No 22.

both on the same footing; therefore, what holds in the one must likewise take place in the other. Besides, our law has proceeded on the supposition, that woods, in the same manner as coals, are *pars fundi;* and that the liferenters, of whatever kind, can no more cut the growing wood, or make use of the coal for sale, than they could destroy the surface of the ground, which might render it useless for many years.

The Lords found, that a liferenter, though by reservation, has not a right to cut woods.

But, upon petition and answers,

They found, that Auchinblain, who is liferenter, by reservation, has a right to cut the woods in question, according to the custom and usage of the country where the woods are.

Fol. Dic. v. 1. p. 549. *C. Home, No.* 73. *p.* 123.

1794. *February* 26. Fraser *against* Middleton.

No 23.

The Lords found, That a father, after disponing his estate to his son in his contract of marriage, reserving to himself a liferent of one half of it, has no power of granting leases of the part liferented by himself to last beyond his own lifetime.

Fol. Dic. v. 3. *p.* 387. *Fac. Coll.*

*** This case is No. 75. p. 7849. *voce* Jus Tertii.

SECTION III.

Power of uplifting liferented Sums.

1661. *July.* Fleming *against* Flemings.

No 24. Found, that a liferenter, who called up the money, was bound to re-employ it conform to the bond.

Malcolm Fleming, merchant in Edinburgh, dies, leaving behind him a wife named Fleming, and many children; she obtains herself confirmed executrix-dative to her husband, and tutrix-dative to her children; and, thereafter, she marries Sir John Gibson, Clerk of Session; betwixt whom and the children there being a count and reckoning depending before the English Judges for the time, for the bairns part of the defunct's moveables; there was

a query given in by Mr John Harper, Auditor, concerning a cancelled bond of L. 180 Sterling, to Patrick Scot of Langshaw, by the defunct; which bond the relict alleged she paid after the husband's decease, and retired the bond cancelled, with a discharge thereof, subscribed by the said Patrick. The matter being heard before the English Judges, they ordained, before answer to the dispute, Patrick's oath to be taken *ex officio*, Whether he was truly paid of the money by the relict or not? Who did depone *affirmative*, that she did pay the money after her husband's decease. The matter being debated *in præsentia*, it was *alleged*, 1*mo*, That Patrick Scot's discharge could not make up a cancelled bond, which is no bond, being of itself no binding writ; 2*do*, Nor could Patrick's oath make it up; for then it were in the power of the relict, or any other, after the defunct's decease, to meddle with retired cancelled bonds, and to deal with the creditors to grant discharges, after the debtor's death, thereby to exhaust the defunct's fortune; 3*tio*, The defunct being a shop-keeper with his wife, she must be presumed to have had her husband's money in cash, wherewith she paid the said bond; 4*to*, If she paid it out of her own money, she has done it not to burden her children, seeing she cancelled the bond; especially seeing the time of the alleged payment she was neither executrix nor tutrix, and so not that party against whom there was any legal title or sentence to make debtor, or to compel her to pay for the time. And if the children had been confirmed executors, and that there had been other tutors given to them, the cancelled bond could not be any ground of action against them: And if it were otherwise, great fraud and inconveniencies could not be obviated. Likeas, in her first count given in to her children, this was not inserted as an article of discharge, but added after she married her husband. It was *answered*, That the bond was a true debt resting by the defunct at his death, as is evident by Patrick Scot's discharge, and his oath, being a famous person; and the bond was seen by the defunct's friends, with the rest of his writs, uncancelled, immediately after his death; and that the defunct's whole lying money was, not many days before, lent out to the Earl of Southesk; and, for to make the sum greater, the defunct borrowed this sum, to be paid on demand, which the relict did pay shortly after her husband's decease, having respect to her husband's credit; that *non præsumitur donare* to her children, when she is now pursued as debtor; and having *bona fide* paid it, the same should be allowed; and alleged a practique extracted out of Durie *anno* 1636. *See* APPENDIX.

THE LORDS having at great length, *in præsentia*, heard the debate, and having considered the same, with the whole circumstances and merits of this article, they refused to allow the same. It is to be remembered, that they had no regard to the payment, whether it was by the relict or not, but to the cancelling the bond; and that she was then neither executrix nor tutrix: And, especially, they had respect to the great inconveniencies which would follow,

No 24. if they should sustain the like; nor had they regard to the practique; and, indeed, it met with this case in many things.

1661. *November* 14.—In this same process, there being a bond granted by the Lord Cardross, by which he acknowledged himself to have borrowed from the relict, for herself, and in name of Andrew and Malcolm Flemings, her sons, 6000 merks, which he obliges himself to repay to her in liferent, and, after her decease, to her two sons in fee; and, failing of her sons, to belong to herself and her heirs, with annualrent, as well not infeft as infeft, but prejudice to her, and, after her decease, to her two sons, to charge for the money without requisition: It was *alleged* for the Relict, That this last clause gave her liberty to call for the money, and dispose thereupon as she pleases; and, accordingly, she has power to loose the fee: And two practiques were alleged out of Durie therefor, *annis* 1625 and 1626.* It was *answered*, That the money was borrowed from the mother herself, and in name of her children; that Cardross's obligement did constitute a liferent allenarly in favour of the mother, and the fee in favours of the children, and not after the manner of the substitution, which was in the practique alleged, whereby the money was payable *simpliciter* to the father at a term, and, in case of his decease, to his son: And the substitution, or tailzie, in this bond, was only in favour of the mother, in case both the children should die, having only a liferent constituted to herself, if any of them should live: That the last clause was but *stilus curiæ*, to exclude the necessity of the requisition; and that the liferenter should have liberty to call for the money, if the debtor be irresponsal, and which power, *de jure*, a liferenter, in such a case, has, whether it had been reserved or not.

The Lords found the relict to be only liferenter; and, if she called for the money, she behoved to re-employ the same, conform to the bond.

Item, In this case it was *alleged* by the Relict, That the bond, in so far as concerns the deceased Malcolm's part, must be accepted in contentation of Malcolm's portion natural *pro tanto*; seeing she being tutrix, and having employed the same in his name, *non præsumitur donare:* And though she be liferenter, and substitute after both her sons' deceases, she is content to renounce the liferent, and quit the substitution. It was *answered*, That *nemo præsumitur donare*, when the money is employed according to the nature of the debt owing, which was a moveable debt, a portion natural, not affected with a liferent or substitution; and, therefore, this being of a far different nature, the bond must stand, as being intended, *ab initio*, to be a debt owing by and attour the portion natural.

The Lords found the allegeance relevant, notwithstanding of the reply; the relict quitting the liferent and substitution.

Gilmour, No. 7. p. 5.

* *See* Appendix.

_ Stair reports this case :

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1661. *November* 14.—DAME ELIZABETH FLEMING, relict and executrix to umquhile Malcolm Fleming, merchant in Edinburgh, and tutrix dative to his bairns, having formerly pursued an action of exoneration against her children, in which she gave up, as an article of her account, a hundred pounds Sterling, paid by her to Patrick Scot of Langshaw, whereupon she had retired her husband's bond, and taken a discharge upon the back thereof, and had taken her husband's name therefrom, whereanent the defenders *alleged*, That this being a cancelled paper, could establish no debt against them, neither could Patrick Scot's discharge prove against them that it was a debt resting by their father, and paid since his death, as Patrick's testimony and oath could not prove, much less his declaration in writing, whereupon the Lords had ordained Patrick Scot's oath to be taken *ex officio*, upon the truth of the debt, and when it was paid to him, and by whom ; who having deponed that it was paid by this pursuer after her husband's death, the Lords did allow the article. Now the cause being wakened at the pursuer's instance, and Sir John Gibson, now her husband, one of the clerks, the defenders further *alleged*, That Patrick Scot's oath ought not to have been taken, and could not be sufficient to prove against them that this was a true debt, and paid by their mother ; but it behoved to be presumed, if it was a debt at all, to have been paid by their father, and the bond cancelled by him, and left amongst his writs, and found by their mother there, and now after her second marriage made use of against her own children, albeit she made no mention of it before ; and therefore the cancelled bond being no writ subscribed by the defunct, cannot prove, nor can Patrick Scot's discharge or his oath make it up, nor any other thing, except the defender's own oath or writ, seeing witnesses are not admitted in cases of this importance. 2*dly*, Though it were evidently and legally instructed and proven, yet the debt was paid by the mother, she can have no allowance of it, because she paid voluntarily, not being tutrix nor executrix at that time, and cancelled it, and took a discharge of it ; and so it is both unwarrantably done, and must be presumed to have been of purpose to gift it to her children out of her opulent fortune, having given above forty thousand pounds to the second husband. The pursuer *answered*, That the allegeances were most irrelevant ; for as to the *first*, anent the probation of the truth of the debt, and payment by the executrix, it is sufficiently proven by the cancelled bond, at which the witnesses' names are yet standing, by Patrick Scot's discharge and oath, already taken, who is a person unconcerned, and above all exception, and if need be, it is offered to be proven by many witnesses above exception, who saw the bond uncancelled after the defunct's death, which is abundantly sufficient to take away the presumption, that it was retired and cancelled by the defunct himself, and that such probation was legal and warrantable, was formerly found by the Lords of Session,

No 24.

7th of March 1629, Falconer against Blair, *voce* Proof; where an executor pursuing the heir for relief of a moveable debt, produced only the defunct's cancelled bond, without a discharge; and these same points being *alleged*, the Lords found, That the action ought to be sustained, and the truth of the debt, and the payment after the defunct's decease, to be proven by the creditor's oath, or, after his decease, by the heir's oath; and it is unquestionable, that the Lords, in matters obscure, as to the probation, may, *ex nobili officio*, take all manner of trial for finding out the truth, by oaths of parties, witnesses, or any other manner of way, in matters of greatest moment, which being here already done, and the testimony so clear and of so unquestionable a person as Patrick Scot, there remains no doubt but the debt was truly owing, and paid by the relict, after her husband's decease. As to the *second* point; there is no necessity in law for executors or tutors to have sentence, unless it be in cases of competition, to secure themselves against other creditors pursuing afterwards, or cases dubious, where the probation is not clear; but to pay a clear debt without burdening pupils with unnecessary expenses of law, against which the pupils can now allege nothing wherein they were prejudged by voluntary payment, such payments were never repelled, especially in the case of a woman paying so soon after her husband's death; nor can it be presumed a donation, because donations are never presumed, but must be clearly proven; and it is very ordinary to those who have interest to pay the debts, and confirm afterwards.

The Lords considering the whole circumstances, found the article not to be allowed, albeit they were clear that the debt was true and really paid by the executrix; yet seeing she paid, not being then executrix, nor tutrix, and cancelled the bond, without taking assignation, they thought she could not distress her children with it, but that it was a donation in their favour.

1661. *November* 19.—*Inter eosdem*, there was another article of the said account, whereby the said Dame Elizabeth Fleeming, having lent out a sum of money, in the name of Malcolm and Andrew Fleemings, two of her bairns, she craved, that the said sum should be taken in part of payment, of the portions of the whole bairns; or at least, in so far as was more than the portions of these two bairns, might be declared to belong to herself. It was *answered* for the bairns, That this bond was a donation by the mother, out of her own means, in favours of her children; and could not be imputed as a part of their means, because, 1*mo*, the bond did bear the money to be lent by her in her childrens name, and not in her own; neither did it bear to be as a part of the bairns means, nor in satisfaction thereof as she had specially taken other bonds in these same bairns' names, and so presumed considerately to gift the sum to these two bairns, of whom one was a posthumous child, born eight months after his father's death, and so was not thought upon by his father, nor provided with legacies as the rest were; 2*do*, the tenor of the bond bears expsessly, the

sum to be payable to the mother, in liferent; and one of the children is substitute heir to another, in case they had not children of their own, (whereas another would have fallen heir of line to them, viz. an intervenient brother) and to them both the mother herself, and her heirs were substituted. The pursuer *answered*, That supposing this were a donation, yet it being a free gift, the mother might do it upon what terms and conditions, and what way she pleased. *Ita est*, by the tenor of the bond, it is provided, that she shall uplift the sum, during her life, and the children after her decease; by which clause she is more than a naked liferenter; and seeing this clause must be interpreted *cum effectu*, the only meaning of it can be, that during her own lifetime, she might uplift the sum, and dispose of it at her pleasure, and so evacuate the fee in her childrens person, seeing there is nothing to oblige her to re-employ it for the bairns use, if she should once uplift it; as when a father infeft his son in his lands, reserving his own liferent, with power to dispone, during his own life, there the father is liferenter, yet by that reservation, he may annul and evacuate the son's fee, even so here; for which two practicks of Durie was adduced, that a father providing a sum to himself and his wife, and the longest liver of them two, and failing of them by decease, to his son, the son being infeft in fee, and in the other practick, the father being expressly infeft in an annualrent for his lifetime, yet the Lords found, that the father, during his lifetime, might uplift the sum, and dispose of it at his pleasure. The Lords found, by the tenor of the bond, that the mother had constituted herself expressly liferenter, and the children fiars; and that the power to charge for the money, did bear nothing of a power to her to dispose of it, but was only the ordinary reservation adjected after the clause of annualrent, in these words, 'but prejudice of the said annualrent to her, during her life, and after her 'decease, to the bairns to uplift the money;' and so, that albeit she was not expressly obliged to re-employ it, yet she constituting herself liferenter, without a power to dispose of the fee, did sufficiently oblige her to re-employ the sum. And as to the practicks, the case clearly differed, in this, that there the father and mother were not constituted liferenters in the sum, though the father was mentioned liferenter of an annualrent, accessory to the sum; but the clause being to the father and mother, and after their decease, to the son, it was clear, by the common practicks, that the son was not fiar, but heir substitute; so that the father was fiar, and might dispose at his pleasure.

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1661. *November* 20.—In the foresaid cause, it was further *alleged* for the tutrix, that the bond in question could not be accounted a donation, notwithstanding the reasons before adduced, in so far as she was debtor to the said two bairns, for their portion, *quia debitor non præsumitur donare*; and therefore, provisions granted by husbands to their wives, albeit they mention not the contract of marriage, but love and favour, and so in the terms of a donation, yet it is always interpreted, to be in satisfaction of a prior obligement in the contract of

No 24. marriage, and not, that both the posterior and former provision, are due to the wife. It was *answered* for the bairns, That though donation be not presumed, yet when by the nature of the deed done, it appeareth to be *animo donandi*, it is truly such, albeit it bear not the name of a donation, especially in this case, which law excepteth from that general rule, that parents bestowing sums for the use of their bairns, from their natural affection, are always presumed to gift, and not to satisfy any former provision, unless it were so expressed; upon which ground an infeftment granted by a father to his son, though but a bastard, redeemable upon a sum of money, was not found in satisfaction of a former bond, granted by him to that natural son, as 24th of July, 1623, Stuart *contra* Fleeming, *voce* SURROGATUM; but here not only is this bond not in satisfaction of the former portion, but bears a clause of a life-rent, and of a return to the mother, which are incompatible with an intention of satisfaction.

THE LORDS found the bond to be in satisfaction of the bairns portions, *pro tanto*, and a donation, *pro reliquo*; which many thought strange, seeing a bond of 100 pounds Sterling, mentioned 14th instant, retired and paid by the mother, and being proved by Patrick Scot's oath, so to have been done, to the satisfaction of most of the LORDS, which was clogged with no provision, was not allowed to be in satisfaction of these bairns' portions.

Stair, v. 1. *p.* 58.

1661. *December* 10. KATHARINE KINROSS *against* LAIRD of HUNTHILL.

No 25.
A bond being payable to a husband and wife in conjunct fee, and to their heirs, &c. the wife, though only liferenter, was found to have power to uplift the stock; but, before extract, she was ordained to give bond for re-employment of the same, to herself in liferent, and to her husband's heir in fee.

KATHARINE KINROSS having charged the Laird of Hunthill for payment of a bond granted to her first husband, and the longest liver of them two, and their heirs, which failing his heirs; he suspends on this reason, that she is but liferenter, and the defunct being infeft in fee, she would not renounce, but the heir.

Which the LORDS sustained, and found the letters only orderly proceeded for the annualrent.

1622. *July* 25.—THE Laird of Hunthill being obliged by bond to pay a sum to umquhile Mr Beverly, and the said Katharine his spouse, the longest liver of them two in conjunct fee, and the heirs betwixt them, which failing, his heirs, or any person he should design, whereupon they were infeft in an annualrent; the said Katharine having charged for payment of the sum, Hunthill suspended, *alleging*, That she was but liferenter, and he could never be *in tuto* till the fiar were called. THE LORDS, formerly found the letters orderly proceeded for the annualrent, but superceded to give answer for the stock, till some to represent Beverly the fiar was called, who now being called and not compearing,