

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 liferent, 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,

The debtor *alleged* he could not be liable to give up the stock to the charger, being only liferenter, neither would her discharge, or renunciation of the wadset liberate him and his estate, but only a renunciation of the heir; neither did the charge at the liferenter's instance, take away the annualrent, and make the principal sum moveable, unless it had been at the fiar's instance. The charger *answered*, That she being conjunct fiar, was not a naked liferenter, albeit it resolved in a liferent; and therefore she craved that it should be declared by the LORDS, that she had power to uplift the stock, and to re-employ it as formerly, and that her discharge and renunciation should be declared to be sufficient to liberate the debtor and his lands, which being so found by the LORDS, the debtor's apparent heir being called, would be an irreduceable and sufficient ground of liberation.

THE LORDS declared as aforesaid, but before extract, ordained the conjunct fiar to give bond for re-employment of the sum to herself in liferent, and to Beverly's heirs in fee; which bond they ordained to be presently registrated, and kept by the clerk, in respect none appeared for the heir.

*Fol. Dic. v. 1. p. 549. Stair, v. 1. p. 67. & 136.*

1662. June 28.

DORATHY GRAY *against* OSWALD.

UMQUHILE Mr John Oswald having married Dorathy Gray, in England, did, at the time of their contract, grant an English bond of L. 1,000 Sterling, to the said Dorathy's mother, and on Wilson, *ad opus et usum dictæ Dorathæ*, the condition of which obligation is, that if Mr John shall pay the said entrusted person the sum of L. 600 Sterling, or shall secure the said Dorathy in lands or chattels, worth the said sum of L. 600 in his lifetime, or by his testament, then he shall be free of the L. 1,000; Mr John granted assignation to the said Dorathy of 5,500 merks due to him by the Earl of Lauderdale, bearing expressly the same to be for implement of the bond, and assigning both principal sum and annualrent. Dorathy confirmed herself executrix to her husband, gives up this bond, and obtains decret against Lauderdale, who calls Dorathy on the one part, and the apparent heir, and creditors of the said Mr John, on the other part. It was *alleged* for the apparent heir and creditors, That they ought to be preferred to the stock of the sum, because the clause, *ad opus et usum*, could only be understood to be for Dorathy's liferent use, and not in fee, and as for the assignation it was on death-bed, and so could operate nothing in their prejudice. It was *answered* for the said Dorathy, That she opponed the clause, the meaning thereof was no other, but that her mother and Wilson were creditors in trust to the use and behoof of her, and could not be a liferent right, because it was provided to her, her heirs, executors, and assignees; and as to the assignation, though on death-bed, yet it may very well be used as an admicicle to clear the meaning of the parties.

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Although it was offered to be proved, that a wife who had been married in England, would, by the interpretation there, of the words of the deed, '*ad opus et usum*,' have only had a liferent use; she was allowed the full right here, as the subject was to heirs and assignees.