

No 144.

and not to satisfy former provisions, unless so expressed; and here the bond was not simple, but bearing a clause of a liferent, and of a return to the mother herself, which were incompatible with an intention of satisfaction.

Fol. Dic. v. 2. p. 144. Stair.

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

1683. February.

SCHAW against STRAITON.

No 145.

A SON having pursued his mother as executor to his father, her defence was, That she acquired a comprising in the pursuer's name by her own means, which should be imputed in satisfaction, seeing *debitor non præsimitur donare*; and the pursuer made use of and assigned the apprising.

THE LORDS sustained the defence for the mother; though the pursuer *contended*, That it was presumeable she acquired the apprising in his name *ex pietate materna*; and here the apprising being assigned by a third party, bearing the mother to have purchased it with her means, there was no occasion from hence to know she procured it to pay the debt, or for love and favour, and now she is dead.

Fol. Dic. v. 2. p. 144. Harcarse, (EXECUTRY.) No 450. p. 123.

1683. December.

INNES against JAMIESON.

No 146.

By contract of marriage betwixt William Innes, taylor in Edinburgh, and Anna Jamieson his spouse, John Jamieson her father being obliged to pay 1000 merks of tocher, and he having disponded his estate to his son with the burden of 1000 merks to be paid to ——— Innes the said Anna's children, she herself being deceased, and they having pursued John Jamieson the son for payment, both of the 1000 merks contained in the contract of marriage and in the disposition, the LORDS found, That the contract and disposition did bear but one and the same sum. And the pursuers, by a petition, having craved that the writer and witnesses might be examined to clear up the grandfather's design, which was, that the pursuers, his grandchildren, should have both provisions contained in the disposition, and the 1000 merks contained in the mother's contract of marriage; the LORDS, before answer, ordained the witnesses inserted in the disposition to be examined upon what was acted and treated in relation to the children's provisions to the said 1000 merks the time of the granting thereof; as also, that Agnes Innes, the relict of John Jamieson, may give her oath of calumny, whether or not her husband promised to pay 1000 merks to the sister's children, distinct from the other provisions that they were provided to by their mother's contract of marriage.

Fol. Dic. v. 2. p. 144. Sir Pat. Home, MS. v. 1. No 515.