1709. *December* 3.
LADY PITMEDDEN and Sir ALEXANDR SEATON of Pitmedden, Her Husband *against* EUPHAN BATHGATE, Relict of ROBERT LAUDER, Clerk-depute of Dundee, and Sir ALEXANDER WEDDERBURN of Blackness.

No 65.

SIR ALEXANDER WEDDERBURN being debtor in 861 pound Scots, to Euphan Bathgate dwelling in Dundee in liferent, and to the Lady Pitmedden in fee, who, with the consent of her husband for his interest, desired to uplift the money, the LORDS found, that the fiar had *jus exigendi*, upon securing Euphan Bathgate, by finding surety within Dundee, to pay her the annualrent there during her lifetime; albeit the debtor was responsible, and the liferentrix was against altering the security.

*Fol. Dic. v.* 1. *p.* 304. *Forbes, p.* 360.

## SECT. VII.

### Rights to Daughters and their Heirs.

1779. *June* 23.
MARGARET PORTERFIELD *against* ELIZABETH GRAHAM, and Others.

No 66.
A bond was granted to a daughter in liferent and her children in fee, with power to the former to uplift and discharge. She was found to be fiar.

DOCTOR WILLIAM PORTERFIELD executed a deed, by which he assigned over to his only child Margaret Porterfield, (wife to Mr Grahame of Gartmore), in liferent, and to the heirs of her body in fee, certain bonds, and the interest remaining due upon them at the time of his death.—This deed contained the following clause: 'With full power to my said daughter, and her foresaids, for 'their respective interests above mentioned, after my decease, to uplift and re- 'ceive the foresaid sums of money; and, if need be, to sue therefor, and to 'grant discharges of the same, which shall be sufficient to the receivers; and, 'generally, to do every thing in the premises which I could have done in my 'life. But declaring always, that these presents are granted by me, and to be 'accepted of by the said Margaret Porterfield, with the burden of the payment 'of my just and lawful debts, and funeral charges, and all legacies that shall 'happen to be left by me at my death.'

Mrs Graham, at the time when this settlement was executed, had issue one child, a daughter, and, before her father's death, had other two children, likewise daughters. She survived both her father and her husband. After her

No 66. husband's death, a doubt arose upon the construction of the above mentioned deed, whether the fee of the sums thereby conveyed was in the mother or in the daughters; and this question was tried in a multiplepoinding brought for that purpose, at the instance of a debtor in one of the bonds.

*Pleaded* for the mother; It appears, from several parts in this deed, as well as the clause of destination, that the intention of the father was to give his daughter the absolute disposal of the money. She is, by the deed, entitled to uplift, to sue for, and to discharge the sums in the bonds conveyed. These are the powers of a fiar, and inconsistent with the mere right of liferent. She is subjected to the payment of the granter's debts, funeral charges, and legacies;—burdens which can, with no propriety, be laid on a liferenter. These circumstances evidently discover the purpose of the father to give his daughter the fee of the subject. Though it were doubtful, therefore, what was the legal meaning of the words in the destination, the intention of the granter, apparent from the other parts of the deed, would regulate the interpretation which they ought to receive.

But the legal import of this conveyance 'to the daughter in liferent, and to the heirs of her body in fee,' is to vest the fee in the mother. This point has been determined in cases where the destination was in similar terms; Frog against his Creditors, No 55. p. 4262; Lilly against Riddel, No 56. p. 4267; Douglas against Ainsly, No 58. p. 4269. On the faith of these decisions, and the general practice, settlements are daily drawn up by conveyancers in this form of words, when the party intends to give the absolute disposal of the subject to the person nominally in the right of liferent. A seeming impropriety of language cannot be opposed to what has been thus generally understood by the country as the import of these words.

*Answered* for the children; The terms of liferent and fee have each a separate signification, totally distinct the one from the other; and, to maintain, that the fee is conveyed by a mere grant of the liferent, involves a contradiction in terms. In the case of land-estates, it has indeed been found, that, where the estate is conveyed to a person in liferent, and his heirs *nascituri* in fee, the fee must vest in the person provided to the liferent. But these decisions are founded on a mere subtilty in the feudal law: That the fee of the feudal subject cannot be *in pendente*. There does not seem to be very solid ground for this doctrine, even in the case of feudal subjects; Erskine, b, 2. t. 1. § 3. But, when moveable subjects are conveyed in these term, the principle does not apply. There is nothing to hinder the property of such subjects to be *in pendente*; and, therefore, there is no reason for constructing the liferent into a fee. The obvious meaning of the words must govern the rights of the different parties in the subjects conveyed; and it has been so found in the case of moveable subjects, Turnbull against Turnbull, No 41. p. 4248.

That the granter used the words *liferent* and *fee* in the plain and natural meaning, as expressive of two distinct interests in the subject, is evident from

these words of the deed : ' With full power to my said daughter, and her fore- No 66.
' saids, for their respective interests above mentioned, after my decease to up-
' lift, &c.' It is here supposed, that his daughter had one interest, and her heirs another, at the time of his death.

THE COURT found, ' That the fee of the bond in question is vested in Mrs
' Graham the mother.'

Lord Ordinary, *Kaimes.* Act. *Wight.* Alt. *M'Laurin.* Clerk, *Campbell.*

*** This cause was appealed.

THE HOUSE OF LORDS, 17th March 1780, ' ordered and adjudged that the ap-
' peal be dismissed, and the interlocutor complained of affirmed.'

*Fol. Dic. v. 3. p. 210. Fac. Col. No 78. p. 151.*

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1781. *March* 1.

BARBARA CUTHBERTSON *against* ISAAC THOMSON and JEAN YOUNG.

No 67.
Disposition to a daughter in liferent, and to her children procreated or to be procreated in fee, conveys the fee to the daughter, and not to the children.

ON the 16th January 1724, Peter Cassils executed a disposition of a house in Edinburgh, ' To and in favour of Anne Cassils, his daughter, in liferent, during
' all the days of her lifetime, with the burden always of the aliment and edu-
' cation of the children of the marriage betwixt her and John Cuthbertson,
' during their respective pupillarities, and to the children procreated, or to be
' procreated of the said marriage, equally and proportionably amongst them, in
' fee ; and failing any of them by decease, to the others surviving.'

The children of the marriage between Anne Cassils and John Cuthbertson were three ; Peter, Anne, and Barbara. Peter died in the year 1755, leaving several children. Anne died in 1762, and left an only son Isaac Thomson. Their mother, the liferentrix, survived them both, and died in 1778.

Some years after the death of Peter Cuthbertson, his eldest son William was charged to enter heir to him, at the instance of William Polson, a creditor, who obtained an adjudication, comprehending, among other subjects, Peter's fee of the third part of the house above mentioned. Polson afterwards got a charter from the Magistrates of Edinburgh, upon which he was infeft. He then purchased a voluntary conveyance from William Cuthbertson, of those subjects which he had adjudged, containing a renunciation of all right of redemption or reversion competent to the said William. And, a short time before his death, he settled upon his spouse Jean Young the liferent of the house in question.

Upon the death of Anne Cassils the liferentrix, Barbara Cuthbertson, her only surviving child, made up titles by a service, as heir of provision to her grandfather ; and, in that character, claimed right to the whole of the subject. Jean Young, Mr Polson's widow, claimed a third of the rent, in virtue of the rights above mentioned, derived from Peter Cuthbertson, and his son William.