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ception from this rule in the case of a claim depending on the fact, that a person is alive. The legal presumption in favour of life, operates only where a party is *in possessorio*. This was the ground of the judgment in the decision Carstairs against Stewart, where an assignee, under a liferentrix, was in possession of lands, out of which the proprietor attempted to remove him. The assignee admitted, "That, were he insisting for possession, he must prove his libel, viz. the existence of the liferentrix."

The purchasers are in possession of the whole of Lord Cranston's estate; Mr Lade is merely *in petitorio*, and cannot obtain payment of the annuity without claiming it from the purchasers. The *onus probandi*, therefore, lies on the assignee, and he must prove the fact, that Lady Cranston is in life, either by getting her subscription to the discharge, or by the certificate proposed.

It does not alter the case, that Mr Lade has already received payment of bygone annuities, without being required to produce such evidence. It is no doubt optional to the purchasers to dispense with this evidence, if they choose.

THE COURT, by their last interlocutor, "found, that Mr Lade is entitled to uplift the annuities in question during Lady Cranston's life, upon his own discharges, without producing any certificates of her being in life at the terms for which the annuities are payable; reserving to the purchasers to apply to this Court by suspension, in the event of Lady Cranston's death, or of their having reasonable cause to suspect or believe her to be dead."

Lord Ordinary, *Auchinleck*.

Alt. Lord Advocate, *H. Erskine*.

For Lade, *D. Rae, Alex. Elphinston*.

Clerk, *Campbell*.

Fol. Dic. v. 4. p. 135. Fac. Col. No 61. p. 108.

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1782. July 26.

HENDERSON against HENDERSONS.

HENDERSON, by his marriage-contract, made certain provisions in favour of the children of the marriage. Afterward having acquired additional funds, he made a total settlement of his effects on four children then existing, reserving therein a power of revocation. Several years afterward, he conveyed an heritable debt to his three elder children, in consideration of their exonerating him of all the provisions in the contract of marriage, or all they could claim through his marriage with their mother, "or any provision heretofore conceived in their favour;" and in these terms they granted him a discharge of all such provisions. On Henderson's death, the total settlement in favour of the whole children was found unrevoked. The youngest child, who had no share in the conveyance of the heritable debt, claimed the whole of her father's succession, as executrix, exclusively of her brothers and sister; and *pleaded*, That they were excluded by the discharge they had granted, of all claim to 'any provisions heretofore conceived in their favour.' THE LORDS found, That as the

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total deed of settlement was not delivered, but remained latent in the grantor's repositories at the time of the children executing the discharge and renunciation, no *jus crediti* could thereon accrue to them till their father's death, and consequently it could not fall under their discharge, which comprehended only provisions actually due to them; they therefore repelled the claim of the youngest child.

Fol. Dic. v. 4. p. 132. Fac. Col.

** This case is No 24. p. 8187. *voce* LEGITIM.

1791. July 5.

CAMPBELL *against* SIMPSON.

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SIMPSON, debtor in L. 109 : 10s. to Campbell, for the price of cattle, *alleged*, in defence against an action for payment, That Campbell had accepted of a composition, which the debtor had offered to all his creditors, on condition of their giving him a discharge in full. Campbell admitted, that he was present at a meeting of the creditors, when Simpson laid before them a state of his circumstances, and offered them 7s. in the pound, on condition of their giving him a discharge; and he owned, that Simpson having laid down L. 38 : 8s. being the composition of his debt at that rate, he had taken the money, and never returned it. But he *alleged*, That the meeting was irregular; that he never had accepted of the proposal made by the debtor, to which the rest had agreed while he was out of the room; and that he had taken the money only as a partial payment, and had desired two persons present to bear witness that he took it only as such. THE LORDS were of opinion, That the pursuer having taken the money, while he understood the condition on which it was laid down, was sufficient to bind him to the transaction; and therefore found he was debarred from insisting for payment of the balance of his debt. See APPENDIX.

Fol. Dic. v. 4. p. 131.

Tocher stipulated by a third party, when presumed paid. See HUSBAND and WIFE.

Wife accepting a right to a part of her legal provisions, understood to pass from the remainder. See IMPLIED DISCHARGE.

Condition, *si sine liberis*, if presumed when not expressed. See IMPLIED CONDITION.

See IMPLIED ASSIGNATION.—IMPLIED CONDITION.—IMPLIED DISCHARGE.

See APPENDIX.