

1705. *November 21.*CREDITORS OF PATERSON and ANDERSON *against* DOUGLASSES.

No 52.

THE dispositive clause by an heiress in her contract of marriage, in favour of her husband in liferent, and the heirs of the marriage in fee; which failing, to his heirs or assignees, reserving her liferent, was found to make the husband fiar; the obligation to infest, and the procuratory of resignation being to him and her in conjunct-fee and liferent, and to the heirs of the marriage in fee, which failing, to his own heirs and assignees; and the assignation to the writs with the obligation of warrandice, being conceived in favours of him, his heirs or assignees.

Fol. Dic. v. 1. p. 302. Forbes. Dalrymple.

* * * See This case, Div. I. Sec. 2. *b. t.* No 21. p. 4223.

1707. *March 27.*

GEORGE FRASER, Brewer in the Canongate, *against* ANNA BROWN, Relict of John Gordon, Brewer in Edinburgh, and her CHILDREN.

No 53.

ANNA BROWN, in her contract of marriage with John Gordon, brewer in Edinburgh, celebrated after the birth of their second son, disposed some lands, whereof she was heiress, to her husband in liferent, and to the heirs procreated or to be procreated of the marriage, which failing, to the husband, his heirs or assignees in fee, heritably and irredeemably, reserving her own liferent: Which contract contains an obligation to infest, either by resignation or confirmation, as best should please her and her said husband, and their foresaids; and a precept for giving heritable sasine to him or his attorney; and gives, in the assignation to the writs, full power to him and his foresaids 'according to the destination of liferent and fee above specified, with the reservation of her liferent above mentioned' to intromit with, uplift, &c. and mentions the writs and rights of the lands to be delivered to the husband to be kept and used by him for the use and behoof above-mentioned. The said Anna Brown suspecting her own interest not well enough secured by the contract, took from her husband a separate bond of the same date, whereby he obliged himself, failing heirs of the marriage, to denude in favours of her, her heirs or assignees. George Fraser, brewer in the Canongate, a creditor of the said John Gordon, having after his decease obtained an adjudication against Francis Gordon the defunct's son, upon a *cognitionis causa*, and his renunciation to enter heir, and pursued a mails and duties against the tenants; comparance was made for the said Anna Brown and the said Francis Gordon her son, who alleged that the rents in question belonged to them in liferent and fee respectively, by virtue of the contract of marriage aforesaid, and so could not be

An heiress, in her contract of marriage, disposed to her husband in liferent, and to their heirs, whom failing, his heirs or assignees. The husband found to be a naked liferenter. See SYNOPSIS.

No 53. carried by the pursuer's adjudication for the debt of the defunct, who was but a simple liferenter.

Replied for the pursuer; John Gordon, the husband, was clearly fiar by the conception of the contract, in so far as, *imo*, He is always named first as the *persona nobilior*; and even where lands were disposed by a woman to her and her husband in conjunct-fee and liferent, and the heirs procreated betwixt them, the man was understood to be fiar, in the case betwixt Sir John Kennedy and Kennedy of Girvenmains*. *2do*, John Gordon's heirs are mentioned in the last place; and, by the current of decisions, *in dubio*, they are thought to be the fiars *quorum hæredibus maxime prospicitur*. *3tio*, Seeing the fee could not be *in pendente*, it behoved to belong either to the husband or to the wife; now, it could not belong to her, who, in all the parts of the contract, reserved nothing but her liferent; nor could it be in the person of the heirs of the marriage, who would not have right without a service; therefore it was in the husband alienarily. *4to*, In the precept of sasine, the wife orders her baillie to give heritable sasine to her husband, without any mention of liferent or heirs. *5to*, The separate bond manifestly implies that the husband was fiar, in so far as the wife takes him obliged to denude and renounce in the event of no children of the marriage.

Duplied for the defender; *imo*, The presumption lies for the husband *qua persona nobilior in casu dubio*; but here there is no manner of dubiety, the subject disposed being the wife's heritage, and there being a son of the marriage extant at the time; and, in all the material clauses, the husband's right being expressed as a liferent contradistinct to a fee. *2do*, Albeit the substitution terminates in the husband's heirs, he must not be presumed fiar; because, his heirs are substituted to the heirs of the marriage; and, in the bond apart of the same date, which is *pars contractus*, as being *pactum ex incontinenti adjectum*, the last termination in favours of the husband's heirs is changed in favours of the wife's heirs. *3tio*, As the wife reserves only her own liferent, so she conveys nothing to her husband but the liferent; therefore, it is plain, the fee could not be in his person, but behoved to remain with the wife, who was frank-tenementar and fiduciary as to the fee, for the behoof of the children of the marriage. *4to*, The precept of sasine must be interpreted from the body of the contract, and the inserting of the word 'heritable' ascribed to the error or ignorance of the writer; who also discovered egregious ignorance in misplacing the words 'in fee' in the other material clauses. *5to*, Suppose the wife *errore juris* had believed, by her taking the separate bond, that the husband had power to dispose and renounce when he had not, could that have prejudiced her?

THE LORDS found, That John Gordon was a naked liferenter by the quality of the disposition in the contract of marriage, and preferred his relict and children to his creditors.

Fol. Dic. v. 1. p. 302. Forbes, p. 162.

* See General List of Names.