

al to lift the sums from the creditors, but would lose them to both parties, he must assign; especially, seeing his acceptance of full satisfaction imports an obligation to denude himself of the superplus; and which the LORDS found relevant, and sustained the summons.

Stair, v. 1. p. 179.

* * * Follows the sequel of the above.

1664. November 16.

DAME ELIZABETH FLEMING, against FLEMING and BAIRD her Husband.

IN a count and reckoning betwixt Dame Elizabeth Fleming and her daughter, and Robert Baird her spouse, the LORDS having considered the contract of marriage, in which Robert Baird accepted 12,000 merks, in full satisfaction of all his wife could claim by her father's decease, or otherwise; and there being some other bonds in her name, her mother craved that she might be decerned by the Lords to denude herself, and assign to her mother, seeing she was satisfied; and she on the other part craved, that her mother and Sir John Gibson might be obliged to warrant her, that her 12,000 merks should be free of any debt of her father's.—It was *answered* for the mother, That there was no such provision contained in the contract, and the Lords, in justice, could not cause her to go beyond the terms of the contract; there was no reason for such a warrandice, seeing debts might arise to exhaust the hail inventory.—It was *answered* for the daughter, That there was no obligation in the contract for her to assign her mother; but if the Lords did supply that as a consequent upon the tenor of the contract, they ought also to supply the other.—It was *answered* for the mother, That there was no reason for her to undertake the hazard, unless it would appear that there was so considerable a diminution of her daughter's portion in her favours, as might import her taking of that hazard for that abatement; and albeit such a warrandice were granted, yet it should only be to warrant the daughter from the father's debt, in so far as might be extended to the superplus of the daughter's full portion above the 12,000 merks.

THE LORDS found, That if there was an abatement in favour of the mother, it behoved to import that she undertook the hazard of the father's debt, not only as to the superplus, but simply; but seeing it was known to the Lords, they gave the mother her choice, either to account to the daughter for the portion, if she thought there was no benefit without any such warrandice; or, if she took herself to the contract, and so acknowledged there was a benefit, they found her liable to warrant her daughter *simpliciter*.

Stair, v. 1. p. 225.

No 15.

No 16.

One party being required to assign, the other party found obliged to warrant, that what the first was to receive should be free of incumbrance.