

1632. February 17. KINNAIRD against ZEAMAN.

A BOND, and infestment thereupon, being granted by a husband to his wife, and mentioning only love and favour, the LORDS found, that although it was never revoked, yet it ought to be understood to be granted in satisfaction of her contract of marriage *pro tanto, quia debitor non præsimitur donare*. This, the observer of the decision says, was wrong, because the brocard only holds where there is no cause expressed of the donation, as there was here, viz. love and favour.

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*Fol. Dic. v. 2. p. 147. Durie.*

\* \* \* This case is No 40. p. 5469.

1665. June 16. CRUIKSHANK against CRUIKSHANK.

GEORGE CRUIKSHANK pursues the relict and executrix of Cruikshank his uncle, for payment of a bond of L. 400. The defender *alleged*, Absolvitor; because the defunct had granted an assignation of certain sums of money to David Cruikshanks, the pursuer's brother, wherein there was a provision in favour of the pursuer, that the said David should pay to him a thousand pounds, which must be understood to be in satisfaction of this debt in the first place, *nam nemo præsimitur donare quamdiu debet*. The pursuer *answered*, That the foresaid rule hath many exceptions; for it being but a presumption, a stronger presumption in the contrary will elide it, as in this case. The defunct had no children, and had a considerable fortune, and the pursuer and the said David his brother were the defunct's nearest of kin; and albeit the foresaid disposition be not in the express terms of a legacy, yet it is *donatio mortis causa*; for it contains an express power to the defunct to dispoise otherwise during his life, and in another provision therein it bears expressly, to be in satisfaction of debt due to that other party, and says not so as to the pursuer; all which are stronger extensive presumptions that the defunct meant to gift no less than the whole thousand pounds:

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A *donatio mortis causa* by a man to his nearest of kin, to whom he owed a small sum by bond, found not to be in satisfaction of that bond.

Which the LORDS found relevant.

*Fol. Dic. v. 2. p. 146. Stair, v. 1. p. 282.*

1668. December 15. WINRAHAME against ELIES.

A FATHER having left a legacy to his second son, in full satisfaction of all he could demand by his father's death; it was not found to be in satisfaction also of a legacy left by a grandfather, and uplifted by the father; for though it was *argued*, That the father was here strictly debtor to his son, by uplifting the grandfather's legacy, *et debitor non præsimitur donare*; it was *answered*, That this presumption yields to a stronger of paternal affection; besides, that the

No 166.

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