

No 38.

It was likewise separately *answered* for Mrs Naysmyth, that her claims did not fall under the terms of the general discharge in the contract of marriage, which was a mere clause of style, and could be considered only as a discharge of claims arising to her as Captain Naysmyth's widow. She further *argued*, that a settlement, *mortis causa*, being held, *præsumptione juris et de jure*, to be the *ultima voluntas* of the testator, the intention there stated must be presumed to continue till the hour of his death; consequently, Captain Naysmyth's settlement must regulate his succession in every point wherein it is not expressly revoked by the marriage-contract.

The question came before the Court in the shape of a multiple-poining, brought by Captain Naysmyth's Trustees; and the Lord Ordinary having taken it to report, the LORDS (6th February 1795), "repelled the claims of the relict Mrs Magdalen Moncrieff, both in regard to the legacy of L. 100 Sterling, and the annuity of L. 10 Sterling: Found the Miss Cullens, *in hoc statu*, not entitled to the respective annuities of L. 10 Sterling claimed by them; but that upon the death of the said relict, they have a good right to said annuities."

Separate reclaiming petitions for Mrs Naysmyth and Miss Cullens were appointed to be answered; and, on again advising the cause, the LORDS found Mrs Naysmyth entitled to the legacy of L. 100 claimed by her, but adhered *quoad ultra*.

Lord Ordinary, *Polkemmet*.
Alt. *J. W. Murray*.

For the Claimants, *W. Maxwell Morison*.
Clerk, *Sinclair*.

R. D.

Fac. Col. No 65. p. 148.

DIVISION II.

Payment when presumed.

SECT. I.

Presumption that articles claimed have been accounted upon.

1611. *January 16.*CARNOWA *against* STEWART.

No 39.

ALTHO' a creditor grant a bond for a greater sum to his debtor, this will not infer a presumption that the former debt was counted upon and taken away.

Fol. Dic. v. 2. p. 135. Haddington.

* * This case is No 48. p. 2600, *voce* COMPENSATION—RETENTION.