SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

THOMSON—*Appellant.*

THOMSON and others—*Respondents.*

LANDS conveyed to one *in life-rent for his life-rent use allenarly*, and to the heirs of his body. He has only a life-rent interest, and not the fee; and cannot sell the estate, nor burthen it beyond the period of his own life.

Dec. 14, 1812.

LIFE-RENT.

WILLIAM Thomson, of North Steelend, father of the Appellant, being owner of a small estate in the county of Fife, and of certain houses in the town of Dunfermline, made a settlement, or testamentary disposition, whereby, as for the love and affection he bore to the Appellant, his only lawful son, and to his daughters, he conveyed his lands of North Steelend, with the pertinents, in the following terms:—"To and in favour of the said Tho-
"mas Thomson, my son, *in life-rent for his life-*
"*rent use allenarly*, and to his heirs whomsoever,
"to be lawfully procreated of his body; whom
"failing him and his heirs, viz. the said Thomas
"Thomson's heirs, arriving at majority or marriage,
"to the said Katherine and Elizabeth Thomson,
"my daughters, in life-rent, for their life-rent use
"*only*, and to their children procreated, or to be
"procreated, equally among them *in fee*, heritably

Testamentary disposition by William Thomson, dated Sept. 4, 1784.

Dec. 14, 1812.

LIFE-RENT.

" and irredeemably." " In which lands I bind and " oblige me, my heirs and successors, to infeft and " sease the said Thomas Thomson in life-rent, and " *the child or children* to be lawfully procreated of " his body, equally, whom failing as aforesaid, the " said Katherine and Elizabeth Thomson in life-" rent, and their children equally in fee."

The settlement contained several other provisions, but not material to the point in issue.

1785. Death of the father, and action by Appellant.

William Thomson, the father, died in 1785, and the Appellant was subsequently infeft in the lands of North Steelend. The Appellant was married, but had no children; and, some time after his father's death, brought an action in the Court of Session against his sisters, the substitutes in the disposition, and their children, concluding that it should be found and declared, " that the *fee* of " the said lands is in him, (the Appellant,) and that " he has a full and undoubted right to sell and dis-" pose of the lands, either for onerous or gratuitous " causes; to contract debt, and burden the estate " therewith, in any way, and to any extent he " should think proper; and, in general, to exercise " every right of property competent to an unlimited " proprietor: and the same being so found and de-" clared, that the said Katherine and Elizabeth " Thomson, and their children, should be decerned " and ordained to desist and cease from troubling " and molesting the Appellant in the exercise of his " right of property, to the full extent foresaid."

The action having come in course before the late Lord Justice Clerk, (M'Queen,) as Ordinary, the

defenders pleaded, that the deed being conceived in favour of the pursuer, (now Appellant,) *for his life-rent use allenarly*, he had no other right than that of a *life-renter*; and that the fee, if in him, was *fiduciary* for his children and the substitutes.

Dec. 14, 1812.

LIFE-RENT.

The Lord Ordinary, on the 14th December, 1792, pronounced an interlocutor sustaining the defences; and to this he afterwards adhered, upon representation and answers. Two reclaiming petitions were presented by the Appellant to the whole Court, who adhered to the Lord Ordinary's judgment.

Case of Newlands, of a similar nature.

About the same time a question arose in the Court of Session, between the creditors of Lieutenant John Newlands, on the one hand, and the son of the said Lieutenant Newlands, on the other, concerning the effect of a deed of settlement executed by Alexander Newlands, in terms similar to those occurring in the present case; for by that deed Alexander Newlands disponed his estate to John Newlands, his son (afterwards Lieutenant Newlands,) "during all the days of his lifetime, *for his* "*life-rent use allenarly*, and to the heirs to be "lawfully procreated of his body, in fee," &c.

The Court considered the two cases of Newlands and Thomson as depending on the same principle; and therefore they ordered the parties in both to plead the point at issue at their joint expense, which was accordingly done.

The creditors of Lieutenant John Newlands contended that, by construction of law, the fee of the estate was vested in their debtor, Lieutenant John Newlands, and therefore insisted, in an action

Dec. 14, 1812.

LIFE-RENT.

for the purpose, that it should be sold for their payment.

The son of Lieutenant John Newlands, on the other hand, maintained that his father was a bare life-renter; that the fee belonged to him the son; and that, therefore, the estate, so far as concerned the fee, should be struck out of the action of sale at the instance of his father's creditors.

Interlocutor of the Court of Session in case of Newlands' creditors, Feb. 7, 1794.

The Lords of Session, in that case of Newlands, by interlocutor, of date 7th day of February, 1794, "ordained the whole heritable subjects there in "question to be struck out of the sale of the estates "belonging to Lieutenant Newlands, in so far as "concerns the fee of said subjects, and decerned;" and to that judgment the Court of Session adhered, after advising a reclaiming petition, with answers, on the 9th of July, 1794.

April 26, 1798.

Appeal. Feb. 1806.

Both cases were carried by appeal to the House of Lords, and the judgment in the case of Newlands' creditors was affirmed. Thomson withdrew his appeal, but entered another in 1806, which came on to be heard this day, (Dec. 14, 1812.)

Appellant's general argument.

It was contended, on the part of the Appellant, that, notwithstanding the conception of the words used by the testator in the deed under consideration, the absolute fee of the real estate of Steelend, thereby conveyed, must be held to have been vested in him, the Appellant, although he was nominally therein described a life-renter only. In support of this proposition, the Appellant maintained, that, by the law of Scotland, *a fee* could not be *in pendente*; that, therefore, in all cases where a grant had been made to a person in life-rent, and to his children,

or to other persons *nascituris* in fee, the Court had uniformly decided *ex necessitate juris*, that the fee must be understood to be in the life-renter; that although when the grant was made to a person in life-rent, and to another existing *nominatim* in fee, the right of the former would confessedly be a bare life-renter, and that of the latter a substantial fee; yet, when a disposition in life-rent was accompanied with a grant in fee to persons *unborn*, and so incapable of holding it, the law reared up *ex necessitate*, and by construction, an *absolute fee in the life-renter*, whereby he and his creditors were enabled effectually to disappoint the succession of the fiars in expectancy; and that the addition of the word *allenarly*, although uniformly used in the deed under consideration, did not materially vary the case, because it did not indicate more clearly the will to confer only a life-rent, than a simple grant in life-rent in common sense ought to do; so that there was a *necessitas legis*, which, as it required the raising by construction an absolute fee in the life-renter in the one case, authorised it equally in the other.

Dec 14, 1812

LIFE-RENT.

In support of these propositions, the following authorities were cited:—*Frogg's* case, Home's Coll. Dec. Nov. 25, 1735.—*Lillie v. Riddell*, Kilk. *voce Fiar*, Feb. 4, 1741.—*Douglas v. Ainslie*, Fac. Coll. July 7, 1761.—*Cuthberton v. Thomson*, Fac. Coll. March 1, 1781.—*Forbes v. Forbes*, Kaimes's Sel. Dec. August 3, 1756.

On the part of the Respondents, it was contended,

Respondent's general argument.

1st, That, in the established practice and under-

Dec. 14, 1812.

LIFE-RENT.

standing of conveyancers, a grant of an heritable subject to a person in life-rent for his life-rent use *allenarly*, and to his children, or to other persons *nascituris* in fee, imported no more than a bare life-rent in the grantee, excluding him entirely from any right or interest in the fee for his own benefit.

2d, That there does not exist in the law of Scotland any principle, or any authority, which can authorise, and far less compel, courts of law *ex necessitate juris*, as insinuated by the Appellant, to defeat the will of the testator, by vesting an absolute fee of his estate where, as in the present case, he most evidently never intended it should be vested; and,

3d, That, on the contrary, the principle as well as the latest and most approved authorities in the law of Scotland, concur in establishing this position, that the will of the testator, when it is unequivocally declared by competent deeds, ought invariably to be carried into complete execution.

And in support of these propositions, the following authorities were cited:—Dirleton's Doubts, *voce Fiar*, with Sir J. Stewart's Answer.—Erskine, b. 2. t. 1. s. 4.—*Forbes v. Forbes*, Kaimes's Sel. Dec. August 3, 1756.——*Gordon v. Carlton*, Falc. Feb. 12, 1758 (48).—Balfour, 103, s. 5.—Stair Inst. Life-rent Infeft. s. 10, 11.—Craig, p. 294. s. 34. p. 421. s. 20.—*Thomsons v. Lawson*, Stair, Dec. February 4, 1681.—*Gerron v. Alexander*, Fac. Coll. 1781.—*Ross v. his Children*, Fac. Coll. March 8, 1791.—*Watherstone v. Rentons*, Nov. 25, 1801.—*Newlands' Case*, Dom. Proc. 1798.

Ordered and adjudged, that the appeal be dismissed, and interlocutors complained of be *affirmed*. Dec. 14, 1812. LIFE-RENT.

Agent for Appellant, CHALMER.
Agent for Respondent, MUNDELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

TURNER and WATSON—*Appellants.*
TURNER and another—*Respondents.*

ENTAIL, with prohibition against alienation, and against "*letting tacks in diminution of the true worth and rental* "MAY BE PAID *for the said tacks.*" Lease of part of the lands for 1000 years, with *growing timber, and mines and minerals*, at a rent below that which was paid at the time of the expiration of the preceding lease of the same lands. This lease was reduced by the Court of Session on the ground that it was an ALIENATION; and the judgment was affirmed by the House of Lords on the ground that it was *in diminution of the true worth and rental* of the lands at the time of the expiration of the preceding lease. July 1, 1813. ENTAIL.

THIS was a question as to the validity of a lease for 1000 years, under an entail containing a prohibition against alienation and letting at a diminished rental.

John Turner, merchant in Dantzic, (a native of Aberdeenshire,) who died in 1688, by his last will and testament, directed certain executors and trus- Settlement in the will of John Turner. 1688.