1789. *February* 24. Gideon Gray *against* Archibald Seton.

No 14.
A liferenter can sell no wood except coppice, not even although planted by himself.

The late Mrs Seton being heiress of the estate of Touch, disponed in her marriage articles these lands, with the woods, fishings, &c. 'to herself and to 'her husband in conjunct fee and liferent, for her husband's liferent use al-'lenarly,' &c.

After Mrs Seton's death, her husband became insolvent. His estate, including his liferent right in the lands of Touch, was brought to sale; and, among other things, the Court authorised a sale of some coppice wood on this estate, none of which had been cut for 30 years. Afterwards, Gideon Gray, factor on the estate then sequestrated, applied to the Court of Session, for authority to expose to sale certain other woods on the lands of Touch, which he divided into three different classes; *first*, What was formely coppice wood, but had been allowed by the liferenter to grow up into large trees; *2dly*, Old planting which was on the estate before the liferenter's right commenced, and was already fit for cutting; and, *3dly*, The trees planted by the liferenter himself, so far as they were fit for immediate use.

Archibald Seton, the only surviving son of the marriage, and after his mother's death, the fiar of the lands of Touch, opposed this measure; and

Pleaded, Our law has established a clear and distinct boundary between the rights of fiar and of liferenter; the former, if not restrained by special agreement, enjoying the uncontrouled privilege of using his property in any manner he pleases; while the latter is only entitled to reap the annual produce of the lands, without performing any act which may render them of less value in any one year than they were before. Particularly, with regard to growing timber, great care has been taken to restrain liferenters from doing any thing which may deprive the lands of that shelter, which, in this country, is so essential to them. Unless in the case of a coppice wood, which has formerly been in use to be cut annually in different hags, so as to yield a constant yearly rent, a liferenter is not at liberty to cut, for sale, woods of any description whatever. And this, whether the trees have been planted by himself or by others. Erskine, b. 2. tit. 9. § 56. 57. 58.; 13th July 1677, Lady Preston, No 7. p. 8242.; June 1727, Heirs of Roseburn, *see* Appendix.

Answered, The authorities above refered to, should seem to be applicable only to the case of widows having their jointures secured on their husband's lands, and cannot be extended to the present one. As, during the marriage, the husband here might have cut down the whole trees on the estate; no good reason can be assigned, why, after its dissolution, and while his right seems to be equally broad as formerly, he, and *a fortiori* his creditors, should not be allowed at least to proceed in the same way as a proprietor of the estate acting *tanquam bonus paterfamilias*, might have done. There seems to be a considerable degree of expediency in such a construction of the liferenter's right.

Without it, persons so situated would be apt, while the marriage subsisted, to exercise their powers in a manner very prejudicial to the estate. And, with regard to that part of the woods which has been planted by the liferenter himself, it would be manifestly unjust, if he were not thus allowed, without any injury to the lands themselves, to avail himself of the fruits of his own industry. So far from being conducive to the advantage of the proprietor, this would, in general, prove a real loss to him, while the improvement of the country at large would be greatly hindered by it; Bankton, b. 2. tit. 6. § 6. No 14.

After advising the petition for Gideon Gray, with answers for Mr Seton, which were followed with replies, the Court were of opinion, that a liferenter had no right to sell any part of the woods growing on the liferented lands, unless in the particular case of a coppice, which had been in use to be cut in a certain yearly progression, so as to yield a constant annual income to the possessors; and that the warrant of sale, so far as it allowed this, ought to be recalled. Mr Gray therefore having agreed to pass from any objection in point of form, the following interlocutor was pronounced:

'THE LORDS find, That none of the woods or plantations condescended on, fall under the liferent of Mr Hugh Seton; and therefore appoint such of the said woods or plantations as are contained in the act of roup, to be struck out of the sale; and refuse the desire of the petition.'

Act. *Abercromby.* Alt. *Dean of Faculty.* Clerk, *Home.*

C. *Fol. Dic. v.* 3. *p.* 386. *Fac. Col. No* 64. *p.* 116.

SECT. II.

Liferent by Reservation.

1596. *December* 13. CLARK *against* WEMYSS.

No 15.

IN an action betwixt one Clark in Dysart and Wemyss, anent the entry of a tenant, infeft as heir to his father in certain acres of Dysart, by the Master of Sinclair, as fiar of the barony of Dysart, the LORDS found, That the sasine given by the Master of Sinclair was null, because my Lord his father's liferent was reserved of the said barony, whereby the entry of the tenants pertained to him; and albeit oft times the resigners used to resign expressly the entry of free tenants, yet the general reservation of the liferent, *cum tenentibus, tenendriis*, &c. is sufficient to make right to the liferenter to enter tenants.

Fol. Dic. v. 1. *p.* 548. *Haddington, MS. No* 605.