

1715. February 8.

MARGARET KER, and Mr THOMAS LINNEN, her Husband, *against* ANNA KER, and JOHN KER of Kersland, her Husband.

THE lands of Kersland being, by the infeftments thereof, vested in the person of Robert Ker, and his heirs male, he in November 1666, by a holograph writ, not very formal, nor in good stile, but sufficient to set forth the mind of the granter, made a settlement of his affairs, and names whom he resolves should succeed, as heirs, viz. Robert Ker, his eldest son, and, failing of him, Daniel Ker, and, failing of him, Jean, Margaret, Anna, or Elizabeth Kers, his daughters, then names a provision of L. 1000 Sterling, to be divided amongst his younger children, and subjoins a clause, that in case his male children die, and none of the female children succeed to him as heirs, that then the said female children shall have among them L. 40,000 Scots; and then follows, "and which foresaid provision, which is forementioned in the case, if my heirs male live and succeed as heirs, or do any way enjoy my said estate, that the same is in contentation of all sums of money, portion natural, falling to, or that befalls them by contract of marriage, or any other way," Robert, the eldest son, dies, and Daniel, the second, succeeded, and was infeft as heir to his father, and he granted a disposition in favours of Jean, the eldest sister, (at least made a conveyance to a third party for her behoof) and Jean disposed the lands to Anna, the third sister, now Lady Kersland, and her husband, passing by Margaret, the second; who having formerly got payment of her share of the L. 1000 Sterling, does now insist for her third share of L. 40,000 Scots, provided to the daughters, in the event of both the sons dying, and his daughters not succeeding as heirs.

*Answered* for the defenders, That this L. 40,000 never became a debt, being only payable to the daughters, in case of the decease of the granter's two sons, and their not living to enjoy his estate, which was a case that did not exist, Daniel having succeeded, and being infeft heir to his father, and granting a disposition to his eldest sister.

*Replied* for the pursuers, That the condition on which the sum is payable, being (in case none of his female children succeeded to him as heirs,) and none of them having so succeeded, nay it being impossible for the defender so to succeed, either by destination, because younger, or by blood, because then she could only come in as heir-portioner with the pursuer; therefore the pursuer being, by a simulate conveyance, excluded from the succession destined to her by her father, she had good right to claim the benefit of the obligation.

THE LORDS sustained the defence in these terms, viz. that Daniel Ker succeeded to his father, either by service, or precept of *clare constat*, and that Jean Ker succeeded to the said Daniel, either as heir, or by singular titles.

Act. Boswel.

Alt. Sir Jo. Ferguson and Ro. Dundas.

Clerk, Alexander.

2.

Bruce, v. 1. No 58. p. 72.

NO 110.

Whether the particular terms of a deed of settlement constituted the provision a positive debt.