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*,

Law constructs the liferent of the house to have been taken as a corroborative or collateral security of the obligement in the contract to employ a sum for her liferent use; which collateral security becomes extinct and returns to the heir, now that the original debt in the contract is overpaid by the L. 7000 bond. The second reason of reduction was, That the value of the household plenishing ought likewise to be imputed in payment of the gratuitous bond; because, 1*mo*, Debitor quocunque modo non præsumitur donare, that is jactare suum, even in prejudice of his heir who is in law una et eadem persona with him; but rather to intend that the small residue of his estate should go to his heir as an encouragement to represent him, that he might not die insolvent without an heir, which no man can be thought to design or desire; 2*do*, The clause of the bond for affecting therewith the granter's whole estate, heritable and moveable, clears that the defunct intended his estate to be the fund of payment; consequently, the Lady could not withdraw the moveables, or any part of the defunct's estate, from the payment of this bond, and claim these *tanquam præcipuum*. And if the whole estate was to be subjected to the payment of the bond, that is to be understod in the order and course of law, viz. the moveables in the first place, and the heritage in the next. No 151.

Answered for the defenders; 1*mo*, It is owned that the liferent of the house is to be esteemed in implement of her liferent annuity; but how can it be again extinguished by another deed, viz. the bond, is incomprehensible; the bond being granted before the liferent of the house, could never come in place thereof. Nor can the liferent be understood in satisfaction of the bond; for, 1*mo*, The liferent was taken simply to the Lady, without any obligation upon my Lord to complete that which became already her plenary right, and properly applicable only to the provision of annuity; 2*do*, The bond and the liferent of the house are *disparata;* the one a liferent infeftment, the other a bond for a sum of money; 3*tio*, The bond is a conditional obligation payable after the granter's decease in default of children of his own body; whereas the liferent of the house was simple and irrevocable, and immediately took place; so July 24. 1623, Stuart *contra* Fleming, No 116. p. 11439, the LORDS found that a posterior security took not away a former bond; these being of different natures, and the last having no relation to the first, nor mentioning to be given in satisfaction thereof. To the same purpose there is a decision marked by Dirleton betwixt Abernethy and Forbes, No 169. p. 11492.

2*do*, No regard to the second reason of reduction, because it is *res judicata* by the decreet extracted, where the heir having alleged that a silver montieth and decanter did not belong to the Lady as household plenishing, the LORDS, July 14. 1710, found that she had right to these two particulars by virtue of the disposition to the household plenishing contained in the contract; now, as here are eædem personæ and eadem causa decidendi, so the subject is the same, viz. part of the same moveables carried by the disposition; since idem subjectum doth not consist in individuals, but in things under the same character and

No 151. kind; 2*do*, The household plenishing was my Lady's property at her husband's decease, because in the contract of marriage the same are disponed to her per verba de præsenti, and so were no part of his estate, heritable and moveable, befalling to his heirs and executors, which he appointed to be applied for payment of the bond. For the clause that the bond should be effectual to his Lady for forcing his heirs and executors to pay, or otherwise for affecting his whole estate, heritable and moveable, hath no other meaning than that either his heirs and executors must pay, or the Lady might have ready execution against the heritage and executry falling to them.

Replied for the pursuer; 1*mo*, The case is the same in law as if the heir had purchased the house, and taken the same to the Lady in liferent; and as she could not in that case have insisted for both the liferent and the whole sum in the bond, neither can she do it in this case, where the purchase was made by the defunct himself, with whom his heir is reckoned *eadem persona*. It is as little to be thought, that the defunct would exhaust his inheritance, and overburden his heir, by multiplying donatives, as that the heir would so overburden himself; nor can it be pretended in law or common sense, that the intervening liberality of the L. 7000 Sterling should make the liferent of the house a better separate security than if no such liberality had been exercised. And though the L. 7000 bond be prior in date to the liferent of the house, yet *in effectu* it is posterior, seeing the bond was undelivered and revocable till it was confirmed by the granter's death; 2*do*, *Illud non agebatur* in the decreet, to call in question the Lady's right to the plenishing, but all the debate therein was about the extent thereof, whether it comprehended a montieth and decanter, which the Lords over-ruled. The heir is not questioning what is comprehended under the denomination of plenishing, nor doth he struggle with the Lady for the right to the plenishing; he is content she have it, but only that it must be imputed in satisfaction of the bond *in valorem*. The Lady is much mistaken if she imagine, that the contract of marriage did *ipso facto* transmit the property of the plenishing to her, from the moment of her husband's death. On the contrary, it belonged to the husband all the days of his life, and was *in bonis ejus* confirmable in his testament after his death. She was entitled by the contract only to pursue the nearest of kin if they should confirm, or to confirm herself executrix creditrix. So from what my Lord Dirleton in his Doubts, Tit. Plenishing, page 136. 137. says, it may well be argued, that the Lady's liferent provision being accepted in full satisfaction of terce or third of moveables, except the plenishing to which she is provided by the contract free of debts, that must be understood so provided as the law did provide her if she had not been excluded; because it is an exception *de regula*, and if she could have had no share of the moveables by reason of debts, she has no claim by the contract: For the assignation is a kind of surrogatum sapiens naturam ejus cui surrogatum est. Nor is the heir bound to warrant the right of the plenishing to her to be free of debt; because a disposition of plenishing or moveables in a contract

is only of the nature of a legacy, which obligeth the executor but not the heir: And if it could take place against the heir, it is a debt of the defunct's absorbed by the L. 7000 bond, quia debitor non præsumitur donare: And *separatim*, suppose the heir were liable to warrant the disposition against onerous creditors and third parties, he could never be obliged to disburden the plenishing of a gratuity given to the Lady herself; nor she allowed to exact from him payment of the bond without allowing him relief of the whole executry, plenishing as well as other moveables; especially considering, that these moveables were at the husband's disposal so long as he lived; and if the Lady had predeceased, her executors had no interest therein: Nor could a general assignation to a subject so uncertain transmit the property without confirmation. The practique betwixt Stuart and Fleming, July 24. 1623, No 116. p. 11439. doth not in the least fortify the Lady's pretence, for it goes upon two specialties, both the bonds bore love and favour, and the second was satisfied in the father's lifetime, without his applying it to payment of the first, or recalling the first. The other decision betwixt Abernethy and Forbes, No 169. p. 11492. doth make as little for the Lady; because the bonds there narrated different preceding causes, and so could never be understood in satisfaction of one another. No 151.

THE LORDS sustained both the reasons of reduction, and found, That the Lady cannot claim the liferent of the house, as a separate claim by and attour the L. 7000 Sterling, but that the former must be interpreted in satisfaction of the latter; and found also, That the L. 7000 bond absorbed the disposition of the household plenishing so as she cannot seek both. See No 149. p. 11465.

Fol. Dic. v. 2. p. 145. Forbes, p. 607.

1728. *December* 4.

ROBERTSON *against* EXECUTORS of the deceased Dr ROBERTSON. No 152.

DR ROBERTSON, in his nephew Archibald's contract of marriage, became bound to provide and secure at the first term after his death the sum of L. 300 Sterling to the said Archibald and his future spouse, &c. Thereafter the Doctor secured the sum of 6000 merks upon the estate of Bedlormie by an heritable bond and infeftment, which he took to himself and heirs whatsomever. The said Archibald succeeding to these subjects as heir whatsomever, the defunct having left no heirs of his own body, insisted against the executors for payment of the said L. 300 stipulated to him by his uncle in his contract of marriage. The defence was, That Dr Robertson had implemented this obligation by securing L. 300 to the pursuer upon the estate of Bedlormie, which has devolved upon him. *Answered*, When the Doctor took the forementioned subject to himself and his heirs whatsomever, he had certainly no intention of implementing the obligation which he bound himself in, to his nephew. At that