No 37.
ship-moveables included, of whatever denomination, which should belong to him at his death; and 'particularly, 'without 'prejudice of 'the foresaid 'generality,' the heritable subjects therein enumerated; neither the entail, nor the lands to which it related, being mentioned in the trust-deed.

The trust-deed contained procuratory and precept as to the subjects enumerated in it. After the testing clause, it was added, 'before subscription,' that Mr Maxwell's share in the Tontine Society and buildings in Glasgow, was meant to be conveyed by it; and this was his only heritable property, except Fingalton, which was not specially mentioned.

Upon Mr Maxwell's death, it turned out that his property, exclusive of Fingalton, was insufficient to pay the debts and annuities; and Walter Logan, the only accepting trustee, brought an action against the heir by the entail of Fingalton, to have it declared, that that estate was comprehended under the trust-deed; contending, that the entail being superseded by the second deed, there was no room for argument as to the intention of the granter; and that besides, it might reasonably be presumed, that by the time the second deed was executed, he had perceived the necessity of a total sale of his property.

Answered; The general clause in the trust-deed is restricted by the subsequent enumeration of particulars of less value than Fingalton; Erskine, b. 3. t. 4. § 9. If Mr Maxwell had considered the trust-deed to include his whole estate, he would not have thought it necessary to mention his share in the Tontine at the close of it. And if he had not meant the entail, so lately executed by him, to subsist, he would have expressly revoked it. House of Lords, 21st May 1783, Sir Thomas Dundas, *voce* TAILZIE.

The Lord Ordinary reported the cause on informations.

THE COURT were unanimously of opinion, that the entail was not meant to be revoked by the trust-deed, nor included under it; and on that ground gave judgment in favour of the defenders.

Lord Ordinary, *Methven.* Act. *Ar. Campbell.* Alt. *Ar. Campbell, jun.* Clerk, *Sinclair.*
D. D. *Fac. Col. No 51. p. 116.*

1798. *February 27.*

MRS MAGDALEN MONCRIEFF, and ELIZABETH, ANN, and MARGARET CULLENS, *against* JOHN NAYSMYTH.

No 38.
A person by a settlement, *mortis causa*, left certain annuities payable from the first term after his then wife's death, 'when 'the annuity 'to her will 'cease.' This wife died before him; and he having

A FORMER branch of this case is reported, 16th May 1797, Patons against Hamilton, No 36. p. 11376., where will be found a statement of the greater part of the facts on which the present point turned.

By the contract of marriage between Captain Naysmyth and Mrs Moncrieff, his third wife, he settled upon her a jointure of L. 80, and some other provisions, which she accepted of in full satisfaction to her 'of all terce of heritage, 'half or third of moveables, or others whatsoever which she can claim or demand from the said John Lockhart Naysmyth, or his representatives, or out 'of his effects, in case she shall survive him.'

No 38.
married again, it was found, that the annuities were not exigible till the death of his widow.
The same person having, by the same settlement, left an annuity in similar terms to the Lady whom he afterward married, it was found to be virtually extinguished by her marriage and provisions.
It was found, that the widow was entitled to a legacy, which he left her by the same settlement, notwithstanding that, by her subsequent contract of marriage, she accepted of certain provisions, in full of all she could claim by his death.

After Captain Naysmith's death, Mrs Moncrieff, nevertheless, claimed both the provisions in her contract, and the legacy of L. 100 bequeathed to her by her husband's settlement 1791. She and the Miss Cullens likewise claimed the annuities of L 10 left to each of them by the same deed, and which Captain Naysmyth's Trustees were appointed to pay to them, or such of them 'as shall 'survive my said wife, (*i. e.* Mrs Margaret Hamilton his second wife), beginning the first term's payment thereof at the first term of Whitsunday or Martinmas, which shall happen, after the death of the said Mrs Margaret Naysmyth, 'when the annuity to her will cease, and so forth thereafter during their respective lives.'

The residue, after paying the debts and admitted legacies left by Captain Naysmyth, and setting aside a sum sufficient for his widow's jointure, was inconsiderable; and if these claims had been sustained, there would, while Mrs Naysmyth lived, have been a deficiency of funds.

In defence against them, the residuary legatee

Pleaded; As Captain Naysmyth declares that the annuities in question shall commence only from his second wife's death, 'when the annuity to her will 'cease,' his intention obviously must have been, that these annuities, and a jointure to his widow, should not be payable at the same time, which would have been a greater burden than his fortune could have supported. Although Captain Naysmyth, therefore, contrary to his own expectations, when he made his settlement, survived his second wife, and married a third, it is clear, according to the spirit and rational interpretation of his settlement, that the annuities to the Miss Cullens must be suspended till the death of his present widow, while that left to herself was necessarily extinguished by her marriage with the testator.

And, besides, the fair presumption with regard both to the legacy and annuity left to Mrs Naysmyth by the settlement is, that Captain Naysmyth revoked them, by the general discharge which he took from her in their subsequent contract of marriage.

Answered; Supposing it to have been Captain Naysmyth's intention, that the annuity to his present widow should be extinguished by their marriage, and that those to the Miss Cullens should commence only at her death, it would not bar the present claim. For these annuities are expressly declared to commence from the death of his former wife; and where the will of a testator is sufficiently explicit, courts of law must give it effect, although it should have consequences which were not foreseen by him.

The Miss Cullens, however, further contended, that it was far from being clear that their claim was not agreeable to the will of the testator, it being difficult to suppose that he could mean to postpone their annuities till the death of his present widow, who was younger than themselves, and equally improbable that, on account of his third marriage, he meant to cut them off entirely.

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-poinding, 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*. For the Claimants, *W. Maxwell Morison*.
Alt. *J. W. Murray*. 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.