the grant of tacks is an ordinary act of administration, but it is no ordinary act of administration to superadd one lease to another.

1766. *July* 22. JANET WATSON, Relict of James Watson, Merchant in Edinburgh, *against* PATRICK JOHNSTON, Son of William Johnston, Smith in Edinburgh.

FIAR.

The fee of a subject proceeding from the wife, taken to the spouses in conjunct fee and liferent, and the heirs of the marriage in fee, found to be in the husband.

[*Faculty Collection, IV.* 268 ; *Dictionary,* 4288.]

ON the 6th October 1740, a postnuptial marriage-contract was entered into by William Johnston and Rebecca Muirhead. By it William Johnston became bound to provide 2800 merks of his own money, and to add to it 1000 merks assigned to him by Rebecca Muirhead, and 1800 merks as the value of a tenement mentioned in the marriage-contract, and to take the rights of the whole, amounting to 5600 merks, "to himself and his spouse, and the longest liver of them two in liferent, and the bairns of the marriage in fee." In the same form is the conquest during the marriage provided. The contract contains also the following clause: "That in case the said marriage shall dissolve, by the said Rebecca her predeceasing without children, that then she shall have it in her power to dispose of all or any part of the subjects, and sums above-mentioned, brought with her, in favours of whatsoever person she shall think fit, without advice or consent of the said William Johnston, he always being allowed to liferent the same." For these causes Rebecca Muirhead assigned the sum of L.60 sterling to William Johnston, his heirs and donatars; and she farther "sells, anailyies, and dispones in favour of her husband and herself, in conjunct-fee and liferent, and to the heirs of the marriage in fee," a tenement of houses in Musselburgh which was redeemable by James Muirhead, writer in Edinburgh, on payment of L.100 sterling; and which is the tenement above-mentioned in the husband's part of the marriage-contract. The contract contains precept of seasine in common form. On the 7th October 1740, seasine was taken upon the precept in this marriage-contract. William Johnston died before his wife, leaving issue, by her, Patrick Johnston. It does not appear that William Johnston ever performed the obligations incumbent on him by the marriage-contract. James Muirhead, the reverser in the tenement, was found liable, by decreet of the Court, 16th February 1762, to pay L.100 sterling, as the redemption-money of the tenement, to Patrick Johnston, executor of his mother Rebecca. Thus much having been premised, it is to be observed that, on the 15th June 1752, William Johnston granted a bill to Janet Watson, the pursuer, for L.27: 8s. sterling. She insisted, in an action for payment, against Patrick Johnston, as heir of William; and she arrested in the hands of James Muirhead that L.100 which

he had been liable by decreet of the Court to pay to Patrick Johnston in right of his mother Rebecca. Muirhead, the arrestee, raised a multiplepoinding, wherein he called Janet Watson and the creditors of William Johnston. Being charged on the decreet obtained by Patrick Johnston for the L.100, he suspended. The multiplepoinding and suspension were conjoined. Muirhead contended that he himself was a creditor of William Johnston, and that William Johnston had no other subject but the said L.100, the price of the tenement: that therefore he, Muirhead, had an interest to plead that the fee of the subject was in William Johnston, not in Rebecca, whereby his son Patrick, before he could draw, would be liable for his father's debts. The same plea was maintained for the pursuer, Janet Watson. This is the state of the fact, in so far as necessary to be known, though at the same time it must be observed, that, by reason of great knavery and litigiousness on the part of Muirhead, the question was much involved before the Lord Ordinary, and even in the Inner-house.

ARGUMENT FOR THE PURSUER:

The general rule of law is, that, when a right is taken to a husband and wife in conjunct fee and liferent, and to the heirs of the marriage in fee, the husband is understood to be fiar. From this general rule there are two exceptions: 1*st*, When the last termination is upon the wife's heirs: 2*dly*, When the subject flows from the wife. The *first* objection can have no place here; for the termination is not to the heirs either of husband or wife, but only to the heirs of the marriage. The *second* exception, When the subject flows from the wife, cannot have place here any more than the first. There is good reason for this exception when the right flows gratuitously from the wife. Thus, if, after the marriage, without any previous obligation, she should take a subject of her own to herself and husband in conjunct fee and liferent, and to the heirs of the marriage in fee, it may be reasonably presumed that she intended a simple liferent to her husband, and a hope of succession to her children, but that she intended to reserve the fee to herself. The case here is widely different: The wife, *nomine dotis*, and in consideration of settlements made by her husband upon her and the children of the marriage, did confer two subjects upon her husband, viz. the L.60 sterling, and the tenement redeemable for L.100 sterling; and it is certain law that a right, though flowing from a wife, belongs in fee to the husband, if granted *nomine dotis*. This doctrine is supported by decisions of the Court, collected in the Dictionary, *voce* Fiar, vol. 1, p. 297. Thus, Forbes, *23d July* 1713, *Edgar* against *Sinclair*: One having, for love and favour, and other onerous causes, assigned to his daughter and her husband, their heirs and executors, a certain sum owing to him by a third party; the Lords found that the wife had the liferent of the whole, but the husband the fee. Durie, *29th January* 1639, *Graham* against *Park*: A subject, given by the wife's father, was found to belong in fee to the husband, because given *nomine dotis*, although the last termination was to the wife's heirs. And under the same title, p. 300, *July* 1720, *Creditors of Northsinton* against *Elliot of Borthwickbrae*: Where the wife disponed the subject, and where the first destination of succession was upon her heirs, yet the fee was found to be in the husband, because the subject was given *nomine dotis*. The general argument here urged is supported by the particular circumstances of the case in question. The sum in the marriage-contract belonged partly to the husband, partly to the wife. The argument of Patrick

Johnston must lead him to maintain that the fee belonged, not partly to the husband partly to the wife, but wholly to the wife. *2dly*, Here the wife, "in consideration of the marriage, sells, annailyies, and dispones in favour of her husband and herself, in conjunct fee and liferent, and to the heirs of the marriage in fee," the foresaid subject. The marriage was itself a valuable consideration, and the subject being thus sold for a valuable consideration, the right in him cannot be taken up by Patrick Johnston otherwise than as his heir. *3dly*, In the event of no children, power is given to the wife of disposing of the subjects brought by her, without her husband's consent. This shows that the fee was wholly in him; for, if it were not, why give the wife a power which she already had?

ARGUMENT FOR PATRICK JOHNSTON:

The decisions of the Court have not uniformly found that a husband is fiar of subjects conveyed by his wife *nomine dotis*, and taken in conjunct fee. The last judgment mentioned in the Dictionary, under this head, is in favour of the wife, *June* 1733, *Angus* against *Ninion*, where a sum assigned by a woman, in her marriage-contract, in name of tocher to herself and husband, and longest liver in conjunct fee and liferent, and the heirs of the marriage; which failing, to the disponee's heirs and assignees,—was found to belong to the wife as fiar. But further, Janet Watson erroneously supposes that the subject was given *nomine dotis*; but the contract does not say so, and there is no ground for presuming it. As William Johnston had no prospect of making any fortune whatever, the L.60 assigned to him by his wife, and actually spent by him, was a *dos* amply sufficient. Besides, here was a postnuptial contract, not one entered into before marriage, so that the wife was under no obligation to give the subject to her husband; and, if she did give it, then she made him a gift of the subject, which is not to be presumed. In the case *Graham* against *Park*, *29th January* 1639, the contract was prior to the marriage. In the case *Elliot*, *July* 1720, the subject was given, failing heirs of the wife's body, to the husband's heirs and assignees; and, in both, the subject was expressly given *nomine dotis*: and as the *dos*, by the law of Scotland, becomes the absolute property of the husband, there was an implied conveyance to him. The concession that Janet Watson makes, in putting the case "of a subject belonging to the wife, being conveyed by her after the marriage, to herself and husband in conjunct fee and liferent, and to the heirs of the marriage in fee," is directly against her, for that case is precisely the present one. As to what is said from the tenor of the contract, that the subject therein mentioned belonged partly to the husband and partly to the wife, and that Patrick Johnston's argument must lead him to maintain that the wife was fiar of the whole, it is answered that William Johnston never performed his part of the obligation; and though he had, there is no difficulty in supposing that the fee of what came from him was descendible to his heirs, of what came from the wife to her heirs. As to the argument, from the style of the marriage-contract, whereby the wife "sells in favour of herself and husband," &c., it is answered, that this is a clause of style invariably used in marriage-contracts. It is only in such contracts that subjects are provided "in conjunct fee and liferent to the husband and wife;" so that, if Janet Watson's argument be good, the fee can never be in the wife at all. The clause, giving the wife a free power of disposal, is at most superfluous; and *superflua non nocent*: it has been inserted for greater security to enable the wife to dispose of a sub-

ject during the coverture, without the consent of her husband, her legal curator. It seems strange to assert that the fee was in the husband, because he had not the disposal of the subject, and not in the wife, because she had. The effect of this clause may be illustrated from a case mentioned by Lord Stair, p. 228, n. edit., *27th June* 1676, *Earl of Dunfermline*, where an obligation by a man to provide the conquest during the marriage to him and his wife in conjunct fee, and, in case of no children, the one half to be disposed as the wife thought fit, was found to make the conquest divide between his and her heirs, so that the wife had not merely a personal faculty, but a fee in the half. The present case is stronger in favour of the wife: for *here* the subject confessedly flowed from the wife, but *there* the clause related to conquest, which must be presumed to flow from the husband.

On the 5th December 1765, the Lord Strichen, Ordinary, found "that the fee was in the mother and not in the father."

On the 18th January and 5th February 1766, he "adhered."

The Lords, on the 22d July 1766, having advised a petition and answers, "found that the fee was in the father and not in the mother."

Act. William Wallace. *Alt.* A. Rolland.

OPINIONS.

PITFOUR. The decisions are uniform. The principles are, 1*st*, To whose heirs is the fee provided? 2*dly*, Whence did it flow? In this case, Where is the property? Answer, In the husband. Here, both a tocher and the conquest are provided; both are the property of the husband. A tocher, in particular, is given to the husband *ad sustinenda onera matrimonii*. If, after the husband's heirs, the subject is provided to the wife's heirs, as in the case of *Scot of Blair*, an *estate* is settled by the wife, not a *tocher*. Here there is no word of the wife's heirs; how then can the wife have a fee? The conquest is settled in the same way, and conquest must certainly go to the husband's heirs. A man and his wife join their stock to the husband and his wife, and to the heirs of the longest liver. If the wife is the longest liver, her heirs succeed, not to the wife, but as heirs of provision to the husband.

This judgment pronounced without a vote.

1766. *July* 23. JOHN MACDOUGAL, Son to John Macdougal in Ballinaid, *against* WILLIAM OLIPHANT, Gardener in Kelso.

WRIT.

Bill Signed by a Mark.

MACDOUGAL, as executor, *qua* nearest of kin to Daniel Irvine, day-labourer at Peick, in England, and Oliphant, as pretending right by assignation from