

1761. July 7.

DR DOUGLAS *against* AINSLIE.

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 disposed 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, infestment 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 disposed in the present terms, the father is fiar, and that the children can only take as heirs of provision. The infestment 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 infest again. The fee of an estate cannot be *in pendente*, otherwise many absurdities would follow. If a superiority was disposed in such terms, there would be no superior, and the vassals could not be entered. If the *dominium utile* was disposed, 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.

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 58.

When lands are disposed to a father in liferent, and to the children of the marriage *nascituri* in fee, the father is fiar, and may sell the lands.

No 59.

A bond was taken to a father in liferent, and to