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Sandilands, No 26. p. 4230. Nor doth it alter the case, that she is first named in all the clauses of the bond, as was decided, 23d July 1713, Edgar *contra* Sinclair, No 7. p. 4201. 2*do*, However the money might originally have belonged to the wife, yet it is presumed to have been a moveable sum, the same being lent out upon security during the marriage, and so belonged to the husband *jure mariti*, conform to the practique, 26th January 1681, Countess of Weems *contra* L. May and M'Kenzie, *voce* SURROGATUM.

Duplied for the defender; 1*mo*, The decisions cited do not come up to the present case; for, in that betwixt Gairns and Sandilands, the conveyance being in a contract of marriage, where no other tocher was provided, it may be understood as given *nomine dotis*, which is onerous *ad sustinenda onera matrimonii*; and therefore, the fee was justly adjudged to belong to the husband, who is naturally obliged to provide for his family; whereas, in the present case, the sum in bond remained in property with the wife, or was a donation from the brother *suo modo*. As to the other practique betwixt Edgar and Sinclair, the donation there seems not to have been purely gratuitous in the granter, seeing the bond bears, not only 'for love and favour,' but also 'for other onerous 'causes.' Besides, that there it doth not appear, as in the present case, that the granter expressly designed to exclude the husband from the fee. 2*do*, If the money did originally belong to the wife, and was secured to her by bond bearing annualrent, the uplifting and re-employing in these terms, would not make it fall to the husband as moveable, 21st February 1679, Cockburn *contra* Burn, *voce* HUSBAND AND WIFE; so that no argument can be drawn from the case of the Countess of Weems *contra* L. May and M'Kenzie, unless the pursuers can instruct, that if the money did originally belong to the wife, it was not secured by a bond bearing annualrent, which is not probable, the sum being considerable.

THE LORDS found, that the fee of the principal sum contained in that bond, did not belong to the Lieutenant, the common debtor, and therefore cannot be affected by his debtors.

Fol. Dic. v. 1. *p.* 303. *Forbes, MS. p.* 43.

1735. *November* 25.

No 55.

A disposition to one in liferent, and the heirs of his body *nascituri* in fee, found to resolve into a right of fee in the father, who was therefore

The CREDITORS of ROBERT FROG *against* His CHILDREN.

THE deceased Bethia Dundas did, for the love and affection she bore to Robert and James Frogs her lawful oyes, sons to the deceased James Frog her eldest son, and the other persons after named, 'Dispone certain houses belonging to her in Edinburgh in favours of the said Robert Frog, her eldest oye in 'liferent, and to the heirs lawfully to be procreated of his body, in fee; and, 'failing of him by decease without heirs of his body, to the said James Frog,

'her other oye, also in liferent, and to the heirs lawfully to be procreated of 'his body, in fee; and, failing both her said oyes without heirs of their bodies, 'to John Frog merchant in Pensylvania, her second son, in liferent, and the 'heirs of his body in fee; which failing, to Elizabeth Frog, her daughter, in 'liferent, and the heirs of her body in fee; which all failing, to her own near-'est lawful heirs whatsoever.'

No 55. found entitled to sell the subjects for payment of his debts.

In virtue of this deed, Robert Frog, who, at the date thereof, was about nine years of age, was infeft; and having thereafter contracted several debts, in order to pay his creditors, he entered into a minute of sale as to part of the subjects contained in the disposition; however, before executing thereof it was *objected*, That the above settlement only conveyed a right of liferent to him, and therefore he had no power to sell, the fee being disponed 'to the heirs lawfully to 'be procreated of his body;' and, it having been agreed of consent that the same should be discussed, it was *urged* for the Creditors of Robert Frog, That, wherever a right is granted to a father in liferent, and to the heirs of his body *nascituri* in fee, the father is always understood to be fiar, if no other restriction is expressed, and his children are only deemed heirs of provision. To illustrate which, it was *observed*, that it is a principle of law, that a fee cannot be *in pendente*, but must be settled upon some person existing at the time of the disposition; the reason of which maxim is, that it would be inconsistent with common sense to suppose a property without a proprietor; and, if the contrary doctrine took place, many absurdities would follow. Thus, if the *dominium directum* were allowed to be pendent, the vassal could not be entered; if the *dominium utile*, the superior could not have a vassal; if the former proprietor had contracted debt, his creditors could not affect it, because there was no person from whom it could be adjudged; besides several others that might be mentioned. And, as this maxim has been considered as a fixed principle in law, it has followed, that parents, taking rights to themselves, or others settling them upon them with substitutions to their children *nascituri*, have promiscuously made use of the words 'fee, conjunct fee, or liferent;' because both these, when applied to the parents, behoved to have the same effect; for, as the children *nascituri* could not possibly be vested in the fee when they were not in being, the liferent provided to the parent is understood to be an *usus fructus causalis* resolving into a real fee, as the children were capable of no other right but a succession to the fee after the father's decease; and, though nominally designed fiars, from the nature of the thing, it could import no more but a provision of succession. And in this manner have all our lawyers constructed such settlements. Thus, Lord Stair, Tit. INFEFTMENT, says, 'infeftments taken to pa-'rents, and, after their decease, to such children and other persons named, the 'parent is understood to be fiar and not liferenter, and the children and others 'to be heirs-substitute.' Sir George M'Kenzie, p. 172, likewise observes, That, if a father dispones to children to be procreated, this will be considered only as a

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destination, and will not hinder the father to make posterior rights, or posterior creditors to affect by diligence what is so disponed. And Dirleton, Tit. Fee quest. 1. asks. 'Where is the fee of a sum provided to husband and wife in 'liferent, and to the bairns in fee?' Shewing plainly, by the method he there proposes to secure the children, that it is his opinion, that, in the case stated, the fee is in the father; besides, this interpretation has been ratified by a variety of decisions. *See* 9th July 1630, Veitch, No 48. p. 4256.; 10th February 1672, Wemyss, No 50. p. 4257.; 4th February 1681, Thomson, No 51. p. 4258. It is no wonder, therefore, after so many authorities, that the lieges have trusted to settlements expressed in that manner; and, that such clauses have been generally so understood, is evident by the excerpts produced from the records of Chancery; whereby it appears, from a variety of instances, that children have been served heirs of provision to their parents who were only infeft in liferent, and their heirs to be procreated of their body in fee.

In the *next* place, when the special circumstances that attend this case are considered, it is by no means probable the granter designed to restrict her grandsons and the other children named to be liferenters, for the love of whom it is said the deed was made, and that she intended to give the fee to their children who were then unborn. 2*dly*, She dispones to them very near in the order they would have succeeded to her by law; which therefore ought to be more extensively interpreted in favours of the heirs at law. 3*dly*, If she had intended to have given them a bare liferent, she would have added the word 'allenarly;' without which, in such settlements, it imports an *usus fructus causalis*. Besides, several absurd consequences would follow from supposing the fee to be lodged any where else than in the person of Robert Frog; to make out which, the case was put, that he had died leaving issue of his body, who had established the fee in their person; and that, thereafter, they had failed, whereby the substitution in favours of James in liferent and his issue in fee, came to take place, how could James make up a title to the liferent? It is unknown, in law, that a liferenter should serve heir to a fiar; and yet, it is believed, he could not come at it otherwise. 2*dly*, Suppose none of the substitutes had children, and that the disponer had left creditors who wanted to affect her lands, they behoved to have adjudged, not from Robert or the other substitutes, if they were liferenters, but from the disponer's remoter heirs at law; nay, even the creditors of these remoter heirs could, while there were no nearer heirs existing of the body of these substitutes, adjudge the lands for their debts; since, if the property is supposed to be devolved on them, nothing could hinder their creditors to affect it; all which are consequences, neither tenible in themselves, or any ways consistent with the meaning of the settlement.

To these arguments, it was *answered* for Robert Frog's Children—The maxim, that a fee cannot be pendent, is, like most other rules in law, subject to exceptions; and so many have occurred, that it scarcely merits the name of one, as appears

from the following decisions, 22d February, Bruce; 4th February 1726, Sir Edward Gibson, (*voce* PRESUMPTION;) 22d February 1724, Douglas. Besides, the case of an *hæreditas jacens* is likewise an instance that a fee may be pendent; but, granting the brocard should take place, it does not apply to the present question, *scil.* Whether a disposition to a person in liferent of a certain subject, is to be explained a disposition in fee, contrary to the plain and obvious meaning of the words, which imports rights of a quite different nature. As to the quotations referred to, they do not come up to the point in dispute; for the passage from Lord Stair does not speak of infeftments taken to parents in liferent, but of infeftments in general to parents, without adjection of the words 'in liferent.' And it is true, in such a case the parent is fiar, because there is nothing to limit the right; but it is otherwise when the words 'in liferent' are adjected; for then the right cannot be extended beyond the restriction. Neither is what Sir George M'Kenzie observes any ways applicable; for the question that he determines, is not of a disposition made to a father in liferent, but of a disposition made by a father to children *nascituri*; which, he says, imports only a destination, not a present right denuding the father; which is true, but nothing to the purpose. And as to the quotation from Dirleton, he gives no opinion on the question stated, but rather seems to think the fee would belong to the children; though, for making this the clearer, he says, it would be better to take the right in trust in the father's person for the behoof of his children. 2*dly*, No argument can be drawn from that case to the present; as a sum in a contract of marriage is understood to be given *ad sustinenda onera*; therefore it ought to receive a more benign interpretation in favours of the father, than when the deed is a pure donation, such as the present. Neither is the instance of children's having served heirs to their fathers, who were only infeft in liferent, of any avail; seeing the opinion of an inquest can have no weight in determining a point of law; especially when it is considered, that the design of serving, is only to cognosce the propinquity. With respect to the particular circumstances condescended on, they are of no force to induce a construction contrary to the natural and legal import of the words; for, as to the *first*, The disposition not only proceeds on the narrative of love and favour, but for other good causes and considerations; the import of which is, that, as the two grandsons were infants, and her second son in Pensylvania, of whose return she had no hopes; therefore, it is probable, her intention was to secure the succession to her daughter Elizabeth; yet so as those, who, by the course of law, fell to succeed, should have the benefit of a liferent, and their children the fee; with a view to which, the deed was devised in the manner it now appears, whereby none of the other heirs could prejudge the succession of her daughter who was the *dilecta persona*. As to the *second*, it is true, that, when the succession is settled in the legal order, it is reasonable to interpret clauses favourably; but then that favour is not to be used to wrest words contrary to their ge-

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No 55. nuine meaning. To the *third*, There was no necessity to add the word 'allenar-'ly' in order to ascertain the import of the word 'liferent;' the simple expression of disponing in liferent excluded the fee, especially when the fee is expressly given to others. In the *last* place, as to the absurd consequences which, it is pretended, would follow from supposing the fee not to be lodged in the person of Robert Frog, it is *answered* to the *first*, That the different grants of the different liferents are not substitutions to the first liferent, but new grants of liferents; and therefore there was no necessity to make up any title to the prior liferenter, but only to prove that the former liferenter was dead, and that the condition of the second liferent existed. To the *second*, The gratuitous deed of the disponer would not prejudge her creditors, seeing they might have adjudged the fee from any who was next heir.

The Creditors *replied*, That, if there is any rule of law that can be said to hold universally and without any exception, it is, that the property of a subject cannot be pendent, but must necessarily belong to some person; neither do the decisions referred to on the other side prove the contrary: For, as to the *first*, it has been since over-ruled by the decision 2d January 1708, Lord Montstewart, *voce* Succession. And, in the other two cases, the reasoning on both sides plainly supposes the certainty of that principle; neither is the instance of an *hæreditas jacens* an exception, seeing the apparent heir *sustinet personam hæredis* even before his service, he having the *jus hæreditatis delatum* from the moment of his predecessor's decease, although a service is necessary to complete his titles. With regard to the answers that have been made to the opinions of our lawyers, they are noways satisfactory; for, as to the passage quoted from Lord Stair, it is probable that he supposes the case where no more is given in express terms to the father than a liferent; because, if the fee were given to him, it could not be the subject of a doubt. And Sir George Mackenzie's authority is directly in point; for the reason why a disposition by a father to his children *nascituri* does not denude him of the fee, is, that they are incapable to take it, on account of their not existing at the date of the deed; which applies directly to this case, as the children were not in being when the disposition was made. It is also obvious from Dirleton's opinion, that he did not think the fee could be taken directly to children *nascituri;* and therefore he proposes to vest it in the father for the behoof of the children, which there would have been no occasion for, if it could have been done directly to the children themselves. In the *next* place, as to the conjecture, that the settlement was intended to secure the fee to Elizabeth, it is without any manner of foundation; as there is not a clause in the whole deed from whence the disponer's *prædelectio* of her can be inferred; and, if the granter's own word is to be credited, Robert is the *prædelecta persona*, and Elizabeth the least *delecta* of them all. Neither are the absurdities that naturally follow from the construction of this settlement by the children any ways removed; for, as to the *first*, the continued succession of liferenters making up no titles by service, but only by a proof of the death

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of the former liferenter, and the existence of the condition of the second liferent, is a novelty unknown in law, and without any foundation in the analogy of law. And, as to the *second*, there is no sort of answer made to it.

Duplied for the Children; That, if this case was to be determined by a jury, agreeable to the practice of other countries, there can be no doubt but the verdict would be in the very terms of the deed, 'That Robert Frog has the life-'rent, and his children the fee:' for the whole of the arguments advanced by the creditors are founded upon this, that a fee cannot be pendent: As to which, it may not be improper to observe, that, if the disposition had been to Robert Frog in liferent allenarly, it would not have been pretended that he was fiar; and yet there is not one single argument drawn from the pendency of the fee in the present question, but what would have applied with equal strength to that case; therefore it must be evident, that either their principle is false or misapplied. At any rate, it is a maxim that does not hold universally. Thus, for instance, by the civil law, *Venter mittebatur in possessionem propter spem nascendi*, which would not have taken place, if the brocard had obtained universally. But, granting it was a rule, it does not concern the present question; for, in law, it is common to give dispositions and legacies under many different conditions; during the pendency of which, the disponer, or his heir, is the fiduciary fiar. Now, to apply this to the point in issue: Suppose there had been no provision of liferent to Robert Frog, it is plain, that the disposition, though pure, would have resolved into a condition, viz. if Robert Frog had children; and, during the pendency thereof, if it is not admitted that the fee was pendent, it must have remained with the disponer and her heirs at law, fiduciary, for the behoof of the children, when they should exist. Nor can it vary the argument, that the liferent is disponed to Robert Frog; for, *tantum concessum, quantum scriptum.*

THE LORDS having considered the right granted by Bethia Dundas to Robert Frog her grandson, found, That thereby a right of liferent was only established in the person of the said Robert; and therefore, that the creditors of the said Robert have no interest in the price.

But, on petition and answers, 'They found Robert Frog to be fiar,' &c.

Fol. Dic. v. 1. *p.* 303. *C. Home, No* 1. *p.* 5.

1741. *February* 24. LILLIE *against* RIDDELL.

No 56.
Found as above.

WHERE one in his son's contract of marriage had disponed his estate to his son in liferent, and to the children to be procreated of the marriage in fee, 'The son was found to be fiar,' though *ex figura verborum*, he had only the liferent.

This point was formerly so determined in the case of the children of Robert Frog against his Creditors, No 55. p. 4262., and only because the Court had