

No 21.

THE LORDS declared, That by the contract of marriage, with the charter and sasine following thereon, Mr James was fiar. *Vide* 29th November 1705, *inter eosdem, voce* REGISTRATION.

*Forbes, p. 42.*

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S E C T. III.

Where the Wife's Heirs last in the Institution.

1612. *July 24.*

No 22.

JAMES RAMSAY of Cockpen *against* JOHN MAXWELL of Conkaith.

FOUND, That the heritable right is not ruled by the last termination, but that it pertains to the heir of the first fiar. This found in an infestment taken by Nicol Ramsay of Cockpen, and Elizabeth Rigg his spouse, in conjunct-fee, and to the heirs betwixt them; which failing, to the heirs of his own body; which failing, to the said Elizabeth, and the heirs of her whatsoever.

*Fol. Dic. v. 1. p. 299. Kerse, MS. fol. 68.*

1639. *January 29.* GRAHAM *against* PARK and GAIRDEN.

No 23.

The wife's tocher in a contract of marriage, was ordained to be paid to the husband and wife in conjunct-fee, and to their children heritably, and failing of heirs betwixt them, to the wife's heirs. There being heirs of the marriage, it was found, that the property of the sum provided be-

By contract of marriage betwixt one Park, daughter to another Park burghess of Edinburgh, and William Gairden her future spouse, the said Park, father to the woman contracted in marriage, is obliged to pay to the said Gairden the sum of 5000 merks in tocher, to which sum the said future husband obliged him to add other 5000 merks of his own money; which whole sum, the husband is obliged by the contract to employ upon land or annualrent to himself, and his said future spouse in conjunct-fee, and to the heirs gotten betwixt them; which failing, the one half to the heirs of the husband, and the other half to the heirs of the wife; according whereto, after the marriage, the father to the wife, having the said 5000 merks promitted in tocher, the same was lent to John Rind, merchant burghess of Edinburgh, who by his obligation was obliged to pay that sum to the said husband, and to the wife, and to their heirs; and failing of them, to the wife's heirs, conform to the contract. This sum being thereafter comprised by one Graham an Englishman, for a debt owing to him by the said Gairden, husband to the wife; and upon this comprising pursuit being moved

against John Rind, debtor of the sum, by his foresaid bond, for payment thereof to the compriser; in the which pursuit the husband, who was bankrupt, being absent, his wife compearing, and her father, the said Park, payer of the tocher, where they *alleged*, That the sum could not be comprised by the husband's creditors for the husband's debts, seeing the husband was not proprietor of the sum, but only liferenter; for the contract and bond bore, 'the sum to be paid to the husband, and the wife in conjunct-fee, and to their heirs betwixt them heritably; and failing of heirs betwixt them, to the wife's heirs;' whereby it is evident, that the wife is fiar, in respect of the termination of the security so declared, and that all the parties have thereto consented, and that the father has provided the money, and gave it after that manner to his daughter and son-in-law, who might affect it with what condition he pleased to annex thereto; and therefore the most that can be comprised by the husband's creditors, is only his naked liferent, seeing no more right subsisted in his person. And the other creditor contending, That the fee remained in the husband's person, notwithstanding of the destination foresaid, and termination of payment in the wife's heirs, failing of heirs gotten betwixt them; because, if there be bairns gotten betwixt them, (as there are two bairns living betwixt them,) they will ever exclude the wife's heirs; which bairns so gotten, if they were to seek this sum after their parents decease, would seek it not as heirs to their mother, but as heirs to their father, and consequently the right must belong to the husband, and not to the wife; and it were a dangerous preparative, tending to the prejudice of the whole country, if money conditioned to any man in tocher, after this manner, were not at the husband's absolute disposition.—THE LORDS found, That the property of this money pertained to the husband, and that he had full power and right to dispoise thereupon at his pleasure, with reservation only of the liferent thereof to his wife; and consequently, that the creditor Graham, who had comprised the sum, had full right thereto, he always finding caution to make the same furthcoming to the wife, to be used by her for her right of liferent, in case she survive her husband; and found, that the property subsisted not in the wife's person, notwithstanding of the termination thereof foresaid, that it should be paid to her heirs, failing of heirs begotten betwixt her and her husband.

Act. *Advocatus & Stuart.*

Alt. *Nicolson, Baird & Johnston.*

Clerk, *Scot.*

*Fol. Dic. v. 1. p. 299. Durie, p. 870.*

1667. February 20: CRANSTON against WILKISON.

By contract of marriage betwixt Wilkison and his spouse, he is obliged to infest her in a tenement, expressed therein, and in all the conquest during the marriage; which infestments were to be taken to them, the longest liver of them two in conjunct-fee, and their heirs betwixt them; which failing, to the

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longed to the husband, and was liable to be affected by his creditors, they finding caution to make the same furthcoming to the wife for her liferent, in case she survived her husband.

No 24.

A husband was obliged by contract of marriage, to take a tenement to himself and wife, and