pence of debt either upon the lands, or upon the rents, for longer than his own lifetime, and though this debt was contracted in conducting the law suits in question, yet there is no legal obligation upon the respondent to pay the same.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be affirmed.

For Appellant, *Al. Wedderburn, Dav. Rae.*

For Respondent, *Henry Dundas, Ar. Macdonald.*

NOTE.—The grounds of the judgment in this case, are explained by Lord Chancellor Eldon, in the Queensberry Leases, Dow, vol. ii. p. 112.

[M. 4277.]

ELIZABETH, MARGARET, and HARIET GRAHAM, Infant Children of William Graham of Gartmore, - - - - - } *Appellants;*

MARGARET GRAHAM, Mother of the said Children, and ALEXANDER GREIG, her Trustee, } *Respondents.*

House of Lords, 17*th March* 1780.

FIAR—FEE OR LIFERENT.—Circumstances in which the terms of a destination to a parent in liferent, and to "*the heirs of her* "*body in fee*," held to give the mother a fee and absolute right to the personal estate conveyed.

Dr. Porterfield, the respondent's father, assigned and transferred "to and in favour of the said Margaret Porter-" field, my daughter, *in liferent*, and to the heirs of her body "*in fee;* whom failing, my own nearest heirs and assignees "whatsoever, the several bonds and sums of money herein "after mentioned." Here followed the enumeration of the "bonds. There was a declaration that "these presents are "granted by me, and to be accepted by the said Margaret "Porterfield, with the burdens of all my just and lawful debts, "legacies, funeral charges and expenses. With full power "to my said daughter, and *her foresaids*, for their respective "interests above mentioned, after my decease, to uplift and "receive the foresaid sums of money, and, if need be, to sue "therefor, and to grant discharges of the same, which

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"shall be sufficient to the receivers, and generally to do "every other thing in the premises which I could have "done in my life." "And I hereby reserve full power to "me, to innovate and alter these presents, by a writing "under my hand, at any time in my life, and even at the "point of death, or to cancel the same as I shall think pro-"per, declaring that these presents shall be effectual, in so "far as not altered by me."

His daughter, Margaret Porterfield, had married Mr. Graham of Gartmore, and, at the time the above disposition was made, their eldest child Elizabeth was born; the other two were

1771. born before his death. Having died, of this date, the question which arose in the present case was, Whether, by the above disposition, there was an absolute right of property conveyed to Mrs. Graham, or merely a liferent.

June 25, 1779. The Court of Session, of this date, pronounced this judgment, "On report of Lord Kaimes, and having advised the "informations of both parties, the Lords find, That the fee "of the bond in question is vested in Mrs. Graham, the "mother (respondent), and remit to the Ordinary to pro-"ceed accordingly."

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The deed in question is in the nature of a will, or testamentary disposition, taking effect only at the testator's death. The intent, even where not so clearly appearing as in the present case, must prevail, if not introducing a new kind of estate, or new mode of property, not allowed by law. But here, both words and intent make it manifest that the respondent was to have these bonds for her life only, and the principal, after her death, to go to her children absolutely. The three appellants, her children, were in being at their grandfather's death, when his disposition took place; and, consequently, the property of these bonds vested instantly in them, subject to their mother's life interest therein. So that however inapplicable the judgments upon limitations of real estates are to questions arising upon mere personality, yet, had this been a disposition even of a land estate, there would not have been a colour for enlarging the liferent into a fee, because the fee would have vested immediately in the appellants. 2d, The respondent's objection, of an inconsistency between her taking only a life interest in these bonds, and yet being charged with the payment of debts, legacies, and funerals, is falla-

cious and totally groundless. The deed expressly sets out by assigning and transferring, with and under the burdens herein after inserted, to Margaret his daughter, in liferent, and to the heirs of her body in fee; so that the burdens affect the several interests given to mother and children; none of whom, till those burdens are discharged, can take any benefit from the disposition. The declaration at the end of the deeds, of the gift being made by the granter, and accepted by the respondent, with burden of payment of his debts, legacies, and funeral expenses, specifies the burdens above mentioned, and has afforded the respondent this notable objection, which could never have been thought of, had the debts, legacies, and funeral been particularly mentioned at the beginning of the deed, as the burdens whereto the whole gift was subjected. But this inaccuracy, if it be one, cannot vary the priority of the charge, expressly laid by Dr. Porterfield, upon the whole effects he was then disposing of, nor enlarge by a forced and unnatural construction, the *life interest* expressly given her; and this for the purpose only of enabling her to strip her children, contrary to their grandfather's apparent intent, of the interest conveyed to them. 3d, And by the decisions in the Court, in similar destinations, it is established that there is a fee in the children, and a liferent only in the parent.

Pleaded for the Respondents.—The assignment upon the construction whereof the present question arises, being a deed of a testamentary nature, great regard is due to what thereby appears to have been the testator's intention. The testator's meaning manifestly was, to give his whole fortune to his daughter, the respondent, to be at her absolute disposal; and that the mention of her heirs is mere words of superfluity, or intended to operate only in the case of her predeceasing the testator. The state of the respondent's family, at the date of the assignment, shows that her child or children, could not be the particular objects of the testator's affection. Had he meant to restrain her from taking more than the growing interest of his fortune, he would have used terms less equivocal; and, by creating a trust, or in some other shape, have preserved the right of the children during her life, at the same time that he provided for the management of the fund; but, in place of this obvious course, he empowers his daughter to levy and receive the whole monies assigned; for though the power is given to her and her foresaids, for their respective interests, the particle *and*

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is here evidently the same with *or*, as if it had been expressed to his daughter, or the heirs of her body, according as the right shall be vested at the time. Another circumstance seemingly demonstrative of the testator's meaning, is the burdening the respondent *alone* with the payment of *his legacies*, funeral charges, and debts, which amounted to more than her liferent could possibly be worth; and the intention is further explained, by no distinction being made between the arrears of interest due upon the bonds at the testator's death, and the principal sums and interest to grow due thereafter. 2d, It is an established rule in the law of Scotland, that a conveyance or assignment to a person, and the heirs or children of his body, vests an absolute fee in the parent, and gives no more than a hope of succession to the children; and adjecting the words *in liferent* to the right of the parent, and in fee to that of the children, makes no difference. Were it otherwise, as the granter is divested, and nothing can vest in the children till the death of the parent, the fee or property would be pendent during his life, contrary to the principle, that the fee must always vest in some person existing, or capable of acting. There is, however, no occasion to adopt that principle here, it being sufficient that the law construes it as the meaning of the parties, to vest the fee, notwithstanding the expression, in liferent; if no further words of limitation are used; and it is well known, that *liferent*, *allenarly*, or for *liferent use only*, are the terms used by conveyancers, to mark that no more than a bare liferent is intended to be given. 3d, It is too late to controvert this doctrine, after being held so long for law, and after the solemn decision in the case of Frog,* and other decisions following it establishing the point.

After hearing counsel, it was
Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Henry Dundas, Al. Forrester.*
For Respondents, *Al. Wedderburn, Alex. Wight.*

* Frog *v.* Frog, Nov. 25, 1735; Mor. 4262.