

79
16

*Attest Mrs Alison Cunningham
Her husband & charges
Age*

March 4. 1771.

(LORD ELLIOCK reporter.)

MEMORIAL

FOR

Mrs ALISON CUNNINGHAM, only daughter of the deceased John Cunningham of Balbougie, and now spouse to Captain Robert Mudie of Leith, and the said Captain Mudie for his interest, chargers;

AGAINST

The Trustees of the deceased John Cunningham of Balbougie, Suspenders.

THE memorialist's father, the now deceased John Cunningham of Balbougie intermarried, 1st with Mrs Janet Pitcairn, by whom he had issue three sons, and the memorialist an only daughter; he intermarried, 2^{dly}, with Mrs Jean Binning, by whom he had no issue; and she having a good deal of money at her own disposal, from the regard and affection she bore to the memorialist, legated and bequeathed to her the sum of L. 400 Sterling, with interest from her death, which happened more than ten years ago.

Balbougie's sons were all bred to business, and educated at considerable expence to their father. However, they not having answered his expectations, but, on the contrary, having been very improvident, and contracted large debts, which obliged him to pay several considerable sums for them during his own lifetime, it was in order to prevent his estate from being carried off by their debts at his death, that he, of this date, executed a tailzie, by

A

which

Feb. 8.
1764.

*The Trustees of
The Deceased John
Cunningham of
Balbougie
Age*

*7th March 1771
J. Dalrymple
22 July 1724
H. Dalrymple
Collection
Daglas, reached
by Mr. Dalrymple in person
afterwards thought
did not apply. - Mr.
thought & Dec. no
Daglas a bad one
Letter, order made
11th March 1771*

which he disponed his estate of Balbougie, &c. in Fife-shire, and a shop in Edinburgh, to the heirs-male to be procreated of his three sons in their order; whom failing, to the memorialist his only daughter, and her heirs-male; whom failing, to the heirs female of his sons and the memorialist in their order; and whom all failing, to his own nearest heirs and assignies whatever; and this deed is burthened with the memorialist's provision to be afterwards mentioned.

Altho' Balbougie's sons had not answered his expectations, the behaviour of his daughter, the memorialist, was to him most unexceptionable. She had lived constantly with him, and attended him with that filial care which became a most dutiful and affectionate child. Sensible of this, and reposing the greatest trust and confidence in the memorialist, Balbougie, of equal date with his tailzie, executed another deed, whereby, for the good and standing of his family, and for the favour and affection he bore to the memorialist for her dutiful behaviour to him, and the great care she took of him in his old age, he dispones to her, for herself, and as trustee for the heirs of tailzie in his other deed, and to the trustees therein named, or, in case of their death or non-acceptance to a *curator bonis* to be named by the Lords of session, his whole heritable and moveable debts and grounds thereof, conform to inventory, his household furniture, stocking, &c. with the burden of his debts, and funeral expences in the first place, and the burthen of the sums provided to the memorialist by bond of provision, or otherways, her mournings and maintenance, till the first term after his death, &c. conform to an account thereof to be given in by her upon her honest word, and suitable mournings to such of his sons as should then be in Scotland, and their wives, as the memorialist should order, in the second place; and with the burden of any aliment he should give his sons, or their wives, in the third place 'My eldest son's aliment being always paid first after my daughter pays herself.'

Of the same date, Balbougie executed a bond of provision in favours of the memorialist, which is hereto annexed, whereby he bound

bound himself, his heirs, and executors, to pay to the memorialist and her lawful issue; which failing, his heirs of tailzie abovementioned, the sum of L. 1200 sterling money, *and that year and day after her marriage* with L. 200 sterling of penalty, and annual rent after the said term of payment, till payment of the same.

In this bond, Balbougie likewise binds himself and his heirs to pay to the memorialist, so long as she remained unmarried, the sum of L. 100 sterling, yearly annuity. And it contains a clause bearing, that, although the principal sum was only payable if she married, she should nevertheless have power to assign, legate, and bequeath, L. 200 sterling, to any person she pleased. And it is likewise declared, That, in the event of her marriage, *Neither the interest of the L. 1200, nor the principal sum itself should fall under the memorialist's husband's, jus mariti or be affected by his creditors.* But the interest to be paid to herself during her life, and the principal to her bairns equally.

And lastly, it is declared, That this bond was granted in full of the memorialist's legitim, portion natural, &c. and of all claims competent to her in virtue of her mother's marriage contract, or in virtue of the settlements made by Balbougie's second spouse, by bond of provision or otherwise, except what the memorialist might succeed to as an heir of Balbougie's entail.

The memorialist Alison Cunningham, in January 1770, intermarried with the other memorialist Captain Mudie. And as, by the conception of the above bond, her provision of L. 1200 became payable a year and day after her marriage. So, in January last when that term was come, she demanded payment thereof; however, her father's trustees thought they were not in safety to pay, without the authority of a judge. And, on this account, they presented a bill of suspension, which was passed by the Lord Elliock Ordinary. But, as it was of consequence to the parties to have the matter speedily ended, a mutual application was made to have the reasons of suspension discussed on the bill. And your Lordships having remitted to the Lord Elliock Ordinary, with power to hear parties and discuss the reasons of suspension summarily,

Feb. 22.
1771.

parties

Feb. 27. 777¹. parties were accordingly heard before his Lordship, when he appointed mutual memorials; and, by an interlocutor of the 2d instant, his Lordship was pleased to take the cause to report, and ordered the mutual memorials to be printed and put into your Lordships boxes. In obedience to which appointment, this memorial is humbly offered on the part of the said Alifon Cunningham and her husband.

The reasons of suspension insisted on by Balbougie's trustees amount to this, That, by the bond of provision, the L. 1200 is made payable, not to the memorialist Alifon Cunningham alone, and failing of her to her children, but to her and her children jointly; and, as a subsequent clause in the bond declares, that neither the interest or principal sum itself shall fall under her husband's *jus mariti*, or be affectable by his creditors, but that the interest thereof shall be paid to herself during her life, by way of aliment, upon her discharge, without her husband's consent, and not affectable by his creditors, and the principal sum to be paid to her bairns equally among them; that therefore, from the words of the bond, as well as the intentions of the granter, the memorialist was only entitled to the liferent of the sum, or, in other words, to the interest thereof, during her life; but that the principal sum could only be paid to her bairns equally among them when they existed.

But the memorialists are advised, that the deed cannot admit of such construction; for the provision is made payable at a day certain, viz. one year and day after the memorialist Alifon Cunningham's marriage, and that without distinction, whether there shall be any child then existing of the marriage or not. The import of such clauses is very well known and established. Where a sum is taken payable to a person at a day certain, and his children *nascituri*, the natural import of such obligation is to vest the fee in the person of the supposed parent; no more is vested in the children than a mere *spes successionis*, which, after the parents death, they are entitled to take up in the character of heirs.

As, in the present case, the provision is made payable to the memorialist Alifon Cunningham herself at a day certain, now bygone, by the

the arrival of that term. The money has become due, unclogg'd with any condition; and, as the fee cannot be *in pendente*, consequently no part of it in children yet unborn, it must follow of consequence, that the full fee is in Alison Cunningham herself, that she is sole creditor for the whole provision; and as, by the express conception of the bond, the money is made payable at a day certain, now past, she must have a good and undoubted right to uplift and discharge the same.

And, indeed, considering that Balbougie had a very great regard for the memorialist, his only daughter, who had been remarkably careful of him in his old age, in whom he had reposed the most unlimited confidence by the trust-deed above narrated, on which she was debarred from acting by her marriage alienarly, and to whom he *ab ante* stood debtor in L. 400 sterling, upon which there would now be due above 10 years interest, and which claim is cut off by the conception of this bond of provision. It is impossible to suppose that Balbougie meant, or intended, that, in the event of the memorialist's marriage, she should be intitled to no more than the mere liferent of the L. 1200 sterling; and that, if she had no children, the principal sum should not be exigible, but descend to the heirs of tailzie. If the deed was to admit of this construction, it would hardly be worth the memorialist's acceptance, notwithstanding it was considered as a strong mark of her father's affection and regard. For the money which he owed the memorialist, in consequence of her step-mother's settlement, amounting now, with interest to upwards of L. 600 sterling, would be of as great value to the memorialist, as an annuity of L. 60 yearly.

As to the subsequent clause in the bond, declaring, That, in case of the memorialist's marriage, neither the interest of the L. 1200, nor the principal sum itself, should fall under her husband's *jus mariti*, or be affectable by his creditors, but that the interest thereof should be paid to her during her life upon her discharge, without her husband's consent. This is a clause both common and ordinary, and which is by no means intended to limit, but rather

ther to enlarge the memorialist's Alison Cunningham's right and interest in the sum, *viz.* That the right and administration of the money should be in herself, independent of her husband; and that neither he, nor his creditors, should be intitled to claim any interest in it.

Indeed, the above clause does, in the memorialist's apprehension, clearly point out, that Balbougie understood, that his daughter the memorialist, upon her marriage, had a right to the principal sum itself; and that, upon the elapse of the term of payment the same was exigible by her: For, if no more had been meant or intended, than to give her a liferent of the money and that the principal sum itself was only exigible by her children, there was no occasion to have excluded her husband's *jus mariti*, *quoad* the principal sum, which, in the foresaid view of the case, did not belong to her: And therefore, when her father has taken care, by an express clause to exclude, in an anxious manner, her husband's *jus mariti* *quoad* the principal sum, it clearly points out, that he understood that the memorialist was creditor for the principal sum, as well as the interest, that the *jus exigendi* was in her, and that she might uplift it upon the elapse of the term of payment.

It was further said for the trustees, that, by the bond of provision, the principal sum, failing of the memorialist's children, stood provided to Balbougie's heirs of tailzie; and that, therefore, the trustees had a good right in their behalf to oppose the payment of the principal sum: But, as all fetters and limitations upon property are to be most strictly interpreted, and not to be extended by implication, further than the maker of the settlement has thought proper to express: Therefore, though the bond of provision contains a substitution in favours of the heirs of entail, failing the memorialist and her issue; yet, as it contains no prohibition to alter that substitution, the memorialist Alison Cunningham, as unlimited fiar of the money, is at liberty to alter that substitution; and, notwithstanding of it, is intitled to uplift and dispose of the money at pleasure.

In respect whereof, &c.

R O. M'QUEEN.

Follows

Follows COPY of the Bond of Provision referred to.

BE it known to all men by thir present letters, me JOHN CUNNINGHAM of Balbougie, writer to the signet, for the love, favour, and affection I have and bear to Alifon-Cunningham my only daughter, for her dutiful behaviour to me, and the great care she takes of me in my old age, and, for certain onerous causes and considerations moving me, I hereby bind and oblige me, and my heirs and executors whatsomever, to content and pay to the said Alifon Cunningham and the children lawfully to be born; which failing, to my heirs of taily, contained in a disposition and taily made by me of my lands and estate of Balbougie, and others therein mentioned, to be applied for buying land, and the rights thereof to be taken in favours of the saids heirs of taily, in the same manner, and under the same conditions contained in the foresaid disposition and taily, the sum of twelve hundred pounds Sterling money; and that year and day after her marriage, with two hundred pounds of penalty in case of failly, and annualrent of the said principal sum after the said day of payment till payment of the same. And further, I bind and oblige me and my foresaids, to content and pay to the said Alifon Cunningham, so long as she is unmarried, the sum of one hundred pounds sterling of yearly annuity, at two terms in the year, at Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas next, and immediately following my decease; and the next term's payment at the first of these terms thereafter, in full of the first year's annuity, and so on yearly at the foresaid two terms, till year and day after her marriage, with five pounds of expences for each term's faillie: but declairing always, notwithstanding the foresaid principal sum of twelve hundred pound is only payable to her if she marries; yet, in case she should not marry, I hereby give her power to assign, legat, and bequeath, the sum

of

of two hundred of the above principal sum to any person or persons she pleases ; which sum she shall dispose of in case she shall not marry ; I hereby oblige my heirs to pay, at the first term of year and day after her death, and annualrent thereafter till payment : And it is hereby declared, that in case the said Alifon Cunningham shall marry, that neither the interest of the twelve hundred pounds, or the principal sum itself, shall fall under her husband's *jus mariti*, or be affectable by his creditors ; but the interest thereof to be paid to her during her life by way of aliment upon her discharge, without her husband's consent, and so not to be affected by his creditors, and the principal sum to be paid to her bairns equally among them. As also, it is hereby declared, that the foresaid one hundred pound of annuity given to the said Alifon Cunningham while unmarried, is hereby given to her by way of aliment for her living and sustenance, not to be affected by her creditors, if she may have any, or assignable by her ; but only to be paid on her discharge. Which provisions above specified are granted by me, and accepted by the said Alifon Cunningham in full satisfaction to her of all legittim, portion natural, deads part, and of all or every claim or demand competent to her by and through my decease, or in virtue of the contract of marriage betwixt Janet Pitcairn my first spouse and me, or in virtue of the settlements made by Jean Binning my second spouse's bond of provision, or otherwise, except what she may succeed to as one of my heirs of tailly, conform to any right of tailly I have made, or may afterwards make. And further, I hereby give, grant, and dispoise to the said Alifon Cunningham, if she shall be alive at my death, all gold, silver, copper, or any other sort of coined money, bank-notes shall be lying by me at my death, for her own use, to be disposed of by her as she pleases, and not to be imputed in part payment of any provisions I have made for her by this bond of provision, or afterwards may make for her, providing what shall be lying by me shall not exceed the sum of fifty pounds sterling ; but, if there is more thereof, she is to be accountable for the superplus thereof, and so to apply any superplus for defraying

defraying my funeral charges, her mournings, or such other uses as are most necessary, as she is to have the foresaid sum free of the burden of her mournings or her maintenance till the term after my death. As also, the particular household furniture, silver-plate, and the other things after mentioned, either in my house of Balbougie, or any other house I may have at my death, to wit, a new droget bed of a rose colour consisting of ells, not yet made; one calico bed, consisting of four curtains, window hangings, and every thing else belonging to said bed; three sewed window-curtains; two of the best feather beds, one bolster to each, and two pillows, and an under blanket to each, all at her choice, either in the house of Balbougie, or any other house I may have at my death; the mahogany stools and bed-steed in my bed-room, or any other place they may be at my death; eight pair of the best blankets; three pair of the best of the servants blankets; one of the best of the servants beds and bolster; two of the best of the white twilts, all in her option and choice; one dozen of damask napery with the Cunningham's arms thereon; one damask table-cloth; one dozen damask tea-servits; two breakfast table-cloaths, three dozen fine napery, with three table-cloaths; eight dozen courser napery with eight table-cloaths the same; two dozen towels; twenty pair fine sheets; six pair coarse sheets; twelve bolster-slips; twelve pair pillowbers, of all which she is to have her choice out of the whole; one china-bowl, and three china-jugs: The particular furniture in the room called *the drawing-room* in the house of Balbougie, being the chimney-grate, tongs, poker, and fender belonging thereto; the chimney-glass, and the glass betwixt the windows; the fire-skreen; all the china in said room; the mahogany tea-table; the mahogany tea-chest, whether in that room or in any other room in said house; the mahogany chairs being ten; two footstools, the brass coffee pot, all the pictures, ware-work, and other things in said room the said Alison Cunningham shall choose; the silver tea tongs, six of the best tea silver spoons, two of the best carpets for the floor she shall choose; the second size of the mahogany eating-tables in the dining-room; the six old

supping silver spoons ; twelve more table or supping silver spoons ;
 twelve silver forks ; twelve knives with silver heads, and the case
 they are in ; and a dividing silver-spoon ; two of the best silver
 salts ; two china-plates ; two china ashets ; two dozen flat china-
 plates ; ten old china soup-plates, to be at her choice ; and any
 stone-plates and trunchers, or other dishes thereof, that be in my
 house of Balbougie, or any other house I may have ; two pair of
 copper candlesticks ; the jack, and any pans, pots, or kitchen-fur-
 niture she may incline to take out of my house of Balbougie, or
 any other house I may have at my death. As also, all books she
 may have in her custody at my death. All which foresaid subjects
 I hereby dispoise to the said Alison Cunningham free of all debts,
 or any burden whatsoever, surrogating and substituting her in
 my full right and place of the premises, with power to her to in-
 tromit with the gold, silver, bank-notes, and other subjects above
 disposed at my death ; and take away the household furniture,
 silver-plate, and other foresaid subjects, out of any house they
 may be in at my death, when she pleases ; and, if need be, is to
 call, charge, and pursue therefore, receipts and other writs neces-
 sary on receiving the said subjects, to grant and to use and dis-
 pose thereon at her pleasure. And further, in regard of the
 unhappy situation my sons were in, I was advised to settle my
 heritable and moveable estate I have or may have at my death upon
 their heirs, and accordingly I have made a settlement in favours
 of the heirs-male lawfully to be procreate of John Cunningham
 my eldest son, his body, and the other heirs therein mentioned ;
 and I am advised to settle a moderate aliment on the said John
 Cunningham, as he has no way to maintain himself. Therefore,
 I do hereby bind and oblige me and my heirs and executors
 whatsoever, to content and pay to the said John Cunningham the
 sum of ninety pounds Sterling yearly during all the days of his life
 time, in name of aliment only, at two terms in the year, Whitfun-
 day and Martinmas, by equal portions, beginning the first term's
 payment of the said aliment at the first term of Whitfunday or
 Martinmas

Martinmas following my decease, and the next term's payment thereof at the next of these terms thereafter, in full of the first year's aliment, and so forth yearly at the first two terms during the said John Cunningham's lifetime, with five pounds money foresaid of expences for each term's faillie. But declaring the foresaid aliments shall be no ways subject or liable to be attached by the said John Cunningham's creditors, nor affected with their debts by arrestment or any other diligence, nor shall it be lawful for him or in his power to assign or convey the same to any person or persons for any cause or occasion whatsoever, but the same shall only be payable to himself for his aliment and support, and upon his sole discharge therefor; and, in case the said John Cunningham should marry a gentlewoman of equal quality with himself, and of ane good character, and shall die before her, I hereby oblige my heirs to pay her fifty pounds Sterling yearly after his death, during her being a widow, only at two term's in the year Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the first term of Whitsunday or Martinmas after his decease, and so forth termly thereafter during her widowity only, with the burden of alimenting her younger children, and educating them till they be twenty-one years of age; and, if she marries again, the said fifty pounds to be paid yearly for educating the said younger children till they be twenty-one years of age, to their tutors and curators, or one to be named by the Lords of Session, reserving always power to me, at any time of my life, in health, or on death-bed, to alter or revoke thir presents, in whole or in part, or destroy the same without consent of my said son or daughter had thereto; and do hereby declare, that, notwithstanding thir presents shall be lying by me, or in the custody of any other person at my death, yet the same shall have the strength of a delivered evident, with the not delivery hereof I hereby dispense, and I revoke all former bonds of provision or aliment, if this be extant, and sixty days past after signing hereof, in favours of my son or daughter; consenting
to

to the registration hereof in the books of Council and Session, or other competent, therein to remain for conservation; and constitute my procurators. In witness whereof, I have written and subscribed this presents on stamped paper, consisting of this and the other three pages hereof, at Balbougie the ninth day of February one thousand seven hundred and sixty-four years, before these witnesses, John Balmain my gardner, and John Wilson my servant, both to body and marginal notes, what words are rased are done by me. (Signed) John Cunningham. Signed John Balmain witness, John Wilson witness.

JOHN CALVERT of Baltimore, Douglas BUCHANAN
of Baltimore and Mr. THOMAS FOOT, Member of the Gov-
ernment, were appointed by the House.
The following names of Baltimore were also in the list.

on the error of the bond itself.

which taking to my hole of earth contained in a disposition and
Castaphene, and the children finally to be born of my body,
exactly as whatsoever, to connect and pay to the said Alton
by this bond the said bond and obliges him, " his heirs and