1761. *July* 7. DR DOUGLAS *against* AINSLIE.

No 58.
When lands are disponed to a father in liferent, and to the children of the marriage *nascituri* in fee, the father is fiar, and may sell the lands.

AINSLIE sold his lands of Harkerse by public roup, and they were purchased by Dr Douglas. Ainslie, by the articles of roup, was bound to deliver a good and sufficient progress, and to clear all bygone and public burdens and incumbrances. Dr Douglas being charged for the price, offered a bill of suspension for the following reason.

The lands in question are disponed to Ainslie by his uncle in liferent during all the days of his life; which failing, to the children procreated or to be procreated of his body in fee; which failing, to the granter's heirs and assignees, reserving to the granter a power to alter. At this time Ainslie was married; and therefore it is clear, that the intention of the granter was to provide for his children. Had not this been his intention, there was no occasion for any disposition, because Ainslie was heir at law to the granter; and accordingly, infeftment has been taken to Ainslie in liferent, and his children in fee; and as he has no children alive, he had no power to sell the lands.

Answered for Ainslie; That nothing is better established in the law of Scotland, than that when lands are disponed in the present terms, the father is fiar, and that the children can only take as heirs of provision. The infeftment taken in their name is good for nothing; because, though Ainslie had died in possession of the estate, they behoved to serve themselves heirs of provision and be infeft again. The fee of an estate cannot be *in pendente*, otherwise many absurdities would follow. If a superiority was disponed in such terms, there would be no superior, and the vassals could not be entered. If the *dominium utile* was disponed, the superior could have no vassal. If a former proprietor of an estate under such circumstances had contracted debt, his creditors could not affect it; because there would be no person from whom it could be adjudged. In short, if the father was not understood to be fiar in such cases, we would have property without a proprietor; than which nothing can be more absurd. This doctrine is firmly established by the following decisions; 25th November 1735, Creditors of Frog *contra* his Children, No 55. p. 4262.; 24th February 1741, Lillie *contra* Riddel, No 56. p. 4267.; and 3d June 1748, Gordon *contra* Sutherland, *voce* FIAR ABSOLUTE AND LIMITED.—PROVISIONS TO HEIRS AND CHILDREN.

'THE LORDS refused the bill of suspension.'

For Ainslie *Montgomery*. Clerk, *Gibson*.

P. M. *Fol. Dic. v.* 3. *p.* 210. *Fac. Col. No* 47. *p.* 100.

1780. *December* 7. ANNE DICKSON *against* ALEXANDER DICKSON.

No 59.
A bond was taken to a father in liferent, and to

JAMES DICKSON, several years before his death, executed a deed, settling his heritable subjects upon his son Alexander, with a substitution in favour of his

No 59.
his son in fee, with power to the father, notwithstanding, to uplift and discharge. The bond was found to belong to the father, and to be part of the fund of the legitim of his children.

daughter Anne; reserving his own and his wife's liferent, and a power to alter and burden as he thought proper. By the same deed he nominated his son; whom failing, his daughter, to be his sole executor or executrix.

Soon after the date of this settlement, James sold his lands of Milltown; and, a few weeks before his death, he took a bond from the purchaser, in whose hands L. 600 Sterling of the price still remained, in favour of himself and his wife, and longest liver of them in liferent, for their liferent use allenarly, and in favour of their son, his heirs, executors, or assignees, in fee; 'without prejudice always to the said James Dickson, of suiting, and using all manner of execution and diligence, at any time in his lifetime, upon this bond, after the aforesaid term of payment, he shall see fit; and uplifting and discharging the principal sum, annualrent, and penalty foresaid, notwithstanding he is only provided to the liferent, as aforesaid.'

Anne, the daughter, had been married previously to the date of the first of these settlements, and had L. 300 Sterling provided to her in name of tocher; but her contract of marriage, to which her father was party, declared, 'That she should still remain a bairn of her father's house, and should have her legal share of his means and estate at his death, notwithstanding the above tocher.'

Upon James's death, his daughter and her husband brought an action against Alexander, for payment, *inter alia*, of L. 400 Sterling, as the share she was entitled to of her father's effects, in virtue of her right of *legitim*; and, in the course of this action, the following question occurred:

Whether the defender, as executor, was accountable for the L. 600 bond above-mentioned?

Pleaded for the pursuers; It is a point, *triti juris*, that, where a father takes a right to himself in liferent, and to his children in fee, the fee still remains in the father, unless the tenor of the deed clearly show a contrary intention. In the present case, it is evident that the father did not mean to divest himself of the fee in favour of his son, but had the bond so conceived, merely to save expense in making up titles after his death; for he, at the same time, expressly reserved to himself a power 'to uplift and discharge *the principal sum*, notwithstanding he was only provided to the liferent.' It is clear, therefore, that the sum in this bond remained under the father's power till the last moment of his life; and that, while he lived, any right which his son had was pendent and defeasible.

But such is the nature of the right of legitim, that it operates with full energy the very moment the father ceases to exist; and, in some respects, even anticipates that period. Thus, no deed by the father, of a testamentary nature, or revocable, can so far divest him of the property, as to disappoint or diminish the right which every unforisfamiliated child has to a share of the goods in communion; Erskine, b. 3. tit. 9. § 16. The bond in question, therefore, remaining *in bonis* of James Dickson till his death, was from that moment subject to the pursuer's legal claims upon his executry.

No 59.

Answered, The defender does not claim an exclusive right to the L. 600 in question, in virtue of any deed, either of a testamentary or of a revocable nature, but in consequence of the fee vested in him by a bond, which could not be revoked. From the moment that bond existed, his father had no more than a liferent-right, which ceased at his death; and the fee, which had all along been in the defender, continued burdened with the liferent provided to his mother, who survived her husband.

The clause in the bond, authorising the father to do diligence upon it, is of no consequence. It was properly thrown in, to prevent any dispute that might arise, in case it should be found expedient, for the security of all concerned, to insist for payment, while the defender, an officer in the army, might be abroad, or not present, to concur in the discharge; and, had his father uplifted the money, in consequence of the power so reserved to him, he could, perhaps, have been compelled to lend it out anew, on the same terms. But this case did not exist; the defender's right of fee remains untouched and entire; and, the bond still subsisting, it is not to be concluded that the debt *must* fall under the executry, merely because it *might* have done so, had the bond been discharged.

Observed on the Bench; As there was no obligation upon the father, in case he should uplift the money, to re-employ it in the same way, the *substantial* fee remained in him.

THE LORDS found, 'That the sum in dispute made a part of the divisible funds, in the present accounting for the pursuer's legitim.'

In the same action, another question arose from the following circumstance.—A debt appeared to be due by the father to one Hamilton, who had not been heard of for many years. The question, therefore, was, Whether the defender was entitled to retention of a sum equivalent to that debt?

Pleaded for the pursuers; The existence of Hamilton's debt being very uncertain, it ought not to be sustained as a burden upon the executry. The pursuers are willing to find caution to indemnify the defender; and this expedient has been adopeted by the Court in similar cases; Durie, 17th March 1636, Weir *contra* Arnot, *voce* PRESUMPTION.

Answered, The defender is clearly entitled to set apart, out of the executry, a sum corresponding to this debt. The caution offered by the pursuer, however unexceptionable, does not afford *perfect* security, or preclude the *possibility* of the defender's being disappointed in his relief. If even the debt should never be demanded, the defender, as executor, is entitled to reap the whole benefit arising from the creditor's neglect.

THE LORDS found, 'That the defender was not bound to pay to the pursuers any part of the sum stated as due to William Hamilton, on their finding caution to repeat.'

Lord Ordinary, *Elliock*. Act. *William Wallace*. Alt. *Wight*. Clerk, *Orme*.

L. *Fol. Dic. v. 3. p. 211. Fac. Col. No 5. p. 10.*