

1793. March 6. ARCHIBALD SETON against The CREDITORS of Hugh Seton.

CHARLES SMITH, in the contract of marriage entered into betwixt his son Hugh Smith afterwards Seton, and Mrs Elizabeth Seton of Touch, obliged himself to have in readiness by Martinmas 1746 L. 8000, and to employ it on land, or other heritable security, and to take the rights in name of certain trustees for behoof of ' Hugh Smith in liferent, and the heirs-male to be procreate of the marriage in fee.'

Charles Smith in part fulfilled this obligation, by purchasing certain lands, and conveying them, together with an heritable bond to the trustees; but at his death there remained a balance of above L. 3000 against him.

The trustees conveyed the lands to Archibald Seton, the heir of the marriage, in terms of the trust.

The heritable bond was paid to Hugh Seton, who was himself one of the trustees, with consent of a *quorum*.

In the ranking of his creditors Archibald Seton claimed to be ranked as a creditor, *1st*, For the said balance which his father owed as representing Charles Smith; and *2dly*, For the amount of the heritable bond, which was paid to him as trustee, and had not been employed in terms of the contract,

The common agent, *inter alia*,

*Objected*; If Charles Smith, in a simple obligation, had bound himself to convey, or had actually conveyed a certain sum or subject to his son Hugh in liferent, and his children *nascituri* in fee, Hugh would have been fiar, and the claimant would have had no *jus crediti*; 1st March 1781, Cuthbertson against Thomson, *infra b. t.*; 29th June 1786, Muir against Muir, *infra b. t.*; 7th December 1780, Dicksons against Dickson, *infra b. t.*; 23d June 1779, Porterfield against Grahame, &c., *infra b. t.* The same would have been the case though the obligation had been contained in a contract of marriage; 3d June 1748, Gordon against Sutherland, affirmed on appeal, *voce* FIAR ABSOLUTE, LIMITED; Strahan's Creditors against Strahan, No 105. p. 996.; 15th November 1787, Children of Mactavish against his Creditors, *voce* PROVISIONS TO HEIRS AND CHILDREN; unless the majority of the heir, or some other fixed period had been specified at which Hugh should be obliged to vest the right in his person. There seems no reason for a different construction of the right when it is taken to trustees for the heir, instead of being taken directly to himself. They were not taken bound to denude in his favour at any given time, nor were they prohibited from making a conveyance to the father in liferent, and the heirs-male *nascituri* in fee, which would have placed Hugh Seton in the same situation as a direct conveyance from his father Charles Smith.

*Answered*; The legal subtlety which prevents a fee from vesting in children *nascituri*, is completely removed by the appointment of trustees, who supply their place, and are, while the trust subsists, fiars of the subject. The case

No 17.

When a subject is conveyed to trustees for a certain person in liferent, and his children *nascituri* in fee, the father is not fiar.

No 17. then comes to be precisely the same as if the obligation had been taken to the father in liferent, and the children *nominatim* in fee, when the father, beyond dispute, would have been only a naked liferenter.

The trustees could not denude themselves of the trust before the existence of an heir of the marriage. They then became bound to convey the funds in their hands to Hugh Seton in liferent, and the heirs *nominatim* in fee; and so far as Mr Smith had not fulfilled his obligation, to convey it and the *jus exigendi* in the same terms.

The case is the stronger, that the obligation did not flow from the father, but from a third party, who vested nothing in the father, but a right of compelling the trustees to give him the liferent of the subject, they continuing fiars till the heirs of the marriage obliged them to denude in their favour.

The Lord Ordinary reported the cause on memorials.

The Court were unanimously of opinion, that the effect and sole intention of appointing trustees was to prevent the father from being fiar. The subject (it was observed) was vested in the trustees, who held the fee for behoof of the children, and the liferent only for the father. If they had paid the sum to Hugh Seton, they would, as infringing on the trust, have been liable in damages to Archibald,

THE LORDS repelled the objection, and sustained Archibald Seton's claim.

Reporter, *Lord Swinton,*

For Archibald Seton, *Dean of Faculty.*

*Act. Solicitor-General, Patison.*

Clerk, *Menzies.*

*D. D.*

*Fol. Dic. v. 3. p. 209. Fac. Col. No 44. p. 92.*

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## S E C T. II.

### Where the Right flows from the Wife.

No 18.

1611. December 13. KINNAIRD against PITFODDLES.

A reversion being granted to a husband and wife, and their heirs, the wife having been fiar of the lands wadset, was found also to be fiar of the reversion.

THE Laird of Kinnaird of that Ilk, as heir by progress to umquhile Thomas Kinnaird of Culbin, pursued this Laird of Pitfoddles, as heir and successor to umquhile Gilbert Merzies burgess of Aberdeen, to hear and see the half lands of Pitfoddles redeemed by payment of 40 merks, conform to a reversion of the said lands granted by Gilbert to Thomas Kinnaird of that Ilk, Geillis Murray his spouse, and to their heirs. It was *excepted*, that no redemption could be granted upon that reversion, which was dated anno 1428, because it was in effect