No 59. LORDS found the daughter's adjudication preferable *pari passu* with the other creditors.

Rem. Dec. Edgar.

*** This case is No 58. p. 8150, *voce* LEGAL DILIGENCE.

1724. *July* 22.

WILLIAM DOUGLAS *against* ROBERT DOUGLAS and EDWARD DRUMMOND, Portioners of Inveresk.

No 60.

The effect of an obligation in a conrract of marriage, conceived in favour of children *nascituri*, and prestable within a limited time.

ROBERT DOUGLAS, by contract of marriage with Helen Gourlay, became bound "to infeft himself in certain lands and tenements about Inveresk, and that betwixt and a precise day, about a year after the marriage; and being so infeft, immediately thereafter to resign for new infeftment to his future spouse in liferent, and the heirs of the marriage in fee; which failing, his own nearest lawful heirs and assignees whatsoever; with reservation of his own liferent." Inhibition being raised upon this contract, William Douglas, a son of the marriage, insisted in an action against the father, to denude; and in that process Edward Drummond having compeared, and produced a disposition for onerous causes, did contend, That the father, by the conception of the contract of marriage, was agreeable to the intention of the marriage-articles still to remain fiar; and consequently, could alienate for onerous causes. It was *pleaded* accordingly, That nothing is better established in our law by decisions, than that a fee in favours of children to be procreated of the marriage does resolve only in a substitution: So it was found in the case of Muir of Anniston, (see No 45. p. 4252.) where a bond being disponed to a husband and wife in liferent, and to the children in fee, the father was found to be fiar, and the children only substitutes. And in the case of Thomsons *contra* Lawsons, 4th February 1681, No 51. p. 4258., where certain tenements were made over to a husband and wife in a contract of marriage in liferent, and to the heirs of the marriage, &c. the Lords found, "that by the conception of the disposition, notwithstanding of a liferent mentioned to the husband, yet he was really fiar." To which may be added the authority of Sir James Stewart, in his Answers to Dirleton's Doubts, Tit. FEE. And the reason of this is plainly, that the fee cannot be *in pendente*, cannot hang in the air; therefore must be in the father, since it cannot be in the children before they are born. Now, besides this argument from the necessity of the thing, it will be easy to make it appear, that such was the design of the parties that the father should be fiar. In the *first* place, The obligation is in favours of heirs, which necessarily imports a succession; and though in some special cases they are to be understood *designative*, here the substitution to those heirs of the marriage demonstrates, that nothing but a succession was intended

in favours of the issue of the marriage. To clear which, let the case be put, that the issue of the marriage should fail in the father's lifetime, and the nearest lawful heir set up the same claim, and serve an inhibition, his plea, by the conception of the contract, would be as strong as the present pursuer's; for the father is bound to him, failing heirs of the marriage, in the precise same words and manner that he is bound to this pursuer. Now, seeing there would be no pretence of denuding in the father's lifetime in the one case, there can be as little in the other. No 60.

To which it was *answered*; It is very true, that in actual settlements, whether with respect to lands or money, taken to a husband and wife in liferent, and to the children in fee, the husband is fiar, because the fee cannot be pendant, and cannot be in the children during their non-existence; but that is altogether out of the present case, which is founded upon an express obligement of the father, to denude himself of the fee within a time limited, in favours of his children, with a reservation only of his liferent; and it has always been reckoned a distinguishing mark betwixt a provision of succession and a direct obligement, that a precise day has been fixed for implement, as was found particularly in the case of the Creditors of Easter Ogle, No 59. p. 12909. Nor is there any thing in the observation, that the heirs of the marriage and their substitues are provided for in the same clause and form of words; for the presumption runs as strongly in favours of the children, whose security is principally in view in contracts of marriage, as it runs against the other persons named, for whom it would need the most express words, before it could be imagined, that they were mentioned in the contract for any other end than to carry out a destination of succession.

Replied for the defenders; There appears to be very little in this distinction; for the obligement to infeft the children in fee can never be more effectual or stronger, than if the father had actually implemented the obligation, by taking the liferent in favours of himself, and the fee for the children *nascituri*; now as this would have only imported a destination of succession to the children, the obligation to infeft, fixed to a certain day, before any child could well exist of the marriage, can never go further.

Duplied; The father's taking the liferent in favours of himself, and the fee to the children *nascituri*, would be no implement of the obligation in this contract of marriage, unless he renewed the infeftment to them *nominatim* after their existence; for such is the import of the obligement: And it would appear, that in putting off performance of the obligement for a twelvemonth, the parties had expressly in view, that infeftment should be taken in name of the heir of the marriage, if any was then in being: And this quadrates with its being an obligation in the strictest sense. Had indeed such an obligement been framed prestable three or six months after the marriage, it would have been a plausible argument, that since there was no possibility of implementing it in any precise meaning of the words, therefore it should be interpreted as a suc-

No 60. cession, *quia verba sumenda sunt cum effectu*; but where clauses bear a fair and literal meaning, there is no place for forced interpretation. Here there was a distinct conditional obligement, to be implemented at the distance of a twelvemonth to the children of the marriage, providing any were at that time, and if none, at any time thereafter upon their existence: The obligement is now purified in the person of this pursuer, which ties down absolutely the father; and seeing it is fenced and secured by the inhibition, ties down also the purchaser.

"THE LORDS found, by the clause in the contract of marriage, the father being obliged after his own right was completed, to infeft the heirs of the marriage in fee, as soon as they exist, that he could not grant any voluntary right in prejudice of these provisions; and therefore, that the inhibition is effectual against the disposition in question."

Fol. Dic. v. 2. *p.* 282. *Rem. Dec. v.* 1. *No* 51. *p.* 99.

*** Edgar reports this case:

1724. *December* 15.—ROBERT DOUGLAS, in his contract of marriage with Helen Gourlay, became bound, "betwixt and a certain day, to procure himself infeft as heir to his father in certain lands; and being so infeft, to infeft and seize the said Helen Gourlay in liferent, and the heirs to be procreated of the marriage in fee; which failing, his own nearest heirs and assignees whatsomever, reserving always his own liferent."

Helen Gourlay died, and the pursuers, her children, suspecting that their father intended to disappoint them in favours of a second wife, used inhibition against him upon their mother's contract of marriage. After the inhibition had been duly published and recorded, Robert Douglas granted a disposition of these lands in favours of Edward Drummond, upon a narrative of onerous causes, which, upon inquiry, was found to be but affected.

Thereafter the children insisted in a process against their father, for implement of the foresaid contract, in which Mr Drummond compeared with his right from the father, and *contended*, That in the construction of law, and by the apparent intention of parties in the marriage-articles, the fee was to remain with the father, and the issue of the marriage could claim no more than a right of succession; and therefore, he had power to burden or alienate the subject, which could not be defeated by an inhibition at their instance.

It was *answered* for the pursuers; That whatever might be the case, where the provision in a contract of marriage was to the father in liferent, and to the children *nascituri* in fee, (in which, was it not for the subtilty that the fee cannot be *in pendente*, a good deal might be said to prove from the genuine principles of law, that there the father was only fiar in trust for the children, when they should exist) yet it is highly reasonable, both in law and equity, that when children of a marriage do exist, and when by the dissolution of the marriage it appears to a certainty who are the heirs of it, the heir so existing should have

No 60.

a proper action, to oblige the father to denude of the fee, and implement his obligation: If it were otherwise, it would be an absurdity to talk of a liferent to the father, and a fee to the children; since he could in no event be liferenter, nor the children become fiars. If this reasoning is just, with regard to the import of a destination of a right to the father in liferent and the children *nascituri* in fee, it must be stronger in this case, where the father is obliged to procure himself infeft as heir to his father, and then to infeft the children of the marriage in fee, with a reservation of his own liferent, and that within a certain fixed time: This is a plain direct obligation to settle the fee of the subject upon the children, and not a provision to settle it either in liferent or fee upon himself: It can admit of no other meaning but that, whenever the children do exist, or at least when it certainly appears that they are heirs of the marriage, the obligation is to be implemented by a conveyance of the fee to them, with a reservation of the father's liferent. By this just interpretation of the intention of parties, all that subtile doctrine, that a fee cannot be pendent, at once flies off: It therefore follows, that the inhibition used by the pursuers, who, as children or heirs of the marriage, have a proper action to make the father denude, must be available *ad hunc effectum*, to reduce the conveyance in Drummond's favours, even though it had been granted for onerous causes. It was upon these principles that the Lords, in the case of Christian Cumming against Cumming of Auchry, (see APPENDIX.) found, "that the father being obliged to provide the heirs of the marriage to certain lands, which failing, his own nearest heirs and assignees whatever, the daughter, as heir of the marriage, had a good action to oblige the father to denude in her favours." See No 46. p. 9191. and No 57. p. 4268.

Replied for Drummond; That the pursuers neither are nor can be heirs of the marriage during the life of their father, especially in this case, where, by the termination of the succession in favours of his heirs whatever, and by his being ordained to serve heir to his own father, the fee is clearly lodged in his person; and therefore, as long as he lives, the children are only substitutes, and their right being pendent during all that time, falls only to be completed by a service after his death. That if it is made out that the father is fiar, it must follow of consequence, that there is here no more than a simple destination alterable at pleasure, or at least in no sense good against onerous transactions, the very essence of a fee or property consisting in an unlimited power to dispone at pleasure, much more for an onerous cause. That in this case the argument for denuding *de præsenti* is without all foundation, seeing the father is not substitute himself to the heirs of the marriage, but his nearest heirs and assignees whatever are substitute to them, which shews, that nothing but a succession was intended in behalf of the issue of the marriage. That *in dubio*, he is presumed fiar *cujus hæredibus maxime prospicitur*, as in the case Thomson *contra* Lawson, 4th February 1681, No 51. p. 4258.; and 21st November 1705, Creditors of Paterson against Douglasses, No 21. p. 4223. See also Dirleton,

No 60. *voce* FEE, with Stewart's Answers. That the nature of the obligation isself being chiefly to be regarded, and there being nothing binding or obligatory in it, nor any prohibitory clause, the inhibition is altogether inept, without any force whatever, as proceeding on no proper legal foundation. And, *lastly*, The case of Auchry was not in point; the husband was obliged to preserve the lands, and do no fact or deed that might anyways prejudge the heirs of the marriage; besides, in that case, a liferent-right allenarly was provided to him, which proves that the fee was not vested in him.

Duplied for the Douglasses; That an obligation on the father to infeft the children in fee, at a certain period, being once established, no satisfactory reason can be given why, after the inhibition, the father should have any power to dispone: That the reasoning, from the last termination of heirs, and the decisions quoted in confirmation thereof can have no weight in a question where the father is specifically obliged to settle the fee in the children, whatever they may have to explain a dubiety, whether a fee is in the husband or wife.

THE LORDS found, by the clause in the contract of marriage, the father being obliged, after his own right was completed, to infeft the heirs of the marriage in fee, as soon as they existed, that he could not grant any voluntary right in prejudice of these provisions; and therefore, that the inhibition was effectual against the disposition in question.

Reporter, *Lord Cullen.* Act. *Ja. Graham* sen. & *Ro. Dundas* Advocatus.
Alt. *Alex. Irvine* & *Ch. Areskine.* Clerk, *Dalrymple.*

Edgar, p. 129.

No 61. 1731. *January* 20. NASMYTH *against* BRANDS.

AN infeftment of annualrent granted by a man to his children therein named, their respective proportions being payable at the first term after his decease, was found preferable according to its date in competition with onerous creditors. See APPENDIX.

Fol. Dic. v. 2. *p.* 281.

No 62. 1741. *July* 31.

Clause in a contract of marriage, Whether importing that the children are creditors, or only heirs of provision?

Competition betwixt the CREDITORS of JAMES LOCKHART and ANNA LOCKHART.

JAMES LOCKHART tenant in Brunston, in his contract of marriage with Margaret Montgomery his second spouse, provided 2000 merks to the children of that marriage, in the following terms, *scil.* "He contracts and provides to himself, and said spouse, or longest liver, during their lifetime, the yearly annualrent of the sum of 2000 merks, and the fee thereof to the bairns of the marriage which shall happen to be procreated betwixt them."