

§ 42, says, " In conjunct fees granted to husband and wife, the wife's right is, in the general case, considered merely as a liferent, which dies with herself; yet, as she is, *by the form of the right*, entitled to the fee equally with the husband, her liferent is as amply extended as a liferent by reservation."

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FORBES OR  
MAITLAND  
v.  
GORDON.

Unreported in Court of Session.

Major ARTHUR FORBES, now taking the name	}	<i>Appellant</i> ;
of MAITLAND - - - - -		
WILLIAM GORDON, Trustee of KATHERINE and	}	<i>Respondent</i> .
ANN MAITLAND - - - - -		

House of Lords, 24th March 1760.

DELIVERY OF DEED—PRESCRIPTION—CONFUSIO—BONA FIDE CONSUMPTION—INTEREST OF DEBT.—Circumstances in which held, 1st, That debts acquired by a husband affecting his wife's estate, do not prescribe during marriage; and that prescription does not run against these bonds during the minority of the person for whose behoof they were purchased. 2nd, That a bond of provision granted by a brother to two sisters, in addition to their family provisions, was to be presumed in law delivered of its date, unless the contrary be proved, although it had not been delivered to them, and there was no clause dispensing with delivery. 3d, That this bond of provision was onerous to the full extent. 4th That the sums in said bonds were not diminished by the sisters having been alimented by their mother, while in family with her. 5th, That the rents of the estate during Katherine's possession were *bona fide percepti et consumpti* by her, and she not accountable therefor; But, 6th, That she was not liable for behaviour as heir, but that the appellant was liable for principal and interest of the sister's bonds, under the deduction of two-thirds of the annual rents, from their mother's death to their brother's death, in consideration of the aliment and necessaries furnished them by their brother.

For the particulars out of which the present action arises see report, p. 570 and 628, ante Craigie and Stewart.

The appellant having prevailed in that suit, was then entitled to possession of the estate, of which he had been deprived, as heir male of the original investiture, but the estate having, in the meantime, been taken possession of by Katherine Maitland, and she, in order to frustrate his obtaining possession, having along with her sister Anne, conveyed their first bonds of provision to the respondent Gordon, as trustee for them, adjudication of the whole estate was rais-

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ed, and charter and sasine, and decree of mails and duties were obtained.

Thereafter an action was raised by the respondent, to whom Katherine and Anne Maitland had assigned, as their trustee, the 25 old bonds which their father, Baron Maitland, had purchased up against the estate for behoof of his son Charles, and to which they, after Charles' death, had succeeded. The title to raise the action was supported by confirmation, to an additional bond of provision, granted them by their brother Charles.

In defence to this action, it was stated, *1st*, That all the old bonds were prescribed, no document having been taken upon them since they were granted 50 years ago. *2d*, That Jane Maitland, who succeeded to the estate after Sir Charles, her brother, was personally liable for his debts, which these 25 old bonds were, and her son Charles, as representing both her and her uncle, was placed precisely in the same situation, and as the rights of debtor and creditor in regard to these bonds met in him, the bonds thus became extinguished, *confusione*. *3d*, That supposing these bonds still subsisting, no interest could be chargeable upon them from 1721 till 1747, during Jane Maitland's possession as heiress of entail, because she, as heir of entail, was bound to keep down the interest of debts during her possession; Charles, her son, who succeeded her, was bound by the same obligation. *4th*, But supposing the old debts still subsisting, and were to be considered the personal estate of Sir Charles; yet the appellant, who represented him merely as heir of entail, must have relief and retention to the extent of the *onerous* debts of Charles. *5th*, That the bond of provision, granted by him to his sisters, was never delivered and not onerous, and so could not form a good ground for confirmation, or title to raise the present action as his executor.

Feb. 3, 1757. The Court, of this date, repelled the objection made to the non-delivery of the bond of provision, by Charles Maitland to his sisters, being the title of the confirmation, and find that the bond, being in satisfaction of former bonds, and in full of their legitim, are presumed to have been delivered of that date, unless the contrary is proven. And, as to the old bonds, they also repelled "the retention and relief pleaded by the  
 " appellant, and found him liable to pay the principal sum,  
 " and interest from 1721, when Baron Maitland died, to Oc-  
 " tober 1741, when Jane died, but no interest was due during

“ the time Charles possessed the estate.” The defence of prescription was also repelled.

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The Court again pronounced this interlocutor.—“ Find that the bond of provision granted by the deceased Mr. Charles Maitland, to his sisters. Katherine and Anne, which is the ground of the confirmation, was an onerous deed, to its full extent, and in so far adhere to the former interlocutor. Find that the sums in the said bond were not diminished by the ladies having been alimeted by the deceased Lady Pittrechie, while they staid in family with her, during her life ; but find that after the Lady Pittrechie’s death, and during the time the young ladies staid in family with Mr. Charles Maitland, their brother, which was from October 1746 to February 1751, their aliment in Charles Maitland’s family, and any furnishings for clothes during that time, falls to be deducted from the annualrent of their bond, and they modify the said aliment and furnishings during that time, to two-thirds of the current annualrent of their respective provisions, during the period of Charles Maitland’s life, after the mother’s decease ; and find that the annualrents fully due on Katherine’s provision during the time she possesses the estate of Pittrechie, after her brother’s death, are extinguished by her intronissions with the rents of the estate during that period ; and find that the rents of the estate of Pittrechie, from Charles Maitland’s death, to the 9th of Aug. 1753, being the date of the interlocutor of the Court in the defender’s process for the estate, were *bona fide percepti et consumpti*, by Mrs. Katherine Maitland, and that she is not accountable therefor ; but find that during possession she is chargeable with the annualrents in the bonds pursued for, and remit to Lord Auchinleck to proceed accordingly.” By the same interlocutor, the Court found that Mrs. Jean Maitland, as heiress of entail, was bound to keep down the *interest of the old bonds, during her possession*, but as she failed to do so, her son Charles was not bound to pay any interest during her possession ; nor to any deduction on account of Charles being alimeted by his mother during his minority, for that *post tantum temporis* such claim is presumed to be satisfied.

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On reclaiming petition, the Court adhered, “ with this variation, that Katherine Maitland’s *bona fide* possession of the estate, ceased upon the 13th July 1753, the date of the first interlocutor, (in the appellant’s process for the

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“ estate), and as to the defence of retention and relief : find,  
 “ that after payment of what is due to Katherine and Anne  
 “ Maitland, on their bond of provision, the ground of confir-  
 “ mation, out of the sums confirmed, Major Maitland is en-  
 “ titled to retention and relief out of the remainder of the  
 “ sums confirmed, for all debts of Charles Maitland he hath  
 “ paid, or shall pay.”

Action was then dropt by the respondent for the old bonds, and new one brought for the additional bond of provision granted by Charles Maitland in 1728, which new action being remitted to the former action on the old bonds; the respondent then insisted that the cause should be disposed of on the bond of provision, and the question in reference to the old bonds remitted to the Lord Ordinary; to which the appellant objected, insisting that as the litigation had existed for nearly six years on the action upon the old bonds, in which the bond of provision was only relied on as the ground of the respondent's title by confirmation, not as a claim of debt; and as the proof then to be taken into consideration was granted in the action upon the old bonds, the appellant, in material justice, was entitled to judgment upon the whole proof.

July 13, 1759. Of this date, the Lords of Session pronounced an interlocutor : “ The Lords having advised the state of the process,  
 “ &c. repel the defence against payment of the sums in the  
 “ bond of provision pursued for, founded on Mrs. Katherine  
 “ Maitland's alleged behaviour as heir to her brother, by in-  
 “ tromission with the rents of Kinmundy : Find the defend-  
 “ er liable to pay the pursuer the sum of 10,000 merks pro-  
 “ vided by the said bond to Catherine Maitland, and of the  
 “ sum of 9000 merks thereby provided to Anne, with a fifth  
 “ part more than the said respective sums of penalty, in  
 “ terms of the bond, and the legal interest of the said prin-  
 “ cipal sums from their respective majorities, under deduc-  
 “ tion of two-thirds of the annualrents of both provisions  
 “ from the death of Lady Pittrechie, their mother, in Octo-  
 “ ber 1746, to the time of their brother Charles Maitland's  
 “ death, in February 1757, in consideration of the aliment  
 “ and necessaries furnished them by their brother during  
 “ that period, and also with deduction of the annualrents of  
 “ Katherine Maitland's provision from the time of her bro-  
 “ ther's death to the 13th July 1753, when the estate of  
 “ Pittrechie was decerned to belong to the defender, in  
 “ terms of the former interlocutor; and find it proven that

“ Katherine Maitland attained the age of 21 years on the  
 “ 3d March 1732 ; and that Anne Maitland attained the said  
 “ age on 18th of August 1735, and that the above provisions  
 “ due to them bear interest from the said respective periods  
 “ during the nonpayment, with the deductions aforesaid ;  
 “ and find the defender is further entitled to have deduc-  
 “ tion of the sum of £339. 9s. 2d. Scots received by the pur-  
 “ suer from John Innes out of the rents of Kinmundy, and  
 “ decern accordingly, and remit to Lord Auchinleck to in-  
 “ quire into the extent of sums due on the 25 old bonds  
 “ granted by Sir Charles Maitland, and to determine and  
 “ report.” The claim for the old bonds being departed  
 from ; it was again urged in a petition that the profits of the  
 estate during Katherine’s possession should be imputed in  
 payment of her provision. The majority of the Court were  
 inclined to listen to these claims ; but these points being  
 already determined by two consecutive interlocutors, the  
 Court adhered to their former interlocutors.

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 v.  
 GORDON, &c.

Aug. 4, 1759.

Against the interlocutors of 3d Feb., 3d Aug., and 1st  
 Dec. 1757, and 15th July and 4th August 1759, repelling  
 the objection to the delivery of the bond of provision, find-  
 ing it presumed to be delivered of the date unless the con-  
 trary be proved ; finding that it was an onerous deed to its  
 full extent ; finding that the sums in the said bond are not  
 diminished by Katherine and Anne having been alimeted  
 by their mother while in family with her ; finding the rents  
 of the estate during Katherine’s possession were *bona fide*  
*percepti et consumpti* by her, and not accountable therefor ;  
 repelling the defence of Katherine Maitland’s behaviour as  
 heir, and finding him liable for the full sums and annualrents  
 in the bonds, the present appeal was brought.

*Pleaded for the Appellant.*—By the law of Scotland, no  
 deed is valid without actual delivery, or a clause therein dis-  
 pensing with delivery ; and even where the rule of law pre-  
 sumes delivery from the deed being in the grantee’s hands,  
 yet this is a presumption which is made to yield to contrary  
 proof, and if evidence is adduced to show that possession was  
 obtained, not in the due course of delivery, or that the deed  
 is in the granter’s hands for some different and specific pur-  
 pose, *that* presumption will not hold. It was incumbent on  
 the respondent to prove *that* delivery, not on the appellant  
 to prove non-delivery, which is the negative. But, assum-  
 ing the delivery of the deed to be made out, yet the addi-  
 tional bond granted by Charles to his sisters was gratuitous,

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and therefore void, he having no power to affect the entailed estate, and the sisters being already provided for by their father's provisions in 1721. And, 2d, Supposing it good, and to be held as delivered, yet there is no good ground to charge the appellant with interest from the year 1732 and 1736, when Katherine and Anne Maitland came of age, to 1751, when Charles Maitland, their brother, died, because during that time they were alimented *aliunde*; and, besides, there ought to be deduction allowed for the reaping of the fruits during Katherine Maitland's possession of the estate, which, in the circumstances of this case, was not, and could not be a *bona fide* possession; and on these grounds he ought to have relief and retention to that extent.

*Pleaded for the Respondent*:—The claimants have an equitable claim to a moderate provision out of an ample estate, to which they ought to have succeeded as heirs of line. The additional bond granted by their brother was granted, he having full powers to do so. It was a delivered writ; and a writ which, if it had not been delivered, would have been effectual without delivery. It was of the nature of a mutual contract, granted for a valuable consideration, and in corroboration of a former deed executed by Baron Maitland, which it is admitted was delivered. But, in point of fact, the bond here in question was delivered. It was given to their mother for their behoof. It lay in her repositories as for them; and the law always presumes delivery of family deeds, unless the contrary be proved. The *onus* of proving the deed a non-delivered deed lay on the appellant, who objects to the same. And the possession of Katherine Maitland of her brother's estate being on a *bona fide* title, she was entitled to the fruits as *bona fide percepti et consumpti*, and nothing can be founded on that possession either of passive title or otherwise, because her *bona fides* protected her.

After hearing counsel, it was

Ordered and adjudged that the said interlocutors be affirmed.

For Appellants, *C. Yorke, Fred. Campbell.*

For Respondents, *Ro. Dundas, Al. Wedderburn.*

*Note.*—The first branches of this case are reported, *Fac. Dec.* p. 101.