

NO. 2. It is likewise a maxim, that *nemo facile præsumitur gravare hæredem*, In the present case, the heir is clearly burdened to a certain extent in favour of the pursuers, and it is not to be presumed, that a double burden is laid upon him, unless the very clearest and most explicit evidence of it be produced.

The Court (22d November 1776) pronounced an interlocutor, “sustaining the defences, and assoilzieing from the action.” A reclaiming petition against this interlocutor, was, (11th December 1776) refused without answers.

Lord Reporter, *Monboddo*.

Act. *Dean of Faculty Dundas*.

Alt. *Hay Campbell*.

*J. W.*

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NO. 3. 1799. December 12. COLONEL HOPE against The EARL of HOPETOUN.

A person who had the prospect of succeeding to a large estate, granted a personal bond, obliging himself, and his heirs who should enjoy it, to pay certain additional provisions to the granter's younger children, when the expected succession should open. He afterwards entailed his own estate, under burden of the provisions he had made, or might

JOHN, Earl of HOPETOUN, possessed the old family estate, under a strict entail.

But he held the lands of Ormiston in fee simple.

He was, besides, heir of line to the Marquis of Annandale, who was unmarried, and insane.

In 1771, the Earl executed a bond in favour of his younger children, in the following terms: “Whereas, if George, Marquis of Annandale, should happen to die without issue, and intestate, his heritable estate in Scotland would, in the course of succession, devolve upon my family; and, seeing I have bestowed much time, pains, and expences in managing the said estate, whereby it has been greatly improved, it would therefore be most just and reasonable, that, in the event of so great a succession to my family estate, that my younger children should be more amply provided for than they can otherwise be: Therefore, I hereby bind and oblige me, and my heir, male or female, who may happen to succeed to the said estate of Annandale, in that event, to make due and lawful payment to my other lawful children, already born, or that may hereafter be born, and to their heirs and assignees, of the respective sums under written.” &c.

In 1773, he executed a strict entail of his lands of Ormiston on himself, and the heirs succeeding to him in the title of Hopetoun, with reserved

powers to alter, and providing: " That these presents are granted by me,  
 " and accepted by my said heirs of tailzie, with and under the burden of  
 " all my just and lawful debts that shall be resting by me, to any person or  
 " persons whatever at the time of my death; but declaring, that all provi-  
 " sions already made, or hereafter to be made by me in favours of my  
 " younger children born, or that yet may be born to me, shall burden, af-  
 " fect, and be imputed, in the first place, to the powers and faculties for  
 " provisions in favour of younger children, given and granted to me by the  
 " deceased Charles, Earl of Hopetoun, my father, over his estate of Hope-  
 " toun, in his said deed of entail in my said marriage settlement; and af-  
 " ter exhausting the said faculties, that all further provisions, made or to be  
 " made by me, in favour of my younger children, and all gifts, donations,  
 " deeds, and obligations of every kind, whether gratuitous or onerous,  
 " made, or hereafter to be made and granted by me in favour of any per-  
 " son or persons whatever at the time of my decease, shall, in the next  
 " place, affect and burden any other separate estate, personal or real, that  
 " may happen to pertain to me the time of my decease, not contained in  
 " this present bond of tailzie, and not disposed, or to be disposed by me to  
 " my younger children, or others, free from the said provisions and debts;  
 " and, after exhausting such other estate, real or personal, shall, in the last  
 " place, and no otherwise, burden, affect and be imputed to the before  
 " written power and faculty reserved by me over my lands and estate  
 " hereby resigned; and in case it shall happen, the said lands and others  
 " hereby resigned and settled, or any part thereof, and the heirs of tailzie  
 " aforesaid succeeding thereto, to pay or be anywise made liable for any of  
 " my provisions to younger children, or of my debts, then, and in that case,  
 " there shall be relief competent to my said heirs of tailzie for the same,  
 " against and out of all my other lands and estate, real or personal, except  
 " such as I have liberated, or shall hereafter expressly liberate from the  
 " same, by any deed under my hand prior or posterior to these presents;  
 " and for that end, I hereby bind and oblige me, and my heirs and execu-  
 " tors whomsoever, with the exception immediately before written, to free  
 " and relieve my said lands and others hereby resigned, and my said heirs  
 " of tailzie succeeding thereto, of and from all payment of any part of the  
 " provisions to younger children, or debts which shall happen to be resting  
 " by me, till all my other estate, real or personal, not contained in this  
 " present tailzie and settlement, and not disposed, or to be disposed by me  
 " to younger children or others, free from the said provisions or debts, be  
 " exhausted; after which, and in that case only, the lands, baronies, and  
 " others hereby settled, shall be affectable for payment of the provisions  
 " made or to be made by me in favour of my younger children, and for  
 " payment of all the just and lawful debts, and of all gifts, donations, or

NO. 3.  
 make, on his  
 younger  
 children.  
 He died be-  
 fore the suc-  
 cession  
 opened; but  
 it devolved  
 to his eldest  
 son, his own  
 heir of en-  
 tail, who  
 was found  
 entitled to  
 charge the  
 bond  
 against the  
 entailed  
 estate, with-  
 out relief  
 from the  
 other suc-  
 cession.

NO. 3. “ other deeds, made, or to be made by me, in favour of any person or persons whatsoever, whether onerous or gratuitous, and whether prior or posterior to these presents.”

Of the same date, he executed a collateral deed, giving the heirs of entail power to sell, so far as necessary, for payment of his debts and provisions.

He died in 1781, and was succeeded by the present Earl, his eldest son, who served heir to him *cum beneficio* in his unentailed lands, and confirmed executor in his moveables.

The Marquis of Annandale died in 1792; and the Earl of Hopetoun succeeded to his landed property in fee-simple.

The bond in 1771 now became exigible against the Earl, and the unentailed property of his father having been exhausted, he proposed to sell part of the Ormiston estate for payment of it,

This was opposed by Colonel Hope, the next heir of entail, who brought an action to have it found, that the bond should ultimately be paid from the Annandale succession; and,

Pleaded: Although the Annandale succession did not open during the lifetime of the late Earl, as the entail of Ormiston was executed by himself, and was revocable, there can be no doubt of his power to bind his son, to pay from his separate funds any sum not exceeding what he derived from the entailed estate; and both the narrative and inductive cause of the bond establish, that it was the Earl's intention that it should be paid from the Annandale succession, without relief from the Earl's property.

The clauses in the entail with regard to provisions, relate only to such as the Earl had not made payable out of other funds.

Answered: The bond does not point out the fund from which it was to be paid, but only the condition on which it was to be exigible. All the Earl meant, was, that when his representative enjoyed the Annandale estate, he could, upon the whole, afford larger provisions to his brothers and sisters.

The bond created a personal obligation on the granter himself, and therefore was properly payable out of his own funds. The Annandale estate never belonged to him; and though he might indirectly have obliged his son to pay the bond from that estate, such obligation surely was not to be presumed.

As Ormiston was not entailed at the date of the bond, there could then have been no argument for exempting that estate from payment of it; and when the entail was executed two years afterwards, so far from introducing any exemption, the heirs of entail were taken bound to pay from it all provisions to children, after exhausting the Earl's other funds, without except-

ing the bond in question, which must have been in his view at the time. NO. 3.

The Lord Ordinary reported the cause on Informations. The Court were much divided in opinion.

It was at all hands considered as a question of intention. Several Judges thought, that at granting the bond, it was the Earl's wish that it should be paid from the Annandale estate, without relief; and that upon the principles of the case 1747, Campbell against Campbell, No. 16. p. 5213; a change of view was not to be inferred from the entail afterwards executed.

But a majority of the Court thought the argument of the defender better founded.

The Lords sustained the defences.

Lord Ordinary, *Bannatyna*.  
Alt, *Williamson* et alii.

Act. *Solicitor-General Blair* et alii.  
Clerk, *Home*.

D. D.

*Fac. Coll. No. 148. p. 331.*

1800. May 16. JANET RENNIE against WILLIAM WALKER.

By marriage-contract between James Brown and Janet Rennie, certain provisions were made on the latter, which were accepted by her in satisfaction of all her claims, "her aliment to the next term after the decease of her husband, and mournings, being excepted."

At the death of Mr Brown, it appeared, that he executed a bond of provision in favour of his wife, for a larger annuity than that contained in the marriage-contract, which was declared to "include all that she can anywise ask or claim in and through my decease, any manner of way, excepting the heirship-moveables, household-furniture and plenishing, in terms of the contract of marriage."

There was also found in his repositories a trust-deed, dated a few days after the bond of provision, by which he disposed all his funds to trustees, who were appointed to pay his widow L. 100, and to deliver to her his chaise and horses, besides fulfilling all her claims under the marriage-contract and bond of provision.

Mrs Brown brought an action against William Walker, her husband's trustee, concluding, *inter alia*, for payment of mournings, and for aliment to the next term after her husband's death.

NO. 4.

The claim of a widow for aliment and mournings, found not to be barred by her acceptance of provisions made on her by her husband, by a deed which declared these provisions to be in full of all claims whatever she might have on her husband's effects.