ARCHIBALD MURRAY, Advocate, *et alii*, trustees for the creditors of WILLIAM SCOTT BLAIR, of Blair, - - - *Appellants*;

HAMILTON BLAIR, Esq. - - *Respondent*.

4th April, 1739.

CONJUNCT FEE AND LIFERENT.—A wife's estate being disponed in her marriage contract "to the husband and wife, in con-" junct fee and liferent, and to the sons of the marriage; which "failing, to the heirs male of the body of her father; which "failing, to the heirs female of the marriage; which failing, "to the heirs male or female of her body of any other mar-" riage; which failing, to the husband, and the heirs male of "his body of any other marriage; which failing, to the wife's "heirs whatsoever;"—the fee found to be in the wife.

HEIR OF PROVISION.—Found that the heir of the marriage may gratuitously dispose of the estate conveyed in the marriage contract.

[Elchies *voce* Service and Confirmation, No. 5.]

No. 49.

WILLIAM BLAIR of Blair conveyed his estate to his son John, and the heirs male of his body; whom failing, to the heirs male of his own body; whom failing, to his son John's heirs whatsoever. John was infeft, and upon his death, Magdalen his sister, served herself heir to him, and was married to Mr. Scott.

By the marriage contract, Scott came under certain obligations on his part, and on the other hand, Magdalen agreed to settle the lands upon herself and husband, and longest liver, 'in conjunct

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'fee and liferent, and to the sons of the marriage; 'which failing, to the heirs male of the body of 'her father; which failing, to the heirs female of 'the marriage; which failing, to the heirs male 'and female of her body of any other marriage; 'which failing, to the said William Scott, and the 'heirs male and female of his body of any other 'marriage; which failing, to Magdalen's heirs 'whatsoever,' &c.

The only issue of the marriage was one son, William Blair, who, upon his mother's death in 1733, took out a general service as heir to her; and having thereby acquired a right to the procuratory of resignation in his grandfather's settlement, he procured a charter of confirmation thereon. He afterwards executed a settlement of the estate, in favour of himself and the heirs of his body; whom failing, of his half-brother Hamilton Blair, a son of Scott by a subsequent marriage.

In 1733, Scott became bankrupt, and made over to certain trustees for his creditors all the right which he then had, or should afterwards acquire, to the estate.

Upon the death of William Blair in 1734, these trustees charged Scott to serve heir in special to the estate, upon the above contract of marriage; and thereupon proceeding to adjudge, Hamilton Blair appeared, and pleaded,—That the estate could not be adjudged for his father's debts, because it had been vested absolutely in William, who had settled it upon him, failing issue of his own body.

Answered:—1. That, by the construction of the words in the marriage contract, "conjunct fee and liferent," the fee was vested in the husband;

a right of liferent in the wife; and only a right of succession in the son: and as the latter had predeceased his father, he had no power to make a settlement of the estate.

2. That at any rate, as the estate, failing issue of Magdalen, was by the marriage contract settled upon Scott, it was not in the power of William Blair, by any voluntary and gratuitous deed, to disappoint his right of succession.

The court, (19th July, 1736,) upon the report of the Lord Ordinary, "Found that the fee of the "estate was in the wife; and that William, the "son and heir of provision of the first marriage, "could gratuitously dispose of the estate."

This interlocutor was adhered to (30th July.) The appeal was brought from these interlocutors of the 19th and 30th July, 1736.

Entered Feb. 6, 1739.

Pleaded for the Appellants:—Provisions of this nature in marriage contracts are by law considered as strictly onerous, and cannot be altered gratuitously by the parties themselves, or their heirs. In this case, the substitution in favour of the husband could not have been defeated by the voluntary deed of the wife; nor can it now be defeated by her heir, who, as such, is liable to the performance of her obligations.

Pleaded for the Respondent:—When a wife's estate is settled upon her husband and herself, in conjunct fee and liferent, the fee is held to be in the wife, and the husband takes only a liferent; especially where the substitution, after the heirs of the marriage, is to the wife's heirs of any other marriage, and also where the last substitution is to the wife's heirs whatsoever.

2. Though neither the husband nor wife can

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gratuitously alter the provisions of a marriage contract to the prejudice of each other, or of the heirs of the marriage; yet the heir of the marriage takes the succession in fee simple, and is under no obligation either to the other heirs of the marriage or to the other substitutes, and may dispose of it at pleasure. But,

3. William Blair, the son, had two titles, under either of which he could take up the estate, either under his grandfather's settlement or under the conveyance in the marriage contract; and having taken it up under the former, he had full power over it,—and, therefore, William Scott and his creditors can have no claim to it.

Judgment, April 4, 1739.

After hearing counsel, "it is ordered and adjudged that the said petition and appeal be, and "is hereby dismissed this house, and that the interlocutors complained of be affirmed."

For Appellants, *J. Browning, Al. Lockhart.*
For Respondent, *Ch. Areskine, R. Craigie.*