

No 116. sist, which is to be considered, seeing he was his natural son only, and so might appear not to have the benefit of both securities, as possibly the lawful son might have claimed.

Act. *Mowat.*

Alt. *Hope.*

Clerk, *Scot.*

Fol. Dic. v. 2. p. 143. Durie, p. 75.

* * * Haddington reports this case :

1623. *July 29.*—IN the action pursued by James Stewart burgess of Glasgow against Isobel Fleming, relict of his father, who had given him a bond of 400 merks for his sustentation; the LORDS found, that a posterior bond given to him by his father, of the like sum, took not away the first.

Haddington, MS. No 2911.

No 117.

1624. *November 13.* WALLACE *against* WALLACE.

A BOND of provision though retained in the father's hands and power during his life, found to be taken away by a posterior provision granted to the child equivalent to the sum contained in the bond of provision.

Fol. Dic. v. 2. p. 143. Durie.

* * * This case is No 14. p. 6344., *voce* IMPLIED CONDITION.

1639. *February 20.* LO. CARDROSS *against* E. of MAR.

No 118.

A bond was granted by a father to infest a younger son in certain lands. It was undelivered at the father's death. Found not taken away or implemented, by the father disposing other lands to the son of greater extent.

THE Lord Cardross pursuing the Earl of Mar, as heir to his father, for implement of a bond granted by the umquhile his father, in favours of the pursuer's father, Henry Erskine, son to the umquhile Earl, whereby he obliged him and his heirs, to infest the said Henry and his heirs, (with reservation of the old Lady Mar, the said Henry's mother, her liferent of the lands), in the lands of Spittleton and Arnekeip, and because the defender had sold the lands, the said Lord Cardross, and the Lady Mar for her liferent, pursue for the price of the said lands, and avails thereof, and for the yearly duty thereof since the date of the bond. And the defender *alleging*, That since the date of the said bond, the umquhile Earl granter of the bond, had given satisfaction by infesting of the said umquhile Henry in far more lands, of far greater avail by a quadruple worth than the lands of this bond; which being done by the father to the same son to whom the bond was given, and the said bond libelled bearing, 'to be granted for love and favour,' must be found an implement of the said prior bond, and so must be a libera-

tion to the heirs of the granter, of the force and effect of the first bond; for in law debitor nunquam præsumitur donare quamdiu est debitor, specially seeing the umquhile Earl himself was possessor and had the bond libelled in his own hands the time of his decease; and the pursuer cannot qualify that ever the bond libelled became his evident, or was delivered to him before the defunct's decease, who lived more than eleven years after the making thereof. Likeas the Lady Cardross, mother to the pursuer, being examined by the Lords, she confessed that she recovered the bond since the Earl's decease, maker thereof, by payment of 2000 merks therefor to a mediate person, who would not declare to her in whose hands that bond had been, and to whom the money should have been paid therefor; in respect whereof the defender *alleged*, That absolvitor ought to be granted from this pursuit, both for all the years bygone, acclaimed by the Lady Mar, as liferentrix, since her husband's death, and also for payment of any price of the land, sold sinsyne by the defender. THE LORDS repelled the exception, and found, that this prior bond was not taken away by that posterior security, granted by the father thereafter to that same son in whose favours the bond was given, seeing the last security made no mention that it was granted for express satisfaction of the first, and so they were found both to stand; but the LORDS assoilzied the defender from all by-gones acclaimed by the liferenter, preceding the date hereof (being *fructus bona fide percepti*); and also found, that the defender for the heritor's and liferenter's security and interest in time coming, by their wanting of the land, ought to have the price of the land, which the defender had received therefor, to be paid by him to them at Whitsunday next, and for the which the LORDS decerned. See WRIT.

No 118.

Act. *Stuart, Hope & Baird.* Alt. *Nicolson & Primrose.* Clerk, *Hay.*

Fol. Dic. v. 2. p. 143. Durie, p. 875.

1661. November 14. FLEMING against Her CHILDREN.

A RELICT having paid a debt due by her husband, and taken a discharge thereof, but not an assignation, being at the time neither executrix to her husband, nor tutrix to her Children, was presumed to have done it on purpose to relieve her Children. THE LORDS refused to sustain it as an article of charge in a count and reckoning with her Children.

No 119.

Fol. Dic. v. 2. p. 143. Stair.

* * * This case is No 24. p. 8259. voce LIFERENTER.