDS found, that the husband had right to uplift and discharge the bond, without consent of the children, now that the wife is dead ; and therefore found the letters orderly proceeded.’

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and liferent,  
and to the  
children pro-  
created be-  
tween them,  
and their  
heirs, in fee.  
The Lords  
found that the  
husband, on  
the death of  
the wife, had  
right to up-  
lift the debt  
without con-  
sent of his  
children.

*Act. Ferguson.*

*Alt. Rae.*

*Reporter, Strichen.*

*D. R.*

*Fol. Dic. v. 3. p. 207. Fac. Col. No 180. p. 321.*