1782. *December* 18.

ANDREW GALLIE *against* FLORENCE MACKENZIE and her Children.

No 35.
Whether a father's ſettling by teſtament a ſum of money on his ſon, be a ground for preſuming revocation of the ſettlement of a like ſum contained in prior bonds of proviſion?

ABNER GALLIE, when about to enter into marriage with Florence Mackenzie his second wife, granted a bond of provision for 1000 merks, payable at the time of his death, in favour of Andrew Gallie, his son by the former marriage.

In the contract executed on that occasion, Abner Gallie devised to Florence Mackenzie in liferent 2000 merks, the fee of which he reserved to himself, his heirs, or any other persons to whom he should afterwards think proper to destine it.

He then, in conformity to that reservation, granted a second bond of provision, purporting to be additional to the first, in favour of his son Andrew, for the sum likewise of 1000 merks, but payable on the death of his wife. Both bonds were placed in the custody of a person who was the common friend of all the parties.

By his latter-will and testament, in which he appointed the children of his second marriage to be his executors, and reserved to their mother Florence Mackenzie the liferent of 2000 merks, as formerly devised to her, Abner Gallie destined to Andrew the whole fee of that sum, the half of which had been already provided to him by the second bond above mentioned. The testament, however, expresses no revocation of either of the bonds. It is to be remarked, too, that the liferentrix was but a little elder than Andrew himself.

After the death of Abner Gallie, Andrew pursued Florence Mackenzie and her children, as representatives of Abner, for payment of the 1000 merks contained in the first bond, due at his father's death, claiming the provision of the second, as making part of the 2000 merks bequeathed by the testament. This question then came to be agitated, Whether, in that bequest, a revocation of the bonds, at least of the former one, were implied?

Pleaded for the defenders; The bonds of provision in question not having been delivered to the grantee, the pursuer, but deposited by the granter, to be recalled at his pleasure, were therefore revocable. For though such bonds in favour of children require not delivery to render them effectual, yet, if not delivered, as they remain under the granter's power, so, of course, till his death, they are subject to revocation, whether express or implied, direct or virtual. In fact, both the bonds granted to the pursuer have been, by the testament, virtually revoked. That very sum of 2000 merks, which was to be liferented by the widow, and of which, as one half was by the posterior bond bestowed in fee on the pursuer, so the other half corresponded to the like provision contained in the prior bond, being here wholly and at once bequeathed to him, the necessary consequence is the revocation of the preceding provisions; although indeed the sole effect of this revocation is no other than to render both moieties of his provision equally payable on the death of the liferentrix, where-

as the period formerly fixed for the payment of one of them had been the death of the granter. No 35.

Answered; That delivery by the granter to the grantee was not necessary to give validity or effect to the bonds in question, has been admitted; as it has likewise been acknowledged, that the granter did not revoke them in any express or direct manner. The only point disputed is, whether a virtual revocation be contained in the testamentary bequest to the pursuer. But it is plain that there is no room for such implication, unless the bonds of provision and the legacy be considered as incompatible. Not any two things, however, can be more inconsistent, than that the pursuer would claim, in virtue of the bond first granted to him by his father, the 1000 merks which it bestowed on him, independently of the testament, as well as those 2000 merks contained in that settlement, of which indeed one half was thereby conferred on him, the other half having been already provided to him by the second bond. If, therefore, on the one hand, no words occur to express a purpose of revoking, as little is there, on the other, any inconsistency in the thing to imply such a design. That construction, besides, is in itself exceedingly unnatural and improbable; as it presumes, that a father, at the moment when by repeated acts he is shewing the most anxious solicitude for securing to a favourite son an effectual provision, should be willing nevertheless to leave him during all the days of his life entirely destitute; in as much as it supposes that provision totally withheld from him until the death of a person not much more advanced in years than he himself is.

Some of the Judges were of opinion, that in all cases in which different provisions to children have been granted, each of them, if the contrary be not expressed, is to be presumed to be due; and therefore, that in this instance both the bonds of provision and the legacy ought to be sustained.

But a majority of the Court considered the testament as implying a revocation of the bonds.

The Lord Ordinary having decerned in terms of the libel,

The Lords altered his interlocutor, and sustained the defence.

Andrew Gallie presented a reclaiming petition against this judgment, which was refused without answers.

Lord Ordinary, *Alva*. Act. *Alex. Abercromby*. Alt. *Swinton*. Clerk, *Menzies*.

S. *Fol. Dic. v.* 4. *p.* 118. *Fac. Col. No* 78. *p.* 121.