1679. *February.* Bell *against* Park.

No 21.

My Lord Dirleton having disponed his lands to young Craigentinny, reserving his liferent, and having died after a part of the mansed lands were sown, and before the barley-seed was cast in the ground:

In a competition for the crop betwixt Craigentinny and Dirleton's daughter his executor, *alleged* for Craigentinny, That, by the common law, *usufructuarius* hath no right to the fruits, which are *pars fundi, nisi perceptione et post separationem;* and though our practique hath fixed upon legal terms of Whitsunday, &c. before separation, yet the party dying before that term, ought to have no more right to the *fructus pendentes*, than was allowed by the common law to one dying *ante separationem*; 2*do*, Our practique hath relaxed this, and given the benefit of the mansed lands sown before his death; but the profit of lands not sown, or teinds thereof, ought not to belong to the liferenter's executors, but only the expenses of labouring.

Answered for the Executor, Our customs vary from the civil law; for, although a person live after Michaelmas, the time of separation, yet, if they die before Martinmas, they lose that term, &c.; 2*do*, This is not a liferent by constitution, but by reservation, which is more exuberant; 3*tio*, By the custom of the Commissary Court, the crop of mansed lands, both sown the time of the decease or thereafter, are confirmed in favour of children executors, and is called the executry crop; 4*to*, The practique 1679 is but a single decision.

The Lords delayed to determine this point.

Harcarse, (Liferents.) *No* 673. *p.* 191.

1737. *July* 26.

Alexander Ferguson *against* William Ferguson of Auchinblain.

No 22.
A liferenter, by reservation, is entitled to cut *sylvæ cæduæ*, according to the custom of the country where the woods grow.

The said William Ferguson, in his son Alexander's contract of marriage, disponed to him the lands of Auchinblain, with the woods and hail pertinents, reserving his own liferent of the premisses. Upon these lands were two small woods, which Auchinblain, imagining he had a right to dispose of, (in virtue of his reserved liferent,) sold one of them that was ready for cutting; in order to stop which, Alexander brought a declarator to have it found, that his father had no title thereto. And the arguments urged in support of this action were, that, though the woods in question are what the law calls *sylvæ cæduæ*, yet the defender had no right to the wood itself, but only, in case it was cut by the pursuer, the liferenter might have the useless shoots that must be cut off, in order to its growing in due course; agreeable to *L.* 10. *De usu fruct.* and the act 25th, P. 1491. ratified by the 15th act, P. 1535.; whereby it is 'pro-

'vided, that liferenters shall find caution that they shall not waste or destroy 'woods, &c. but that they hold them in sicklike kind as they are at the time 'they receive the same, taking their reasonable sustentation or using in need-'ful things, without destruction or wasting thereof.' See Sir George M'Kenzie upon this act, and Craig, *lib.* 2. *dieg.* 8. § 17. No 22.

For the defender it was *argued*, That, as he had reserved the liferent of the subjects disponed, it followed, that the liferent behoved to be as comprehensive as the fee; of course, it included the woods; and, though his right was only temporary, yet, during the continuance thereof, the use of the subjects were as fully in him as the pursuer; with this restriction, indeed, that he must still use the same *salva substantia.* Nor does this militate against the doctrine now pleaded for, seeing the defender does not pretend to destroy the subjects liferented, but solely to have the use of them, in the like manner as was accustomed to be done formerly; and if it can be made appear, that the timber of a wood falls under the description of *fructus*, it seems necessarily to follow, that the liferenter has a right to cut the same.

Upon this question, the civilians distinguish betwixt *sylvæ cæduæ* and *non cæduæ*, the last of which, the defender admits, do not belong to a liferenter; but, as to the former, which are designed for cutting, and which are regularly cut in a certain number of years, which is the case with the woods in question, it is believed, that, since the *fructus* of these consists in nothing but the timber got out of them by cutting, and that, notwithstanding thereof, the wood remains, just as much as a meadow, after it is mown, is still a meadow; that, therefore, the right to cut such woods belongs to the liferenter, conform to *L.* 9. § *ult. D. De usufruct. &c.* Neither are the words of the act, quoted for the pursuer, contrary to this doctrine, as the meaning thereof is *tantamount*, as if it had said, he using the same *tanquam bonus paterfamilias;* and, most certainly, it is the part of every prudent man to cut his woods when they come to maturity, which is putting them to a reasonable use, and a preservation instead of waste. It is true, that this right has been found not to be competent to liferenters by constitution; but that is no objection against the defender, seeing a liferent, by reservation, such as the present, has many privileges attending it that the other has not; a liferent, by constitution, being considered as intended only for an *annuus reditus;* and, therefore, is strictly interpreted so as to take nothing but what falls within the description thereof. But, with respect to the other, it is more favourably constructed, as a liferenter, by reservation, does not derive his right from the fiar, but the fiar from him; of course, it is interpreted extensively, *viz.* to be as broad as the fee.

Answered for the pursuer, That a conjunct fiar, whose right resolves into a liferent, has as strong an interest in the subject as a liferenter by reservation; and yet the liferent, by conjunct fee, does not give an interest to cut the woods. See Craig, *lib.* 2. *dieg.* 22. § 21. and Lord Stair, B. 2. T. 6. § 10. who puts

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.

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

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

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