1806. *July* 4. POLLOCKS, *against* POLLOCK.

No. 6.
An estate being devised to husband and wife in conjunct fee and liferent, to the children according to the division of their parents, and to be restricted to an annuity in the survivor of the spouses,—what right thereby vests in the children?

ROBERT POLLOCK, proprietor of the lands of Netherlinn, executed a settlement in 1760, in favour of his daughter Margaret, and Robert Pollock her husband, in which he disponed his lands, 'under the burdens and limitations 'after mentioned, to and in favours of the said Margaret Pollock and Robert 'Pollock, spouses, in conjunct fee and liferent, and to the children procreate 'and to be procreate betwixt them, according to their parents' division; which 'failing, equally among them and their heirs; whom failing, to the said Mar-'garet Pollock and her own nearest heirs and assignees, in fee.' The limitation which was introduced in a subsequent part of the deed was, 'that the survi-'vor of the said Margaret Pollock and Robert Pollock, spouses, shall, at the first 'of their deaths, betake themselves to, and their liferent of the said whole sub-'jects, is, and shall be thereafter, restricted to the foresaid sum of 100 merks 'Scots, a cow grazed, herded and foddered, the west chamber aforesaid well 'furnished to live in, and sufficient yearding and furnishing, and home-leading, 'sufficiency of elding to serve him or her yearly, and the furniture of the cham-'ber, to be disposed of by the survivor at pleasure, and the remainder to go 'to the subsistence of their children.' Robert Pollock reserved to himself and his wife, a provision during their lives, in the same terms, and surrendered the possession of the lands to his daughter and her husband.

After the death of Robert Pollock, the lands were possessed by Robert Pollock *junior*, and Margaret his wife, who resided upon them with their family, which consisted of five children. Robert Pollock *junior* died in 1778, and his widow and family continued their possession of the lands. Two of the daughters were afterwards married; and the rest of the family, consisting of two sons and a daughter, resided on the lands with their mother.

An action of declarator was brought by the two married daughters and their husbands, against the mother, concluding, that the defenders right in the subjects in question, should, at the period of her husband's death, have been restricted to the particular provisions specified in her father's settlement; and that she had it not in her power, after her husband's death, to settle the subjects in any way to the prejudice of the pursuer's right to their two-fifths: That the defender should be decerned to give up possession of the said two-fifth parts, under the burden and reservation of the restricted liferent; and that she should account to the pursuers for their shares of the rents and profits of their two fifth parts of these heritable subjects from Martinmas 1778, the first term after the death of Robert Pollock their father, with interest thereon.

The Lord Ordinary took the cause to report, and the pursuers

Pleaded: The object of the deed of settlement was, to make a provision for the children of the marriage; and the lands were disponed to the defender and her husband, under the express limitation, that the right of the division should be restricted to a certain annuity, to which he had restricted himself in the set-

tlement. Although the fee of the lands was vested in the defender, she is not an absolute, but only a fiduciary fiar. Whatever, therefore, might be the case in a question with creditors, she must be held, in a question with her children, to hold the lands in trust for them, under the burdens and limitations imposed by her father; one of which was, that at her husband's death she should betake herself to her liferent; Lillie against Riddle, February 24, 1741, No. 56. p. 4267. Gerran against Alexander, June 14, 1794, No. 55. p. 4402. Newlands against Creditors of Newlands, July 9, 1794, No. 73. p. 4289. No. 6.

Answered: By the dispositive clause of her father's settlement, the defender was constituted fiar of the lands conveyed. For when property is disponed to a parent in liferent, and to the children in fee, the parent is considered as absolute fiar; Douglas against Ainslie, July 7, 1761, No. 58. p. 4269. Cuthbertson against Thomson, March 1, 1781, No. 67. p. 4279. The object of the limiting clause in this settlement is, that 'the remainder may go to the subsist-'ence of the children.' But no right is conferred upon any particular child, who may choose to withdraw from the family, to force a division of the property, and carry off his share. The right is conferred on the children *tanquam familiæ*, and is enjoyed by those children who still remain members of the family.

The Lords, 'upon report of the Lord Glenlee, and having advised the mu-'tual informations for the parties, find, that there is no sufficient ground for 'any claim at the instance of the pursuers *hoc statu*; and, therefore, sustain 'the defences, assoilzie the defender, and decern.' And they afterwards refused a reclaiming petition, without answers.

Lord Ordinary, *Glenlee*. Alt. *Forsyth*. Act. *Boyle*. Agent, *W. Howison*. Agent, *P. Wishart*, W. S. Clerk, *Pringle*.

J. *Fac. Coll. No. 257. p. 577.*