

The appellant thereupon reclaimed. The Court, after a hearing, on the 29th of July 1726, “adhered to the Lord Ordinary’s interlocutor, and refused the desire of the petition.”

The appeal was brought from “several interlocutory sentences or decrees of the Court of Session of the 18th of February 1724, the 20th, 25th, 26th, and 29th of July 1726.”

Entered,
1 Feb.
1726-7.

[It has not been deemed necessary to detail the argument on either side upon this case: such argument relating almost entirely to the circumstances involving the fact of the trust, impugned on one side, and defended on the other, upon which no correct information is given.]

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed, and that the interlocutors therein complained of be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the respondents the sum of 60l. for their costs in respect of the said appeal.*

Judgment,
13 April
1727.

For Appellant, Dun. Forbes. Will. Hamilton.
For Respondents, P. Yorke. Ch. Areskine.

David M'Culloch, of Pilton, - - - Appellant; Case 137.
Christian M'Culloch, - - - Respondent.

17th April 1727.

Aliment by a mother to her son, if granted animo donandi or not.—A father grants bond of provision to a younger son, in a certain sum, binding himself and his heirs to aliment him till 21, or to pay interest on the bond: the mother marries a second husband, and in her marriage-contract stipulates a power of alimending her son, out of her jointure from her first husband: in a process by the assignee of the younger son, against his eldest brother, for interest, as not being alimended by the father's heirs, such interest is decreed, and the mother is found to have alimended the younger son *gratis*.

Litigious.—The eldest son, pending this action, paid his mother's second husband a sum for his younger brother's aliment, but it is found that the discharge taken for that sum, being granted *pendente processu*, did not influence the cause.

Bond.—Termly Penalty.—A bond of provision by a father contains a clause of annual-rent, but no penalty on failure: in an action of damages for not punctual payment of interest, and expences thereon incurred, the defence that the bond contained no termly penalty is overruled.

Costs.—An affirmance with 80l. costs.

JAMES M'CULLOCH of Pilton left issue three daughters, Jane, the respondent Christian, and Catherine; and two sons, David the appellant, and Alexander, who were twins. The real estate descended to David the appellant, as eldest son; to his other children he granted bonds of provision, payable at the first terms of Whitsunday, or Martinmas, after Alexander should attain his age of 21 years, or the daughters be married, with interest from the terms of payment; and he bound himself and his heirs to aliment and educate these younger children severally till the interest upon

their bonds became payable; and upon failure to maintain, educate, and instruct them, he bound himself and his heirs to pay them the interest of their provisions, beginning at the first term of Whitsunday or Martinmas after such failure. The provision to Alexander was 10,000 merks, to the respondent Christian 4000 merks, and to Catherine 3000 merks.

James M'Culloch died in February 1703, and after his death the appellant David and his brother Alexander, then minors, were alimeted by their mother; they did not attain to 21 years of age till 1714. In 1705 the mother intermarried with Mr. Rofs, her second husband; and by their marriage-contract it was agreed, that during the lifetime of Lady Lindores, who life-rented great part of Mr. M'Culloch's real estate, it should be in the power of the mother to apply such part of her jointure from her first husband as she thought fit, not exceeding three chalders of bear or oatmeal yearly, for the maintenance of the appellant and his brother Alexander, whilst they should remain in family with her. And she at same time made over to her said second husband a debt of 2000 merks, to which she had right as executrix confirmed to her first husband, and which Mr. Rofs agreed should be a fund for the aliment of her two sons David and Alexander.

Accordingly the appellant and his brother continued in family with their mother till May 1710, when their uncle and tutor at law took charge of them, and settled them first at school at Inverness, and afterwards at Edinburgh.

In May 1715 the respondent procured from her brother Alexander an assignment of so much of the interest of his bond of provision from his father, due preceding the term of Whitsunday 1715, as should amount to the sum of 100*l*. And the respondent thereupon commenced her action against the appellant for that sum. The appellant stated for defence, that Alexander's bond of provision entitled him to no annual-rents till his majority, except upon failure of alimeting and educating him; but that Alexander had been constantly maintained and educated, as the appellant was, till his majority in August 1714. After the commencement of this process the appellant accounted with his mother's second husband for his own and his brother Alexander's aliment, paying a balance in money to Mr. Rofs, and taking a discharge for the same.

The marriage-articles between Mr. Rofs and the appellant's mother were produced; and the cause stood over till 1724, but being then revived, the respondent insisted, that the marriage-articles were a proof that the mother intended to make a present of Alexander's aliment to himself; and that the aliment having been so furnished by her *animo donandi*, the payment made by the appellant in 1716 could not be construed as a satisfaction for that aliment, especially since the account was settled after the appellant was put in *mala fide* to make any such transaction by the commencement of the action.

After

After sundry proceedings, and a reclaiming petition and answers, the Court, on the 1st of January 1725, " Found, that Mr. Rofs's discharge, being granted *pendente processu*, doth not influence the cause, and that Alexander was alimeted by the mother *gratis*; and that the benefit thereof doth accresce to the said Alexander, reserving the further consideration if the said benefit ought to be extended further than the value of the aliment." And to this interlocutor the Court adhered on the 29th of the same month of January. The appellant having presented a petition, praying that extracting the decree might be stopped, the Court, after answers, on the 20th of February 1725, " refused the desire of his petition."

During the dependence of the said action, the respondent had obtained a decree, in 1715, against the appellant for payment to her of the interest on her own bond of provision for 4000 merks, and on her sister Catherine's bond for 3000 merks, to which she had right by assignment, until the principal sums should be paid. She afterwards insisted, in a fresh action, to have the appellant decreed to pay the principal sums to the respondent; and also to pay a sum of money, in name of damages and expences, through her not having received punctual payment of her interest since 1715. The appellant in defence stated, that all the interest was paid up but for one year; that there was no penalty in the bond for not punctual payment of the interest, and that no damages could be demanded, as the debtor had accepted of her interest, though perhaps later than the day of its falling due.

The Lord Ordinary dismissed the libel as to the principal sums, and having reported the remainder of the cause to the Court, their lordships, on the 19th of February 1724, " Found the appellant liable in damages and in the expences of process." A condescendance having been given in, the Lord Ordinary, on the 3d of July 1724, " modified the damages and expences to 456*l.* 18*s.* 4*d.* Scots, and decerned." To this interlocutor his lordship adhered on the 18th of July 1724, and the appellant having reclaimed, the Court, on the 24th of July, refused the desire of his petition.

The appeal was brought from " several interlocutory sentences of the Lords of Session, made the 19th of February, the 3d, 18th, and 24th days of July 1724, the 1st of January, and the affirmance thereof, and an interlocutor of the 20th of February 1725."

Entered,
12 March
1724-5.

Heads of the Appellant's Argument.

The interest, by the express condition of the bond to Alexander, was not to commence till he was 21 years complete; in consideration whereof he was to be alimeted at the appellant's expence; and interest was only to become due before his majority, upon failure of alimeting, the next term after such failure, so without proof made of a failure in alimeting, the interest could not be found due; and the *onus probandi* ought to have lain on the respondent.

It appeared in court that the appellant did aliment his brother Alexander, inasmuch as his mother did furnish that aliment, partly out of the appellant's effects, and partly out of her own, and had allowance in account, and repayment of what she so furnished.

His mother's furnishing aliment to Alexander could not be considered as a donation *ex pietate materna*, because Alexander had of his own to aliment him with, viz. the obligation which lay upon the appellant to aliment him.

If the mother's act, in alimending the appellant and his brother, is to be considered as a donation, it must be presumed a gratuity to the appellant, because it helped to fulfil the obligation under which he lay, and appears to have been intended to continue until his estate was relieved of the burden of the life-rent of the Lady Lindores.

Bonds in the law of Scotland are considered to be *stricti juris*, and therefore afford action no further than is expressly stipulated in them: now in the bonds in question there is a penalty adjoined upon the failure of paying the principal sum, but there is no penalty added upon the failure of paying the interest precisely at a day; and therefore the demand for expence and damages ought not to be allowed.

Though it should be allowed that the respondent ought to be reimbursed of any charges really expended in recovering payment; she could have no pretence to damages, of which no account is given, nor proof made; and which, as they are decreed, exceed by much the value of the whole interest owing to her at the time of making the demand.

Heads of the Respondent's Argument.

This assignment was made many years after the said Alexander was alimended, and when he was come of age, (no demand having ever been made on that account), and was obtained *pendente processu*.

As aliment furnished by a parent to an infant, without demanding a previous settlement for it, or claiming satisfaction, even after the son was of age, is presumed to be given, and to proceed *ex pietate parentis*; so the gift can never bear a construction in favour of any other than the child so alimended, where it is not otherwise expressly declared. The mother having in her contract of marriage with her second husband, reserved a power to apply part of her jointure for the aliment of her sons, the appellant and Alexander, she thereby plainly signified her intention to renounce all demand for the expence of such aliment for the future, till they came of age; which was a convincing argument, that the former aliment was a gift, and could not be retracted by her husband after the marriage, he having renounced his interest therein. By the bond of provision the appellant was bound not only to aliment, but likewise to educate the said Alexander at school, college, law, or any other science that he should incline to, or pay the interest of the money; and there-

therefore the subsistence furnished by the mother did not fulfil the condition of the bond, the appellant not having at any time been at the least expence toward his education.

The power in the contract of marriage was only to dispose of part of the jointure for maintenance, but not for education of the said Alexander. The giving bread to her own child could be deemed a favour to himself only, and the rather for that a condition is added in the said contract, that during the continuance of the maintenance her sons should remain in the custody and keeping and under the power and direction of their mother.

The appellant had, as heir to his father, a very considerable estate; and the respondent but a poor provision. Nevertheless the appellant was so litigious, that, without a suit at law, she could not recover any one term's interest; whereby she was obliged to accept of any payment the appellant was pleased to offer. But being thereby reduced to very great necessities, and obliged to contract debts, whilst these suits were depending, which were drawn out to an intolerable length, and having never released her claim of damages, which had been taxed far below her real expences, her demand was just and well founded both in law and equity.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the several interlocutory sentences, and the affirmances thereof, therein complained of, be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the said respondent the sum of 80l. for her costs in respect of the said appeal.*

Judgment,
17 April
1727

For Appellant, Dun. Forbes. C. Talbot.
For Respondent, C. Erskine.