

No 24.
the longest liver of them two, in conjunct-fee, and their heirs betwixt them; whom failing, to the heirs of the husband's body; whom all failing, to the wife's heirs whatsoever. The husband was found fiar.

heir's of the man's body; which failing, to the wife's heirs whatsoever; after which the husband purchased a piece of land, but took the infeftment thereof to him and his wife, and the heirs betwixt them; which failing, to his own heirs whatsoever, omitting the wife's heirs. This Cranston obtains himself infeft in this conquest tenement, as heir to the wife, and thereupon obtained decret for mails and duties. Wilkison, as heir to the husband, pursues reduction of the decret upon these grounds; 1st, That Cranston's infeftment, as heir to the wife, was null, because the wife was not fiar, but liferenter; 2dly, The wife having accepted of an infeftment, posterior to the contract, without mention of her heirs, that innovates the provision of the contract, and exeludes her heirs.— It was answered, first, That the man and wife being conjunct-fiar, the wife was fiar, and the husband but liferenter; because the last termination of heirs whatsoever, terminated upon her; 2dly, Albeit Cranston had taken his infeftment wrong, Wilkison cannot quarrel the same; because he, as heir to Wilkison, was obliged to infeft him, as heir to the wife; and to the posterior infeftment, it is contrary to the provision of the contract of marriage, and there does appear no accepting thereof by the wife; 3dly, Cranston is not obliged to dispute the validity of this right, because he hath been infeft *qualitercunque*, and by virtue of his infeftment hath been seven years in possession, whereby he hath the benefit of a possessory judgment, ay and while his infeftment be reduced.

THE LORDS found, That even by the contract of marriage the husband was fiar, and not the wife; but that the wife's heirs of line were heirs of provision to the husband, and that if there had been an heir of the marriage, or an heir of the man's body, they could never have been served heirs to the wife; and that by the deficiency thereof, the condition of the fee cannot change; and therefore they found that Cranston was wrong infeft; yet they found the allegiance of his seven years possession relevant to give him the benefit of a possessory judgment, without disputing whether the provision of the contract of marriage, in favour of the wife, was derogated, by the posterior infeftment, omitting her heirs.

Fol. Dic. v. 2. p. 299. Stair, v. 1. p. 444.

No 25.

A bond was taken payable to a husband and wife, and the heirs betwixt them, or assignees, whom failing, to the heirs of the last liver. The husband

1668. January 23.

JOHN JUSTICE against MARY STIRLING.

THERE was a bond granted by Stirling of Coldoch, whereby he granted him to have received from umquhile John Justice, and Mary Stirling his spouse, the sum of 1300 merks, and obliged him to pay to the said husband and his spouse, and longest liver of them two, and the heirs gotten between them, or their assignees, which failing, to the heirs of the last liver. The said Mary having survived, did uplift the sum, and now John Justice (as heir of the marriage to his father), pursues his mother to make forthcoming the sum, and employ the same

to her in liferent, and to him in fee. It was *alleged* for the defender absolutor, because by the conception of the bond she is fiar, and so may dispose of the money at her pleasure. The pursuer *answered*, That the conception of the bond did noways make the wife fiar, but the husband, according to the ordinary interpretation of law in conjunct-fee betwixt husband and wife; and, as to the clause in relation to the longest liver, their heirs and assignees, the fee could not be constituted thereby, otherwise the fee behoved to be pendent and uncertain, and in effect be in no person so long as they live together, but after the death of either, the fee should then begin to be constituted in the survivor, which is inconsistent, and therefore the fee behoved to be constituted by the first words, obliging to pay the sum to the husband and wife, the longest liver of them two, whereby the husband was fiar, and might have disposed thereupon during his life, but without prejudice of his wife's liferent; there is no doubt but this sum might have been arrested for his debt, and it could not be then pretended that *ex eventu*, the wife by surviving might become the fiar. It was *answered* for the wife, That albeit conjunct-fee between man and wife do ordinarily constitute the husband fiar, yet there are many cases in which such conjunct-fee the wife may be fiar; and here, the termination being upon the survivor, makes her the survivor sole fiar, although both were conjunct fiars before, and neither of them properly a liferenter, till by the event it did appear who should survive, neither can any such subtilty of the dependence, or uncertainty of the fee, render the intention of the parties ineffectual.

THE LORDS found, that by the foresaid clause, the husband was fiar, and the heirs of the marriage were heirs of provision to him, and that failing the heirs of the marriage, the wife's heirs were substituted as heirs of tailzie; and therefore ordained the sum to be so employed and secured, that if the pursuer, being the only heir of the marriage, should die before he dispose thereupon, it should return to the heirs and assignees of the mother.

Fol. Dic. v. I. p. 299. Stair, v. I. p. 512.

. Dirleton reports the same case:

IN the case, Justice and his Tutors, *contra* Stirling and Cockburn her Husband; a bond being granted to a husband and his wife, the longest liver, and the heirs betwixt them; which failing, to the heirs of the longest liver, and the wife having survived, there being only one child of the marriage,

THE LORDS found, That the fee of the said bond belonged to the husband as *dignior persona*, and that the child had right thereto as heir to him; and that the heirs of the wife could have no right till after the child's decease as heirs of provision to the child; and, that the wife had not the right of fee, which she pretended to be in suspense, until it should be determined by the death of either who should be the last liver.

Dirleton, No 144. p. 58.

No 25.
was found fiar
tho' the wife
survived.