

1672. July 25.

GRAY against GRAY.

No 6.

An infestment in conjunct-fee, whereby the husband was fiar, was reduced as to the fee *ex capite lecti*, and yet was found to stand as to the husband's liferent implied in the fee.

MICHAEL GIBSON having but one daughter, married to John Gray, he did dispone certain tenements in Edinburgh, to her and the said John her husband, the longest liver of them two in conjunct-fee, and to the heirs betwixt them; which failing, to John Gray's heirs: Whereupon John Gray and his spouse were infest, and bruiked five years after the said Michael's death. Margaret Gray, the only bairn of the marriage, serves herself heir to Michael Gibson her goodsire, and pursues reduction of the disposition granted by Michael to her father and mother, as being on death-bed. The defender *alleged*, That this action could only take effect, in so far as the heir was prejudged by the disposition; *ita est*, The heir had no prejudice; *imo*, Because the disposition being to the wife in the first place, and not being as a tocher, or for any onerous cause, the wife must thereby be fiar, and the husband only liferenter; and albeit the termination of the heirs be on the husband, that doth not always infer the husband to be fiar, but the husband's heirs of line may be the wife's heirs of provision; for though *in dubio potior est conditio masculi*, that is but a presumption; and here it is excluded by a stronger presumption for the wife on the contrary. *2do*, Though the disposition made the husband fiar, and that there was a lesion, as to the fee, yet the fee doth *eminenter* contain a liferent; and, as to the liferent granted to the husband, the heir was not prejudged, because if the right to the husband had not been granted, he would have infest his wife, as heir to her father, and so would have had his liferent by the courtesy of Scotland; so that the heir is in no worse case by this infestment, in so far as it contains a liferent. It was *answered*, That this infestment can never be sustained as a liferent infestment in place of the courtesy, because the courtesy is only competent to the husband, when the wife dies actually infest, and when she is heir to her predecessor; but, in this case, the wife was only infest as liferenter by conjunct-fee; and though she had been infest as fiar, her husband would not have had the courtesy, because she was not infest as heir to her father, which only could be after his death; but by his voluntary disposition in her life. It was *answered*, That albeit the courtesy is only competent where the wife is infest as heir to her father, yet it doth not necessarily import that she must be infest as heir served and retoured; for, an infestment upon a precept of *clare constat* will be sufficient, and yet she is thereby but heir *passive*, and she is the same heir to her father by his disposition and infestment thereon, which is *perceptio hereditatis*, and makes her heir *passive*. *2do*, The allegiance is not as if this infestment were equivalent to the courtesy, but that by this infestment the heir hath no lesion; for if it had not been, it cannot be proved but the husband would have infest his wife as heir to her father, she having survived her father five years; as if an heir were reducing a disposition on death-bed, it would be sustained, because it was granted for sums equiva-

lent, due by the defunct, albeit he was not obliged to infeft the creditor for these sums; yet, seeing the creditor might, for the same sums, have apprised the lands if he had not been infeft, therefore the heir had no lesion by the disposition, and so it could not be reduced.

THE LORDS found, albeit this infeftment was reduced, as to the fee, yet that it did subsist as to the husband's liferent, in respect that there was thereby no lesion to the heir; because it is presumed, that the husband would have infeft his wife, and so enjoyed the courtesy, if this infeftment had not been. See DEATH-BED, No 16. p. 3196. *Stair, v. 2, p. 109.*

No 6.

1713. July 23.

JOHN EDGAR, Chirurgion-apothecary in Haddington, and CHRISTIAN BROWN, his Spouse, against WILLIAM SINCLAIR, of the Parish of St Martin's in London.

THE deceased William Brown, chirurgion-apothecary in Haddington, having, for the love and favour he bore to Christian Brown, his daughter, and for certain other onerous causes, assigned to her and Francis Sinclair, then her husband, and their heirs and executors, 700 merks Scots, owing to him by Alexander Miller of Gourlybank, there arose, after Francis Sinclair's decease, who died abroad, a competition for the sum aforesaid, betwixt William Sinclair who produced a probate of the defunct's will out of the prerogative court of Canterbury, naming him his executor and administrator, and John Edgar, present husband to Christian Brown.

William Sinclair *pleaded*, That Francis Sinclair, the husband, being conjoined with Catharine Brown, his wife, in the assignation to this moveable sum, he, *tanquam persona dignior*, was sole fiar, June 9. 1667, Johnston *contra* Cunningham, No 5. p. 4199.; January 23. 1668, Justice *contra* Stirling, No 25. p. 4228.; January 29. 1639, Graham *contra* Park, No 23. p. 4226. And Christian has right only to the annualrent of the half of the sum; because not provided to the man and his wife, and the longest liver, but only to her and him, February 18. 1637, Mungal *contra* Steel, *voce* HUSBAND and WIFE.

Answered for John Edgar; Though usually transmissions to husband and wife infer a preference in favours of the husband, yet that suffers many exceptions, not only in matters of heritage, but even in the transmission of moveable sums, where the design of the granter to make the wife fiar, appears from pregnant presumptions; as in this case, where the right flows from the wife's father, upon a narrative of love and favour to his daughter, the wife is first named, and the husband only in a manner, follows *pro interesse*. Upon which ground the wife hath a just claim to the fee of the whole; at least she ought to be preferred to the fee of the half, as a common conjunct fiar, the conveyance not being to them in the usual style of conjunct-fee and liferent, which useth to be interpreted in the husband's favours; but the assignation is made to Christian Brown and Francis Sinclair her husband simply, as when a subject

No 7.

One having, for love and favour to his daughter, and other onerous causes, assigned to her and her husband, their heirs and executors, a certain sum owing to him by a third party, the Lords found that the husband had right to the fee, and the wife to the liferent of the whole.