tody, the fee vested in the children might have been considered to be of a revocable nature. Another, however, whose opinion was followed by the Court, observed, that although in bonds granted directly by a father to his children, the delivery in a question with the granter's creditors, must be proved by the children, the law was different in cases like the present. Without enquiring, therefore, in what manner the possessor of this bond had received it, the LORDS No 246.

" Found, that the fee was in the children, and could not be attached for the debts of the father."

Lord Ordinary, *Gardenston*. For the Creditors, *Baillie, M'Cormick*,
For the Children, *Geo. Wallace, Ilay Campbell*. Clerk, *Hume*.

C. *Fol. Dic. v.* 4. *p.* 126. *Fac. Col. No* 81. *p.* 128.

1796. *May* 31.

JOHN ZEPHANIAH HOLWELL, and his Attorney, *against* LADY CUMING.

No 247.
A bond of provision by a father to his daughter, found in the repositories of her grand-uncle by the father's side, presumed to have been held for behoof of the father.

CAPTAIN WEDDERBURN, after having been many years abroad in the service of the East India Company, returned to Scotland; and in 1768 he granted a bond for L. 4000, payable after his death, to his then only child, now Lady Cuming.

The bond bore to be granted for 'love, favour, and paternal affection,' and 'in order to secure her in a suitable provision.' It contained no power of revocation, nor dispensation with delivery.

Soon after granting the bond, Captain Wedderburn returned to India, where he died in 1776. After the date of the bond he was twice married. He named his third wife his executrix, who intromitted with his whole effects in India.

His property in this country was sold by judicial sale; and after paying a preferable creditor, Lady Cuming received the reversion, which was about L. 1000, in part payment of her bond.

In 1789, John Zephaniah Holwell, a creditor to Captain Wedderburn, by a bond for L. 1704: 19: 4, granted in India in 1769, and upon which no interest had been paid since 1774, brought an action against Lady Cuming, as representing her father, and in 1790, raised a reduction of the bond, on the act 1621.

These actions were conjoined.

In the course of procedure evidence was led by the pursuer, to establish that his bond in 1769 was a renewal of one granted in 1766; and he contended, that Captain Wedderburn was even then insolvent.

The defender controverted the evidence of the priority of the debt, and denied that her father was ever insolvent.

No 247.

The puruer farther stated, that, independently of these circumstances, as the defender's bond was revocable till her father's death, she fell to be postponed to his onerous creditors. The defender *answered*, That the bond was, immediately on its execution, delivered to Mr Wedderburn of St Germains, her father's uncle, from whose widow she afterward received it: That the object of delivering it to him, was to put it out of the power of her father, who was then on the eve of a second marriage, to revoke it; and that accordingly it contained no power of revocation, and bore to be granted for the defender's security. The pursuer said there was no evidence of the bond having been delivered to Mr Wedderburn; and farther denied that that circumstance created any presumption in favour of the defender;

Pleaded; Where there are no express terms of depositation, a bond of provision by a father to a child, found in the possession of a third party, is presumed to have been delivered to him for behoof of the granter, during his lifetime, and only after his death, for behoof of the grantee; Stair, b. 1. tit. 13. § 4.; 16th November 1697, Simpson against Finlay, No 238. p. 11570. So far from there being any thing to elide this presumption in the present case, Mr Wedderburn of St Germains was the person to whom the deeds of the granter were naturally entrusted in his absence.

Answered; The general presumption is, that a deed in possession of a third party is held for behoof of the person in whose favour it is executed; Stair, b. 1. tit. 7. § 14.; b. 4. tit. 42. § 8.; Bankton, v. 1. p. 510.; and in this respect there is no distinction between onerous and gratuitous deeds; Erskine, b. 3. tit. 2. § 43.; 5th July 1662, Drummond against Campbell, *voce* Writ.; 11th June 1630, Fairlie against Fairly, No 235. p 11567.; 3d January 1750, Riddel against Inglis, No 243. p. 11577. When the granter of a deed wishes to retain his power over it, after putting it into the custody of another, he ought either to reserve a faculty of revocation in the deed itself, or take an obligation from the depositary to restore it on demand: Further, it cannot be disputed, that the pursuer's presumption would be elided by the oath of the depositary; but, upon his death, according to the pursuer's doctrine, proof of the fact would become impossible, even in cases where delivery was expressly made for behoof of the grantee.

The Lord Ordinary reported the cause on informations.

Some of the Judges thought the whole circumstances of the case afforded evidence that the bond was delivered for behoof of the defender, who, as Captain Wedderburn, in their opinion, was not then insolvent, fell to be assoilzied.

But a great majority thought the action well founded. The insolvency of Captain Wedderburn, which, in the circumstances of the case, was to be presumed *retro* to the date of the bond, was mentioned as one foundation of this opinion; but the decision was rested chiefly on the general presumption pleaded for the pursuer.

THE LORDS, (27th January 1796), sustained the reasons of reduction, and found the defender liable in repetition of what she had recovered out of her father's estate. No 247.

And upon advising a petition, with answers, they "adhered."

Lord Ordinary, *Monboddo.* Act. *D. Cathcart.* Alt. *M. Ross.* Clerk, *Menzies.*
D. D. *Fac. Col. No* 220. *p.* 516.

DIVISION IX.

Rights when presumed simulate.

SECT. I.

Disposition of moveables *retenta possessione.*

1630. *January* 30. CALDERWOOD *against* PORTEOUS.

No 248.

IN a process upon the passive titles, the defender acknowledged his intromission with the heirship moveables, but that it was in virtue of a disposition from his father. *Objected*, That the disposition was null, *retenta possessione.* The LORDS sustained the answer, that the father and son lived in the same house, and that it must be reputed the son's possession, he being married, and the father old and infirm and a widower.

Fol. Dic. v. 2. *p.* 156.

*** This case is No 39. p. 9681, *voce* PASSIVE TITLE.

1662. *June* . BOWIS *against* BARCLAY of Johnstoun.

No 249.

ROBERT BOWIS *alleging*, that John Wood was debtor to him in a certain sum of money, as cautioner for John Strachan of Haugh-head, and having arrested certain goods in the hands of John Barclay of Johnstoun, pursues to make the arrested goods furthcoming. It was *excepted* by the defender, That the goods