

be given to that word ; and particularly a very learned Judge, of great authority, who had commenced practice at a very early period of life, had declared, that such had been the understanding ever since he remembered any thing, and that individuals had acted upon this supposition, ever since. It was also observed, that though such understanding could not be stated to have been come up to by any express decision upon this particular point, yet it had been a familiar idea upwards of a century ago, that there was such a difference as had been contended for in the present case. In a case reported by Lord Stair, in the year 1681, (No 51. p. 4258.) this distinction was mentioned. I do not take it that it was there stated as the mere argument from the bar ; but I conceive, that in this, as in other cases reported by Lord Stair, where a principle, adverse to the decision, was stated, it was an opinion thrown out by the Court."

" These things considered, and that the judgment gives effect to the intention of the testator, which, in equity, ought always to be supported, as far as it can be done consistently with the rules of law ; though I feel no conviction, though my mind incline to doubt exceedingly that the judgment proceeded on safe grounds ; yet I have not courage to venture on a reversal, when I am told by a person of high authority, that the effect of such reversal would be to put numerous settlements, made even in the course of his own experience, in a situation in which they were not understood by the makers of them to stand. I would, therefore, have it understood, that this consideration alone restrains me, and I would wish that the Court would, in some future case proper for the purpose, re-consider the principle of their judgment in this case, which, in consequence of this high authority, I think it more safe, for the present, to let remain unaltered, in the hope that the question may afterwards come again before the Court to be maturely settled."

\* \* \* It cannot well be conceived how, in any future case, the Court could be at liberty to decide, in opposition both to their former precedents and practice, and to this decision of the House of Lords. The influence of the causes which induced the decision in this case, must remain undiminished in any future instance. See No 75. p. 4297.

1797. January 27.

MARGARET SHANKS *against* The KIRK-SESSION of CERES and Others.

JOHN HOWIE, mason in Ceres, purchased a few acres of land from Sir Thomas Bruce Hope. In the dispositive clause of the charter obtained by Howie, the lands were conveyed to him and his wife in conjunct-fee and liferent, and their son Thomas in fee ; whom failing, to the heirs and assignees of John Howie. But, in the precept of sasine, warrant was given for infefting John and his wife simply in liferent, and their son Thomas in fee.

The instrument of sasine was in terms of the precept.

No 73.

No 74.

The fee of a subject being vested in one person by the dispositive clause of a charter, and in another by the precept and instrument of sasine, the former was found to be bar.

No 74.

John Howie was heir to his father in certain houses and yards, which likewise held of Sir Thomas Hope, as to which the charter of the lands contained a precept of *clare constat* in his favour, and, subjoined to the instrument of sasine, as to the lands, there was a declaration by the notary, but not signed by John Howie, that the latter had, *propriis manibus*, given infeftment of the houses and yards to his wife in liferent, and his son Thomas in fee.

Thomas Howie died before his father, who disposed the subjects to himself and his wife in liferent, and his other two sons equally in fee.

One of the sons, after John Howie's death, sold his half to the kirk-session of Ceres; against whom, and the proprietors of the other half, Margaret Shanks, widow of Thomas Howie, brought an action in order to have her right to a terce out of the subjects declared; and the question came to be, Whether Thomas Howie was fiar of the subjects during his father's lifetime?

As to the lands purchased from Sir Thomas Bruce Hope, the defenders

*Pleaded*, By the dispositive clause of the charter, the fee was clearly vested in the father, and the name of the son introduced merely to save expense in making up titles in case he should survive him, Stair, p. 286.; Dict. *vocce* FIAR; Bankton, v. I. p. 576.; Erskine, p. 561. Nor is there any reason to presume, that the precept of sasine, the object of which is solely to carry the dispositive clause into effect, was meant to alter the nature of the right, and therefore the discrepancy between them must have arisen from an oversight of the writer: Indeed, as the dispositive clause is the principal, and the other the accessory, wherever they disagree the right must be regulated by the former. Originally, when the superior gave a verbal mandate to his bailie to grant infeftment to his vassal, the terms of the infeftment could not have varied the right conveyed by the charter. The same must have held when afterwards the precept came to be in writing, but on a paper apart; nor can it make any difference, that the precept is now engrossed in the body of the charter.

*Answered*, When a father conveys a subject to himself in liferent, and his son *nominatim* in fee, the fee is vested in the latter, and it depends merely on the intention of parties, whether the expression 'conjunct-fee and liferent,' gives the father a fee or a liferent. His intention to confine himself to the latter, is here established by the terms of the precept and instrument of sasine, and by his afterwards disposing the same subjects to his younger sons, reserving his own and his wife's liferent.

Besides, wherever there is a discrepancy between the dispositive clause and the precept of sasine, the latter must prevail; for, in consequence of the various statutes directing the publication and registration of sasines, (1503, c. 89.; 1540, c. 79.; 1555, c. 46.; 1587, c. 64.) which must be in terms of the precept on which they proceed, the precept has become the most material clause in the charter. The pursuer, therefore, became entitled to her terce on the faith of the records.

As to the houses and yards, the defenders

*Pleaded*, The infestment said to have been given *propriis manibus* of John Howie is null, because it was not subscribed by him.

*Answered*, It is no objection to the instrument of sasine, that it is not signed by John Howie, as the circumstances of the case afford evidence that it was agreeable to his intention; Stair, b. 2. tit. 3. § 19.; Stair, 11th February 1669, Buchan against Tait, *voce* PROOF; 23d January 1618, Murray against Shaw (Hope) *IBIDEM*; Stair, 29th June 1665, Norvel against Hunter, *IBIDEM*.

THE LORD ORDINARY found the fee of the subject, in the charter granted by Sir Thomas Bruce Hope, was in Thomas Howie the son, and that therefore the pursuer was entitled to her terce.

Upon advising a reclaiming petition, with answers, it was

*Observed* on the Bench, The dispositive clause of the charter clearly conveys the fee of the acres to the father, and the effect of any discrepancy in the precept would be, not to vest the fee in the son, but to make the father's right still personal.

As there was no previous disposition of the houses and yards by John Howie to his son, the instrument of sasine *propriis manibus* is null, for want of the father's subscription.

THE LORDS almost unanimously 'Altered the interlocutor reclaimed against, and assoilzied the defenders.'

Lord Ordinary, *Dregborn.* Act. *D. Cathcart.* Alt. *Neil Ferguson.* Clerk, *Pringle.*  
D. D. *Fac. Col. No 13. p. 27.*

1801. November 25. WATHERSTONE against RENTONS.

No 75.

JAMES WATHERSTONE of Kirktonhill, in the year 1781, disposed the lands of Trabown to his daughter Christian; and to George Renton her husband, in conjunct-fee and liferent, and to the longest liver 'for their liferent-use allenary, and to the children procreated; or to be procreated of the marriage, equally in fee.'

A disposition taken to a husband and wife in conjunct-fee and liferent, to the longest liver, for their liferent-use allenary, and to their children in fee, conveys only a liferent of the subject to the parents, who hold the fee *fiduciaria* for their children.

Doubts having arisen with respect to the interpretation of this deed, whether it conveyed to the immediate disponees an absolute or a fiduciary fee, an action of declarator was brought at their instance, in which their children were called as defenders, to have it found that they had the power 'to sell or dispose of the lands, either for onerous or gratuitous causes.'

THE LORD ORDINARY reported the cause, but the Court were clearly of opinion, that the point was already fixed, and that after the decision of the House