

1775. February 23.

JEAN MONCRIEFF *against* Mrs ANNE BURNET.

Mrs ANNE BURNET, relict of Colonel Halyburton, in whose family Mrs Anne Moncrieff, aunt to the pursuer Jean, had lived for many years as a sort of housekeeper, upon the 17th December 1765, granted a bond, whereby she obliged herself to pay to the said Jean Moncrieff, herself, exclusive of the *jus mariti* of her husband, and to be nowise subject to, or affectable by his debts or deeds, the sum of L. 5 Sterling yearly, during the natural life of the said Jean Moncrieff, beginning the first year's payment of the said L. 5 at Whitsunday then next.

In September 1766, Mrs Burnet granted another bond, by which she became bound to pay L. 50 Sterling yearly of an annuity to the said Anne Moncrieff, during her life, to commence at the decease of the granter; and which annuity, upon the death of Anne, was to descend to her niece, Jean Moncrieff, during her life; and, on Jean's death, to her husband, William Mitchell; and, in the event of his death, to his daughter, Anne Mirchell.

Some time before Mrs Burnet's marriage with her present husband, Andrew Burnet, she, on the 20th of April 1767, executed a bond, 'Whereby, upon the narrative of being sensible of the great obligations I lie under to Mrs Anne Moncrieff, who had the care of me when I was young, and from that time has constantly attended me, and employed herself in the care and concern of me and my affairs, so that I think myself obliged to give a return of gratitude to the said Mrs Anne Moncrieff; for which purpose I did, by a deed dated the day of September last, legate and bequeath to her the sum of L. 50 Sterling of an annuity, during her life, to commence immediately after my decease; and, after the said Mrs Anne Moncrieff's decease, the like annuity to Jean Moncrieff, her niece, &c. but now, in place of the said annuities, I am resolved to grant a certain sum, and to extend the said mark of my good-will to the said Jean Moncrieff, and the said William Mitchell himself, and their children, to whom I have also been much obliged in the management of my affairs; and now that I am resolved to marry Mr Andrew Burnet, Clerk to his Majesty's Signet, who is also sensible of the obligations I lie under to the before-named persons, and has agreed to consent to and approve of this present bond; therefore, with the consent of the said Andrew Burnet, I do hereby bind me, my heirs, &c. to pay to the said Anne Moncrieff, in liferent, during all the days of her lifetime, for her liferent use only, and to the said Jean Moncrieff, and the said William Mitchell himself, in fee; whom failing, to the children procreated, or to be procreated, betwixt them, and their nearest heirs and assignees, all and whole the sum of L. 2000 Sterling money, and that at the first term of Whitsunday or Martinmas next, and immediately following my decease, with a fifth part of the said principal sum of penalty, in case of failzie, and lawful interest of the

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Whether a posterior large donation in money is to be held as granted in satisfaction, not only of an eventual annuity formerly bequeathed, to different persons, in place of which it is specially declared to be; but also, of a still prior small annuity conferred by an irrevocable deed on one of the eventual annuitants, but of which no mention is made in the last deed.

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' not payment of the same. Registration, &c.

The L. 5 annuity, originally conferred on Jean Moncrieff, had been paid for one year; but farther payment being refused, an action was now brought against Mrs Anne Burnet for payment.

Pleaded for the defenders; That annuity was for ever at an end, upon the L. 2000 bond being granted, in the sense and understanding of all parties concerned, and upon the well known principle, *debitor non præsumitur donare*, and the uniform practice of the Court, in cases such as the present, to hold that former bonds or rights were included in after bonds given to the same person for large sums, where no special facts have been condescended on for taking off the natural presumption that arises from the face of the transaction.

Answered; There never was the least hint or intention that the bond for L. 2000 was to annul the settlement of L. 5, which was intended as a certain aid to the pursuer; for it was agreed and pointedly specified, that it should come in place of the eventual annuities of L. 50 only. Nor will the maxim pleaded avail in this case; and there are various decisions of the Court adverse to such plea; Fountainhall, 20th June 1704, Stirling against Deans, No 120. p. 11442.; and others cited in the same section. Even upon presumption, the pursuer might rest with safety. If it had been really intended to sopite the annuity in question, is it possible that the defender's present husband, who was himself the writer of the bond, would not have taken care to mention so in express terms? But there is no place here for presumptive arguments; for here is confessedly an irrevocable deed of an annuity of L. 5, to set aside which would be required a clear and expressive consent on the part of the pursuer.

THE LORD ORDINARY pronounced the following interlocutor: " Finds, That, as the annuity in question, of L. 5 Sterling yearly, is, by the bond, made payable at Whitsunday after the date of the bond, (being Whitsunday 1765,) and so to continue during the life of this pursuer, and the bond contains no power of revocation, it was not in the power of the defender, by her after-deed, with consent of her then suitor, now husband, to alter the bond in any shape; and, besides, there is nothing in the bond, founded on by the defender, which derogates from the bond now sued upon; for, although it is for a large sum, as it does not say that other bond should sopite this annuity pursued for, it is no way inconsistent both should stand; at any rate, no good exception lies against paying the pursuer her annuity, with interest, in terms of the bond; and, therefore, repels the defences."—And to which his Lordship adhered, by a subsequent interlocutor, upon considering a representation: " And, more particularly, that the bond for L. 2000 contains a revocation of the annuity of L. 50, but does not stipulate that the small annuity in question should be discharged."

Upon a reclaiming bill and answers, the Court were much moved with the appearance there was, of advantage having been taken of the very liberal donor by these donees; but thought they could not recede from the rules of law, to give her any relief; especially in the shape the question had come before them; which was not a challenge by a reduction at her instance, but a defence set up in an action against her for payment.

“ THE LORDS adhered.”

Act. *J. Borwell.*

Alt. *A. Elphinston.*

Clerk, *Gibson.*

Fol. Dic. v. 4. p. 123. Fac. Col. No 164. p. 51.

1782. February 21. SMOLLET CAMPBELL *against* CAMPBELL of Craignish.

IN 1772, Campbell of Craignish executed bonds of provision in favour of his younger children, and delivered the same to their uncle for their behoof. Among the rest, he obliged himself to pay to Smollet Campbell, ‘ upon his attaining the years of majority, the sum of L. 400 Sterling; and in the mean time, to maintain and educate him in a manner suitable to his station in life.’

In 1775, Smollet, then 17 years of age, and a student at the College of Glasgow, was appointed an ensign in one of the new regiments. On this occasion the sum of L. 150 Sterling was advanced by his father to levy his compliment of recruits. He was likewise furnished with cloaths, a silver watch, and other necessaries, when he left Scotland. He served in America for the remaining years of his minority, and then brought an action against his elder brother, the present Craignish, as representing his father, for the contents of the bond. The defender claimed a deduction of the money advanced for his brother. Against which the pursuer

Pleaded; When a father grants a bond of provision, payable at a distant period, and becomes bound in the mean time to maintain and educate his child, there is an implied obligation to set him out in due time to some employment or business, in which he may earn his bread in the future part of his life. The father, in this case, by procuring an ensigncy for the pursuer, did no more than fulfil this obligation; *2do*, Had the pursuer, instead of entering into a military life, remained at college, a much larger sum than was here advanced must have been expended in his support. Since his joining the regiment he has subsisted solely upon his pay. He is therefore entitled to compensate the claim here made out of the funds so saved.

Answered for Craignish; The plea here maintained for the pursuer, if recognised by courts of law, would be attended with very heavy consequences to parents and their general representatives. It would in the end be exceedingly prejudicial to the interests of younger children, by discouraging parents from advancing them in the world before their provisions are exigible. A father is

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One granted a bond of provision to his son payable at majority, with an obligation to maintain and educate him in the mean time. The father, before his majority, bought him a commission in the army and paid his outfit. These allowed to be deducted from the bond.