

the order made thereupon, till the 24th of June following, so that the respondent could not put in his answer to the said appeal, in order to have the matter discussed during that Session, whereby the appellant hath not only delayed the payment of the interest of the said portion amounting to about 44*l.* but has prevented the respondent from giving him a charge of horning and registering thereof, as he might long ere now have done, and have been thereby, according to the law of Scotland, entitled to interest for the said sum, from the time of such registering.

Counsel appearing for the respondent, but no counsel for the appellant, *It is ordered and adjudged, that the said petition and appeal of Sir James Sinclair be dismissed, and that the two interlocutors therein complained of be affirmed; and it is further ordered that the Lords of Session do order Sir James Sinclair the appellant to pay to the respondent John Sinclair, all such interest as the said John Sinclair might have entitled himself unto by diligence had he not been restrained from doing diligence by reason of the said appeal to this house; and it is also further ordered thae the said Sir James Sinclair shall pay or cause to be paid to the respondent the sum of 40*l.* for his costs sustained by reason of the bringing the said appeal into this House.*

Judgment,
2 June
1713.

For Respondent, P. King.

Adam Cockburn of Ormiston, one of the
Senators of the College of Justice, and
Dame Ann his Wife, - - -
John Hamilton of Bangour, a Minor, by
his Guardian, - - -

Appellants;

Respondent.

Case 18.

Forbes, 4 &
23 July,
1712.

12th June 1713.

Construction.—In a question with regard to funeral expences, and expences of confirmation, the House of Peers having reversed a judgment of *lis finita* and found that the assignee of an executrix *might insist* for these claims, it was still competent to plead prescription thereto.

Funeral Charges. Prescription.—The accounts paid by the said assignee, without the 3 years were prescribed where she herself was not contractor, but where she was contractor did not prescribe.

Confirmation.—The Expences of confirmation though not especially conveyed to the said assignee, but paid by her, are found to exhaust the executry.

Debitor non præsumitur donare.—By marriage contract a wife is provided to the household furniture, the husband afterwards grants her a bond and the liferent of a house is settled upon her, these may subsist as separate and distinct rights.

AFTER determination given in the former appeal (No. 11 of this collection), the parties returned to the Court of Session, and the appellants claimed the whole funeral expences, and charges of confirmation; and insisted that in consequence of the judgment of the House of Peers, no objection thereto could now be stirred on the part of the respondent. The latter contended, on the other hand, that objections were still competent; and insisted that

that the whole funeral expences were prescribed, having been paid by the appellant Ann, after a lapse of three years from the dates of furnishing; and to the charges of confirmation the respondent made the same objection which had formerly been propounded, namely, that they were paid by the executrix herself, and were not specified in the assignation made by her to the appellant Ann. After sundry proceedings on these points, the Court on the 23d of July 1712, “ found that notwithstanding
 “ of the decree and judgment of the House of Lords, it was
 “ still competent to the defender to propose prescription, and
 “ found the accounts of the funeral charges paid without the
 “ three years are prescribed where the pursuer Ann was not con-
 “ tractor, but where she was contractor do not prescribe; and
 “ found the expences of confirmation, not being transmitted by
 “ the assignation to the pursuer Ann, do not exhaust the subject
 “ of the executry.”

In the mean time another point had arisen in this cause. By the marriage contract, in the former appeal mentioned, between Sir William Hamilton and the appellant Ann, the latter accepted of the liferent, provision thereby provided to her in full satisfaction of all legal claims, “ except the whole household plenishing that
 “ should happen to be in their dwelling-houses, the time of his
 “ decease, which household plenishing, heirship moveables in-
 “ cluded, in case she survived him, he thereby disposed to her
 “ free of all debts whatsoever.” At a subsequent period Sir William executed in favour of the appellant Ann, the bond for 7000*l.* in the former appeal mentioned; and having afterwards purchased a house in Edinburgh, Sir William provided the liferent thereof to her after his decease.

The respondent brought an action before the Court of Session, against the appellants, for reduction of the decree, in the former appeal mentioned, which had been pronounced of consent of parties and extracted in September 1710, on the ground of minority and lesion, as his curator had omitted to ask allowance for the value of Sir William Hamilton’s household furniture, intermitted with by the appellant Ann; and also of the rent of the house in Edinburgh, which she possessed in virtue of the said right of liferent, both which he contended ought to have been deducted from the 7000*l.* bond. After sundry proceedings in this action of reduction, the Court on the 4th of July 1712, “ found
 “ that the 7000*l.* bond granted by the said Sir William Hamilton
 “ to the defender Ann, and the liferent of the house also pro-
 “ vided to her, cannot subsist as separate and distinct rights; and
 “ also found that the defender Ann could not claim the household
 “ plenishing without allowing the value thereof in part payment
 “ of the 7000*l.* bond, and therefore sustained the reasons of re-
 “ duction as to these two articles.”

The appeal was brought from “ several decrees, sentences, and
 “ interlocutory orders of the Lords of Council and Session, of the
 “ 4th and 23d July 1712”.

Entered,
 April 10,
 1713.

On

*On the point of Funeral Expences, and Charges of Confirmation.
Heads of the Argument of the Appellants.*

This point is not now open, for the House of Lords having reversed the judgment of *lis finita*, and allowed the appellants "to insist" for the funeral charges and expences of confirmation, their right to the same was thereby established, and the Court of Session had only to consider what the appellant Ann had paid on these accounts.

With regard to the charges of confirmation, as the executrix assigned her whole right of administration to the appellant Ann, there was no occasion for any particular assignment of these charges. And the appellant Ann was taken, bound to indemnify the executrix against these charges, and has actually paid the same.

Heads of the Respondent's Argument.

Though it be determined by the judgment of the House of Lords, that the appellant should be at liberty to "insist" for the funeral charges, and charges of confirmation, the respondent was not, nor was intended to be thereby precluded from insisting on any thing he should be advised as a bar to this demand.

Though the executrix herself might have deducted the expences of confirmation from the personal estate, yet the appellant Ann has no pretence to do so; because as she is not executrix herself, and did not pay out any part of these expences, so she has no manner of right to them from the executrix who paid them; and she neither was nor could be assigned to the office of executrix, but only to the personal estate.

In the Reduction.—Heads of the Argument of the Appellants.

The property in the household furniture accrued to the appellant Ann, in virtue of the contract of marriage, at the very moment of her late husband's decease, and this property could not be supposed to be taken from her by the bond for 700*l.* which did not become payable, or bear interest, till about five months after his decease, for he died in December, and the bond did not fall due till the Whitsunday following. They must therefore be understood as different rights, since they were to take effect *at different periods of time*. And the declaration in the bond that it should be effectual for forcing his heirs, &c. to pay the same, or else that it should affect his whole estate real and personal, could only be intended of such estate as fell to them, of which the household furniture formed no part.

With regard to the life-rent of the house, though the court had sustained the bond to be in satisfaction of the annuity, (which the appellants acquiesced in, knowing that the estate was not sufficient to answer both demands) yet it could not be reasonably supposed that this bond should be extinguished by the subsequent grant of the life-rent of the house. Though in the point of the annuity and posterior bond, the Court held that the annuity was satisfied by the bond, upon the ground that *debitor non presumitur donare,*

donare, yet there is still liberty for a person to give twice, and the second gift cannot be taken away by the first, or presumed to be in satisfaction thereof, as a gift might be where the giver lies under an antecedent obligation.

Heads of the Respondent's Argument.

It is a maxim in the law of Scotland, that *debitor non presumitur donare*, and consequently whatever the appellant Ann enjoys and possesses of Sir William Hamilton's estate by whatever title must be imputed in payment and satisfaction of the said 7000*l.* bond *pro tanto*. When the action, therefore, was brought for the annuity of 200*l.* secured to the appellant by the marriage contract, the Court found that the bond was to be considered in satisfaction of that annuity. The respondent does not at all question the right of the appellant Ann to the household furniture by the contract of marriage; but he insists, that if she betake herself to the bond, she cannot touch any part of Sir William Hamilton's estate by whatever title, but what must be imputed in satisfaction of the bond *pro tanto*, for the bond and the provisions in the contract of marriage, cannot subsist as separate deeds. And this appears plainly to have been the intention of the grantor, since by an express clause in the bond, he declares, that it should *affect his whole estate, real and personal*. Nor does the grant by the contract of marriage transmit the property in the furniture immediately, but it must have been confirmed, given up in the inventory, and was subjected to the payment of the husband's debts, which never was disputed.

Nor is it of moment to urge that the life-rent of the house being granted after the bond, the same could not be in satisfaction of that life-rent. For by the law of Scotland a bond by a husband to his wife is looked upon only as a legacy or testamentary deed, and is interpreted to be only dated from the death of the grantor, and consequently this bond must be looked upon as posterior in date to the deed giving the appellant Ann the life-rent of the house.

Judgment,
12 June
1713.

After hearing counsel, *It is ordered and adjudged, as to such part of the said decree or interlocutory sentence of the 23d of July, complained of in the said appeal, whereby the said Lords of Council and Session found, "that notwithstanding the decree and judgment of this house, it was still competent to the respondent to propose prescription," and found, "that the accounts of the funeral charges paid without the three years were prescribed, where the appellant Ann was not contractor, but where she was contractor, were not prescribed," that the same be so far affirmed: but as to such part of the said decree or interlocutory sentence of the said 23d of July, complained of in the said appeal, whereby the said Lords of Session found the expences of confirmation (or administration), not being transmitted by the assignment to the appellant Ann, did not exhaust the executry or personal estate, it is further ordered and adjudged, that the same be so far reversed; and it is further ordered and adjudged that the ordinary and extraordinary costs and expences touching the administration or confirmation of the testament of the deceased,*
shall

shall be taken as remaining due upon the bond bearing date the 5th day of March 1703, and be computed with interest from such time as the money secured by the said bond became payable until the payment thereof, and stand as a charge upon the heritable estate: And it is further ordered and adjudged, that the said decree, order, or interlocutory sentence of the 4th July last, whereby the Lords of Council and Session did find, “ that the said bond of 7000l. granted to the appellant Ann by her late husband, and the estate for life, in the house granted also to her by her said late husband, could not subsist as distinct separate rights, and that she could not claim the household goods, by virtue of her contract of marriage, without deducting the value thereof from the said bond, and therefore sustained the reason of the reduction of the decree mentioned in the said appeal,” as to those two articles be reversed.

For Appellants, T. Powys. P. King.
For Respondent, Rob. Raymond. J. Pratt.

The judgment of the Court of Session on the point of the maxim *debitor non presumitur donare*, though here reversed, is stated as an existing case in the Dictionary of Decisions, vol. II. voce *presumption*, p. 145. and in Erskine, B. 3. Tit. 3. §93.

William Lord Viscount Kilsyth, Sir Hugh Paterson of Bannockburn, John Murray of Touchadam, Archibald Seton of Touch, and John Erskine of Balgounie, Heritors of the Parish of St. Ninians in the Shire of Stirling, for themselves and in name and behalf of the other Heritors of the said Parish, - - - - - *Appellants*;
The Moderator and Presbytery of Stirling, *Respondents*.

Case 19.

13th June 1713.

Teind Court.—Reasons sufficient to reduce a decret of erection of a new parish. —The reasons of reduction ought to have been advised before ordering a new proof and perambulation.

IN 1696, an application was made to the Presbytery of Stirling by certain heritors of the parish of St. Ninians, setting forth that the said parish being near ten miles in length from west to east, and six in breadth from north to south, and very populous, it was impossible for one person to serve the cure; and several of the parishioners being at considerable distance from, and having bad roads to the church, could very seldom attend divine service; and there being free teinds therein sufficient for the maintenance of two ministers, the application therefore stated, that it was necessary that the said parish should be divided, and a new church erected