No 55.

of the former liferenter, and the existence of the condition of the second liferent, is a novelty unknown in law, and without any foundation in the analogy of law. And, as to the *second*, there is no sort of answer made to it.

Duplied for the Children; That, if this case was to be determined by a jury, agreeable to the practice of other countries, there can be no doubt but the verdict would be in the very terms of the deed, 'That Robert Frog has the life-'rent, and his children the fee:' for the whole of the arguments advanced by the creditors are founded upon this, that a fee cannot be pendent: As to which, it may not be improper to observe, that, if the disposition had been to Robert Frog in liferent allenarly, it would not have been pretended that he was fiar; and yet there is not one single argument drawn from the pendency of the fee in the present question, but what would have applied with equal strength to that case; therefore it must be evident, that either their principle is false or misapplied. At any rate, it is a maxim that does not hold universally. Thus, for instance, by the civil law, *Venter mittebatur in possessionem propter spem nascendi*, which would not have taken place, if the brocard had obtained universally. But, granting it was a rule, it does not concern the present question; for, in law, it is common to give dispositions and legacies under many different conditions; during the pendency of which, the disponer, or his heir, is the fiduciary fiar. Now, to apply this to the point in issue: Suppose there had been no provision of liferent to Robert Frog, it is plain, that the disposition, though pure, would have resolved into a condition, viz. if Robert Frog had children; and, during the pendency thereof, if it is not admitted that the fee was pendent, it must have remained with the disponer and her heirs at law, fiduciary, for the behoof of the children, when they should exist. Nor can it vary the argument, that the liferent is disponed to Robert Frog; for, *tantum concessum, quantum scriptum.*

THE LORDS having considered the right granted by Bethia Dundas to Robert Frog her grandson, found, That thereby a right of liferent was only established in the person of the said Robert; and therefore, that the creditors of the said Robert have no interest in the price.

But, on petition and answers, 'They found Robert Frog to be fiar,' &c.

Fol. Dic. v. 1. *p.* 303. *C. Home, No* 1. *p.* 5.

1741. *February* 24. LILLIE *against* RIDDELL.

No 56.
Found as above.

WHERE one in his son's contract of marriage had disponed his estate to his son in liferent, and to the children to be procreated of the marriage in fee, 'The son was found to be fiar,' though *ex figura verborum*, he had only the liferent.

This point was formerly so determined in the case of the children of Robert Frog against his Creditors, No 55. p. 4262., and only because the Court had

No 56.

given different judgments upon it in that case, is the present case taken notice of, in which it was so much considered as an established point, that a bill reclaiming against the Ordinary's interlocutor 'was refused without answers;' many of the Court, at the same time declaring, as likewise had been done in the said case of Frog, that but for the course of decisions, they should have been of opinion, that the son was not fiar, but fiduciary for his children.

Fol. Dic. v. 3. *p.* 210. *Kilkerran*, (Fiar.) *No* 2. 190.

1756. *February* 10.

Christian Cumming *against* His Majesty's Advocate.

No 57.
A father took a charter of lands to himself in liferent, and to his son *nominatim* in fee. He reserved power of disponing the lands. On this charter infeftment was taken. After the son's death, the father executed his reserved faculty, by disponing the lands to his grandson. The grandson was forfeited. The widow of the son found not entitled to a terce of the lands.

In the year 1692, Adam Hay obtained a charter of the lands of Aslied, to himself in liferent, and to his son Andrew in fee; whom failing, to certain substitutes.

By this charter there was reserved to Adam a power of contracting debt, and of disposing of the lands. Infeftment was taken upon this charter.

Andrew died; and Adam, in the 1726, executed the reserved faculty, by disponing the lands of Aslied to his grandson Adam Hay; whom failing, to the substitutes contained in the charter 1692.

This Adam, after the death of his grandfather, engaged in the rebellion 1745, and was forfeited. His estate was surveyed for the Crown. Christian Cumming, the widow of Andrew, entered her claim for a terce of the lands of Aslied, in the fee whereof her husband had died infeft.

Objected for his Majesty's Advocate; The property of the estate of Aslied must, in respect of the reserved faculty, be held to have been in Adam; his son Andrew was a nominal fiar only; and consequently his widow is not entitled to a terce.

Answered for the claimant; By the deed 1726, Adam meant to save his grandson the expense of a service to Andrew, not to recall the fee which had been vested in Andrew. Neither could he prejudice the right of the claimant which had already taken place by the predecease of her husband Andrew; at least no personal deed of his could be effectual in competition with his singular successor's deriving right from Andrew, or with Andrew's creditors infeft. *See* the case, Rome against the Creditors of Graham, February 1719, No 17. p. 4113.; and, by parity of reason, such deed cannot be good against the widow claiming a terce; for that a widow, as to her terce, is upon the same footing as a creditor with infeftment.

'The Lords dismissed the claim.' *See* Terce.

Reporter, *Auchinleck*. Act. *Burnet*. Alt. *M'Queen & King's Counsel*.

D. *Fol. Dic. v.* 3. *p.* 210. *Fac. Col. No* 185. *p.* 276.