1773. *February* 25.
ELIZABETH and ISOBEL GRAYS, Daughters of JOHN GRAY of Rogart, deceased *against* JOHN WOOD, and Others, Creditors of said JOHN GRAY.

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The fee of lands, which, by a minute of a post-nuptial contract of marriage, the wife became bound to dispone to her husband in liferent, and to the heirs of the marriage in fee, not bearing to be *nomine dotis*, found to belong to two daughters afterwards existing of the marriage, and not to the husband.

THE lands of Rogart belonged formerly to a family of the name of Monro; and Rachel Monro, the last of that family, had a personal right, by disposition from her father, to that estate; but she was not infeft thereon, nor did she ever make up any title in her person.

Rachel Monro was married to John Gray, by whom she had issue Elizabeth and Isobel Grays. After her death, her two daughters made up titles to the estate, and were infeft therein, first in 1741, and afterwards, upon more complete titles, in 1762.

In 1733, a minute of a post-nuptial contract of marriage had been entered into between the said John Gray and Rachel Monro, conceived as follows:

'For as much as there was no contract of marriage betwixt the said John 'Gray and the said Mrs Rachel Monro before their marriage, and they being 'resolved, and desirous, that there be an ample post-nuptial contract extended 'betwixt them, with all clauses needful,' have agreed to the following articles. '*1mo*, The said Rachel Monro is to procure herself served and retoured heiress 'in general and special to her said deceased father, and thereupon infeft and 'seized in all and hail the lands of Meikle Rogart, with the mill and mill lands 'thereof, &c. And being so infeft, to dispone the said lands, &c. to and in fa'vours of the said John Gray in liferent, and to the heirs of the said marriage 'in fee;' and to assign and dispone to him the whole moveable subjects belonging to her. *2do*, 'The said John Gray is to secure the sum of L. 200 Sterling 'money upon land, or other good sufficient security, and take the rights there'of in favour of himself and his said spouse, and the longest liver of them two 'in conjunct fee and liferent, and to the heirs of the marriage in fee; and is 'also to provide his said spouse in and to the liferent of the town, mill-lands, 'and others above mentioned, with terce of moveables and conquest; and the 'children of the said marriage to be provided to such sums as the said John 'Gray shall please to provide them, at any time in his lifetime; and failing of 'such division, to such sum as shall be agreed on by two of their nearest rela'tions, one upon the father's side, and another upon the mother's side.'

On this foot, things remained at the time of Rachel Monro's death, and when the titles were made up in the person of the daughters; and who afterwards, in 1762, along with their father, granted a disposition of the lands of Rogart to the Earl of Sutherland, in pursuance of a previous minute of sale, on his giving a bond for the price.

In a multiple-poinding brought by the purchaser, the Creditors of John Gray, who had used arrestments, contended, in the *first* place, that, by the conception of the minute of contract with his wife, their debtor John Gray was con-

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stituted fiar of the lands of Rogart, at least of the personal right thereof; and, of consequence, that the price, while *in medio*, must be affectable for his debts. *2do*, They founded on a contract between Gray and his daughter, purporting their concurrence to sell the lands to the best offerer; that the daughters were to have a sum certain between them; and the father to take the chance of the surplus in lieu of his claims.

Answered to the *first* plea; The husband could have no right to those lands which were the wife's property, other than her conveyance gave. She, however, conveyed nothing to him but a naked right of liferent, the fee remaining in her own person; descendible, however, by that deed, to the heirs of the marriage, as her heirs. Had no heirs of the marriage existed, as there was no destination in favour of the husband's heirs, nor no substitution by her to the heirs of the marriage; in short, as nothing was done to convey the lands in any series other than the legal succession, Mrs Gray's heirs whatsoever, in the event of her death, would have succeeded to the fee of the estate, and had a right to make up titles thereto, as her heirs, subject only to the burden of her husband's liferent, which was all that she had habilely conveyed.

The words of the *second* article of the minute, which the creditors lay hold of, as importing, that by that contract, the fee was conveyed to Mr Gray, so that, to vest the liferent in his wife, a re-conveyance was necessary, appear to be inaccurately conceived; but their supposition is ill founded; for the property not being vested in Mr Gray, by the preceding part of the contract, no conveyance of the liferent to his wife was necessary. On the contrary, that liferent remained with her in consequence of her absolute right of property, in case her husband predeceased her. The meaning of this clause appears to be truly this; that the liferent of the sum of L. 200 Sterling to be placed on security, together with the terce of moveables and conquest, should be secure to her, besides what she drew from the town, mill-lands, and others, though the deed in this particular has been inaccurately expressed.

In *answer* to the *second* plea; The contract 1762, between John Gray and his daughters, can have no effect. It was a most improper deed, impetrated from them, to their great prejudice, by unfair means, and which they would be entitled to set aside. And a condescendence of the facts and circumstances they offered to prove in support of their reasons of reduction of this contract, and also of their own ages, was exhibited by order of Court.

'THE LORDS find, that the fee of the lands of Rogart belonged to Elizabeth and Isobel Grays; also find, that the contract, of date February 18. 1762, is not a subsisting contract binding on them; and remit to the Lord Ordinary to proceed accordingly.'

A reclaiming petition was refused without answers.

Act. *Crosbie.* Alt. *Blair.* Clerk, *Kirkpatrick.*

Fac. Col. No 60, p. 148.