

1780. December 6.

MARY PATERSON and OTHERS *against* JAMES BALFOUR.

## No 15.

A husband bound himself in his contract of marriage, to settle a certain sum of money, furnished by himself, together with lands belonging to his wife, 'on himself and his spouse in conjunct-fee and liferent, for her liferent use *allenary*, and to the children of the marriage in fee.' The wife obliged herself to resign her lands 'for new infeftment to be granted to her and her husband in *conjunct fee and liferent*, and to the children in fee.' Upon the death of the husband without issue, a question arose between his children of a former marriage and the widow, whether the latter was *fiar* or *liferenter*. The Lords found she was *fiar*.

By contract of marriage between John Sword and Jean Glasgow, Sword became 'bound to provide, and have in readiness, of his own proper means and effects, the sum of L. 500 Sterling; which, with the sum of L. 360 Sterling of dote or tocher with the said Jean Glasgow, extending both to the sum of L. 860 Sterling, besides and over and above the lands hereafter likewise disposed by the said Jean Glasgow,' he obliged himself, his heirs and successors, to employ upon good security, and to take the rights thereof in favour of himself and the said 'Jean Glasgow, his future spouse, and longest liver of them two, in conjunct-fee and liferent, for the said Jean Glasgow, her liferent-use *allenary*, in so far as extends to the liferent provision or annuity conceived in her favour, as particularly after-mentioned.' The provision here referred to, was a free liferent annuity of L. 50 Sterling, which, with the conquest of the marriage, in case of no children, and the half thereof if there should be children existing, she accepted in full of all she could demand.

'For the which causes, and on the other part, Jean Glasgow bound herself, her heirs and successors, to make due and lawful resignation of all and hail the eight shilling-land of old extent, of the lands of third part of Giffan, &c. in the hands of her immediate lawful superiors thereof, in favour, and for new infeftment to be made and granted to the said John Sword and Jean Glasgow, in conjunct-fee and liferent, and to the children of the marriage between them in fee.' Then followed a procuratory of resignation, and an assignation of Jean Glasgow's moveable subjects; after which the contract provided and declared, 'That the liferent of the said lands of third part of Giffan, which by this contract is provided to the said Jean Glasgow, in case she shall survive the said John Sword, and that there shall be children, one or more, of the marriage, at the time of the dissolution thereof, shall impute in payment *pro tanto*, to her, of the liferent-provision of L. 50 Sterling conceived in her favour, as before-mentioned.'

John Sword died without issue. His relict, within a year of his death, was confirmed executrix-dative; and in that character brought a multiple-poining against her husband's creditors. She afterwards sold the lands of Giffan, and conveyed the price to Mr Balfour, as trustee, for behoof of herself and her relations. Upon her death, it became a subject of competition between the Creditors of her husband and the Trustee, in which it was

*Pleaded* for the Creditors; Wherever there is any difficulty in determining whether a husband or his wife is *fiar*, the fee is presumed to be in the husband, as the *dignior persona*; and so the Court have decided in a variety of cases, Dirleton, Stair, 19th June 1667, Johnston *contra* Cunningham, No 5. p. 4199.; Dalrymple, 21st November 1705, Creditors of Earnslaw, No 21. p. 4223.; Forbes, 23d July 1713, Edgar *contra* Sinclair, No 7. p. 4201; June 1727,

Edgar *contra* Edgars, No 8. p. 4202. ; Stair, 12th July 1671, Gairns *contra* Sandilands, No 26. p. 4230. ; Marcus, Contracts of Marriage, 20th December 1682, Ramsay *contra* Ramsay, No 28. p. 4234. ; Fountainhall, 19th January 1697, Laws *contra* Tod, No 30. p. 4236. ; July 1720, Competition betwixt the Creditors of Elliot of Northsenton and Elliot of Borthwickbrae, No 35. p. 4244.

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In the present case, the circumstances tending to shew that the fee was meant to be in the husband are very strong. The whole that Jean Glasgow possessed was no more than a moderate tocher: And, accordingly, both her money and her lands were conveyed by the contract, *nomine dotis*, and in consideration of the provisions made upon her; Sword obliging himself to lay out the L. 860 Sterling upon good security, 'besides and over and above the lands ' hereafter disposed.' The destination is absolute to the children of the marriage, without any substitution in favour of the wife's heirs; and, had the succession once been taken up by children of the marriage, the heirs of the father, not those of the mother, must have succeeded to them. The subsequent clause, declaring 'that the liferent of the lands, which by this contract is provided to ' the said Jean Glasgow,' should impute in payment, *pro tanto*, of her liferent-provision, clearly demonstrates, that her right was only a liferent, and that the fee was completely made over and vested in the husband.

*Answered*; Matters must be very equally balanced, indeed, before a fee can be found to be in the husband, merely as the *dignior persona*. Neither do the decisions quoted support any such doctrine. In the case of Johnston, 1667, the subject was money lent by the husband, which could not belong to the wife, *stante matrimonio*. In the case of the Creditors of Earnslaw, 1705, the termination was to the husband's heirs and assignees whatsoever; and to them the wife bound herself in absolute warrandice, reserving only her liferent. The decision, Edgar *contra* Edgars, 1727, proceeded on the same principle. And in that of Edgar *contra* Sinclair, 1713, the subject being moveable, fell to the husband *jure mariti*. The case, Gairns *contra* Sandilands, 1671, was a very singular one; but there, a little bit of land, being all that the wife brought with her, was provided to the longest liver in fee. The husband survived; yet his daughter, making up titles by precept of *clare*, as heir to her mother, and possessing the subject found to have belonged to her father, was assoilzied from the passive title. In the case of Ramsay, 1682, the subject was a sum of money, of which the conjunct-fee was not even nominally provided to the wife. The case of Laws, 1697, was very special, and turned upon a question of substitution; but the decision did not necessarily imply that the fee was in the husband. And in that of Elliots, 1720, as stated, it appears, that the last termination was to the husband, his heirs, and assignees, whatsoever.

But, in all questions of this nature, it is principally to be attended to, who is the party to whom the subject belonged before marriage; for there the fee must still remain, unless the contrary clearly appears. The words conjunct-fee

No 15. and liferent, import no divestiture; and Jean Glasgow, by settling her lands in this way, did certainly not give up the fee, or limit her original right to a liferent.

The clause wherein the money and land are classed together, as conveyed *nomine dotis*, must be explained and limited by the terms in which these different subjects are afterwards made over. The bonds and bills are assigned absolutely 'to John Sword, his heirs and assignees whatsoever;' and he is bound to take the new securities 'to himself and his future spouse, in conjunct-fee and 'liferent, for her liferent-use allenary.' And, had it been intended to vest the fee of the lands in him, it is presumeable, that the right of his wife would have been limited in a similar manner.

It was altogether unnecessary to insert any substitution in favour of the wife's heirs; for the fee remaining in her, necessarily devolved to her heirs, failing of children of the marriage. And, had such children existed, they could have made up their titles in no other way than by special service to her, the person last infest in the subject.

Neither is it of the smallest consequence, that, if the succession had once been taken up by the children of the marriage, the lands would afterwards have gone to the heirs of the father, in preference to those of the mother. This is owing to the genius of our law, which admits no succession through the mother of the deceased. But those circumstances, which regulate the succession after the failure of the first heirs, can have no influence in determining where the original fee was vested.

Nor is it more material, that, in one part of the contract, Jean Glasgow is said, *obiter et narrative*, to have the liferent of the lands provided to her. This, though certainly true, was not sufficient to deprive her of the fee inherent in her. It was plainly an *usus-fructus causalis*, which belongs, *optimo jure*, to every fiar, and which is not in the least repugnant to the idea of a fee in its purest signification; Clerk Home, No 1. Frog, Div. 2. Sec. 4. *b. t.*

*Replied*; It is a principle maintained by every writer on the Law of Scotland, that, where a right is taken to a husband and wife, in conjunct-fee and liferent, and their heirs, the husband is the sole fiar, 'unless the provision bear expressly a power in the wife to dispoise;' Stair, b. 3. tit. 5. § 51. And even 'though the right have flowed from the wife, yet, if it was given her in name of tocher, the fee is in the husband; since whatever is given in tocher is the 'property of the husband;' Erskine, b. 3. tit. 8. § 36.

*Observed* on the Bench; That, if the subject in question had appeared to have been settled *nomine dotis*, the fee would have been in the husband; but, as a separate sum of money was provided in the name of tocher, the presumption in favour of the husband did not hold.

The COURT adhered to the interlocutor of the Lord Ordinary, finding, 'that

the fee of the lands was in Mrs Sword, and not in her husband ; and, therefore, that the price of said lands is not affectable by his creditors.' No 15.

Lord Ordinary, Stonefield. For the Creditors, *Ilay Campbell et Alexander Abercrombie.*  
Alt. G. Wallace.

L. *Fol. Dic. v. 3. p. 208. Fac. Col. No 4. p. 6.*

1790. *January 20.*

ROBERT BRUCE-HENDERSON *against* SIR JOHN HENDERSON.

ROBERT BRUCE of Earlsball settled his estate ' on the heirs-male of his body ;  
' failing these, on his four daughters successively ; and they and their heirs fail-  
' ing, on his sisters.'

The succession, under this destination, opened to Helen Bruce, the eldest daughter.

She was afterwards married to James Henderson. To him, by the marriage-contract, she became bound to pay a sum of money equal to the value of the estate ; and probably from some doubt of the feudal right in her father, or of his powers to make the settlement, she prevailed on her sisters to concur with her in granting a trust-bond for a sum exceeding the value of the estate, for the sole purpose ' of establishing a title by adjudication to the lands of Earlsball, ' and then denuding thereof in favour of James Henderson and Helen Bruce in ' conjunct-fee and liferent, and the heirs of his body to be procreated betwixt ' him and the said Helen Bruce ; which failing, to and in favour of the said ' Helen Bruce, and the heirs of her body by any subsequent marriage ; and ' (after substituting her sisters and their heirs) of James Henderson, his heirs ' and assignees whomsoever.'

An adjudication was accordingly led by the trustee, he having charged Helen Bruce and her sisters to enter heirs in special to their predecessors.

In order to denude himself, the trustee executed a conveyance, stating, that the bond had been granted to him for behoof of James Henderson, and that it was just he should convey to him the right created by the adjudication, the dispositive clause being as follows : ' Therefore wit ye me to have disposed, &c. ' to the said James Henderson, and Helen Bruce his spouse, and longest liver ' of them two, in conjunct-fee and liferent, and failing either of them by de- ' cease, to the heirs and assignees of the survivor, all and whole the lands,' &c.

A charter of adjudication and resignation of the estate was afterwards expedé in these terms : *Dilecto nostro Jacobo Henderson de Earlsball, ejusque hæredibus et assignatis quibuscunque.*

After taking infestment, Mr Henderson executed an entail ' in favour of him- ' self and Helen Bruce in conjunct-fee and liferent, and (after various substitu-

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A husband understood to be a fiar of a subject provided to him *nomine dotis*, though the wife's heirs be called next after those of the marriage, the wife herself being named as a substitute.