

No. 166.

words of the father's legacy cannot comprehend the other legacy, for the father being directly debtor therein, the son could demand the same, without waiting for his father's death; and therefore this did not arise to him by his father's death.

*Fol. Dic. v. 2. p. 146. Stair. Gosford.*

\* \* \* This case is No 108. p. 11433.

No 167.

The maxim *debitor non præsimitur donare* was not applied to make a posterior bond, bearing for love and favour, in favour of a brother's son, to be in satisfaction of a former bond to that brother.

1671. December 5.

DICKSON *against* DICKSON.

JOHN DICKSON, by his contract of marriage, obliges him to pay to Andrew Dickson, his brother, and his heirs, 600 merks, so soon as the said John should happen to have heirs of his body; and likewise obliges him to repair some houses for his brother; and after the said Andrew his death, he grants a second bond to John Dickson, eldest son to the said Andrew, being pupil, bearing for love and favour, and for bettering the said John his patrimony, obliging him to pay to the said John 600 merks at his death; providing always, that if he had no children at his death, the bond should be void. The said John, granter of these bonds, pursues now a declarator that both of these bonds are granted for one cause, seeing the second is granted to John Dickson, who is apparent heir to Andrew, to whom the first is granted, the sum the same, and the condition the same, neither being payable if John had no children, and both being payable if he had children, *et debitor non præsimitur donare*. It was answered, That albeit *debitor non præsimitur donare*, yet where expressly he gifts for love and favour only, there is no place for presumption, *quæ cedit veritati*; but here the second bond is an express donation for love and favour, and bears for bettering of the pupil's patrimony, and without any mention or relation to the former bond.

THE LORDS found the bonds distinct, and assoilzied from the declarator; in which declarator there was also a member craving that a ticket granted by Andrew, bearing that he should bear the half of the expenses of the reparation, though not holograph, should be proved that the subscription was truly Andrew's hand-writ, *comparatione literarum*, or by witnesses, being between two brethren *in re modica*, not much exceeding an hundred pounds. THE LORDS refused to admit any such probation. See WRIT.

*Fol. Dic. v. 2. p. 146. Stair, v. 2. p. 17.*

\* \* \* Gosford reports this case :

In a declarator pursued at the said John Dickson's instance against his nephew, to hear and see it found and declared, that a bond granted by the pursuer to the defender for 600 merks, was only for that same sum contained in his father's contract of marriage, wherein the pursuer was obliged to pay the like sum of 600 merks to the defender's father Andrew Dickson, who was brother

to the pursuer ; in respect that both in the contract and bond the pursuer was liable in payment, so soon as he should have heirs of his own body ; and that he being debtor in the contract of marriage to the father, and having granted a new bond to the son upon these same terms and conditions, he ought to be liable but in one single payment, *quia debitor non præsimitur donare* ; and it could not be imagined, that having children of his own, that he should bestow so much upon his brother and his son for no onerous cause, especially being a man of no great fortune.

THE LORDS did find, that both the sums contained in the two bonds were due, seeing the last was not in satisfaction of the first, but made to the son for his better provision. But thereafter, it being *alleged*, That the last bond was delivered to the mother, to be deposited in her hands upon that condition, that the first bond should be delivered back upon payment of the last ; the LORDS before answer did ordain the mother to be examined.

*Gosford, MS. No 417. p. 210.*

1673. January 23.

KATHARINE FENTON and Mr LAURENCE SKINNER *against* Mr THOMAS SKINNER.

KATHARINE FENTON being provided by her contract of marriage with John Skinner to the sum of 2000 merks, to be employed to her husband and her in liferent, and to the heirs of the marriage in fee, which failing, to the heirs of the said Katharine whatsoever ; the marriage being dissolved without heirs, she and her assignee pursue Mr Thomas Skinner, as representing the party contractor, for payment of the said sum. It was *alleged* for the defender, That the husband having conquest some tenements in Brechin to himself and her in liferent, he ought to have defalcation of so much of the 2000 merks as her liferent of the said tenements will amount to, at least ought to be free of the annual-rent of the said principal sum during the possession of the said tenements, their rent and the liferent of the sum being of a like value. It was *replied*, That her infestment in the tenement did bear expressly for love and favour, and not in satisfaction of her provision of 2000 merks contained in her contract of marriage ; and they being *disparata*, the one the fee of a principal sum, and the other the liferent of the tenement, the one could never be ascribed in satisfaction of the other, neither could it be the meaning of the husband, who had expressly declared the liferent to be for love and favour. THE LORDS did repel the defence in respect of the reply, and found, that they were not in the case of *debitor non præsimitur donare*, which holds only where the donation and *debitum* are *ejusdem naturæ*, and where the cause of the donation is not at all expressed, whereas here the liferent was made expressly for love and favour.

*Fol. Dic. v. 2. p. 147. Gosford, MS. No 563. p. 305.*

No 167.

No 168.

A husband being obliged to provide his wife to a sum of money in liferent, and thereafter for love and favour infesting her in a tenement, the Lords refused to ascribe it in satisfaction of the first obligation.