1709. *February* 24.

JEAN BURNET, Daughter to the deceased Mr Alexander Burnet of Craigmyle, and ANDREW BURNET her Husband, *against* Mr ALEXANDER MAITLAND of Pittrichie, one of the Barons of Exchequer, and ROBERT YOUNG of Auldbar.

No 150.
One granted, at distant intervals, two bonds to his daughter. Found that the first was comprehended in the second.

THE deceased Mr Alexander Burnet of Craigmyle, in the year 1667, granted a bond in favour of Jean Burnet his youngest daughter, an infant only a few days old, for the principal sum of 3000 merks, payable at the term of Whitsunday 1680, with annualrent thereafter; and, in the year 1677, having granted her another bond for the principal sum of 4000 merks, payable at Martinmas 1677, with annualrent thereafter; both which bear to have been granted in satisfaction of all that she could claim by his decease, and that in case she should happen to die before she were year and day married without children, the sums should return to the father's heirs; but the clause, in satisfaction of all that the daughter could claim in the posterior bond, hath these words subjoined, " Except what the father should please of his own accord to leave her." Jean Burnet and her husband pursued Baron Maitland and the Laird of Auldbar, as coming in the place of the heirs-portioners of Craigmyle, for payment of both bonds.

Alleged for the defenders; Both bonds cannot subsist as distinct and separate rights, but the second was a clear innovation of the first; because, the second contains 1000 merks more than was in the first, and bears annualrent two years and a half sooner than the first, but mentions not the sums therein provided to be over and above those in the first; 2*do*, *Debitor non præsumitur donare*, Nov. 1685, Robertson *contra* Her Father's Heirs, No 2. p. 9619; 3*tio*, Both bonds bear to be in satisfaction of all the pursuer could ask by her father's decease; consequently, the last must be understood in satisfaction of the former. It doth not alter the case, that the second bond bears an exception of good will, which looks only forward, and cannot be drawn ten years back, to support a bond so plainly innovated.

Answered for the pursuers; Albeit both bonds bear in satisfaction of what the daughter could ask by her father's decease, the second cannot include the first, which falls not to her by his decease, but was payable at Whitsunday 1680, with annualrent thereafter, whether he were dead or alive. Had the father intended the last bond to be in implement of the first, it was easy to have expressed that, or to have cancelled the first bond; neither of which being done, he is presumed to will that his daughter should have right to both bonds; especially considering, that both do make but a moderate provision with respect to the father's estate; and innovation is never presumed, unless it be expressed, March 29. 1626, King *contra* Taylor, No 193. p. 11518.; July 23. 1633, Lawson *contra* Scot of Whitslead, No 195. p. 11519. My Lord Stair, Lib. 1. Tit. 8. § 2. is clear that posterior bonds of provision granted to children are not interpreted to be in satisfaction of prior bonds; because bonds

No 150. of provision are reckoned donations. And for the like reasons, legacies left by a debtor to his creditor are not understood in satisfaction of the debt, June 16. 1665, Cruickshank *contra* Cruickshank, No 165. p. 11489.; November 13. 1679, Anderson *contra* Anderson, No 185. p. 11509.; so that the brocard, *debitor non præsumitur donare* ceaseth here, where *præsumptio cedit veritati*. 2*do*, The exception in the last bond of what the father should please to leave his daughter, has probably been added to clear that the second bond should not be interpreted in satisfaction of the first; and though the exception be restricted to subsequent deeds in favour of the daughter, the first bond must be considered as such a deed, in respect it was not delivered to the mother for the daughter's behoof till after the granting of the second bond, and it is delivery that makes a bond effectual.

The Lords found, That the pursuers had no right to pursue for the 3000 merk bond, as being innovated by, and comprehended in the 4000 merk bond.

Fol. Dic. v. 2. *p.* 144. *Forbes, p.* 326.

1712. *July* 4.

John Hamilton of Bangour and His Tutrix, *against* The Lord and Lady Ormiston.

No 151.
Found in conformity with No 140. p. 11462. and cases subsequent.

The deceased Sir William Hamilton, Lord Whitelaw, in his contract of marriage with Dame Anna Houston, "obliged himself to employ 60,000 merks upon land or other sufficient security for her liferent use, which the Lady accepted in full satisfaction, &c. except the whole household plenishing that should happen to be in their dwelling-house the time of his decease; which household plenishing, heirship moveables included, in case she survived him, he thereby disponed to her, free of all debts whatsoever." Sir William, *stante matrimonio*, granted to his Lady a bond, wherein "he obliged his heirs not of his own body, for important causes and considerations, to pay to her L. 7000 Sterling, and declared that the bond should be effectual for forcing his heirs, executors, and successors to pay her the sum therein mentioned, or otherwise for affecting his whole estate, heritable and moveable, therefor." Thereafter he purchased a lodging in Edinburgh, and provided her to the liferent thereof. This Lady, and my Lord Ormiston, her present husband, for his interest, pursued Bangour as heir to the Lord Whitelaw, for payment of several debts, and recovered decreet against him; who raised reduction upon the head of minority and lesion, for the reasons following: 1*mo*, The Lady could not claim both the L. 7000 bond and the liferent of the house as separate and distinct rights; because, 1*mo*, The liferent being posterior to the bond is to be interpreted in satisfaction thereof *pro tanto*; just as the bond being posterior to the contract, was November 16. 1708, found to be in satisfaction of the liferent provisions therein; 2*do*,