1686. *February* 2. Mr ROBERT SELKIRK *against* CATHARINE INGLIS.

No 147.

ROBERT SELKIRK, who, in his contract of marriage, provided, That 3000 merks should return to his wife, failing children, *stante matrimonio*, provided her to 6000 merks, in case of no children; and thereafter took bonds for several sums, payable to him and her, and the longest liver, and to the bairns, &c.; which failing, to her heirs and assignees. The wife having claimed the 6000 merks bond, and also the sums in the other bonds, by virtue of the substitution, it was *alleged* for the heir and nearest of kin, That *debitor non præsumitur donare*.

Answered; That brocard holds not between a husband and his wife.

THE LORDS sustained the brocard, and found the substitution in the other bonds was in implement of the 6000 merks.

Fol. Dic. v. 2. *p.* 146. *Harcarse*, (BONDS.) *No* 209. *p.* 47.

1706. *June* 25. DAVIDSON *against* RENDAL.

No 148.

A PARTY in his contract of a second marriage having provided a certain sum to the children thereof, and long thereafter giving a bond of provision to the only child that existed of that marriage; the LORDS, in a reduction of an adjudication led for both the sums, found, That the last bond was in implement of the contract of marriage, and that they were not both due, and therefore restricted the adjudication to one of the sums and its annualrents.

Fol. Dic. v. 2. *p.* 144. *Fountainhall*.

*** This case is No 37. p. 6966.

1708. *November* 16.

Dame ANNA HOUSTON, and the LORD JUSTICE CLERK, Her Husband, for His Interest, *against* JOHN HAMILTON of Bangour.

No 149.
A person who stood obliged to provide his Lady, by their contract of marriage, to a certain liferent annuity, having granted her a bond, bearing important causes, for a sum payable by his heirs not of his own body, the

THE deceased Sir William Hamilton of Whitelaw having, in his contract of marriage with Dame Anna Houston, "obliged himself to employ 60,000 merks Scots upon annualrent, or other sufficient security, to himself and her in conjunct-fee and liferent;" and thereafter, by a bond "obliged his heirs not of his own body, for important causes and considerations, to pay to her L. 7000 Sterling; the said Dame Anna Houston and the Lord Justice Clerk, her present husband, for his interest, pursued John Hamilton of Bangour, as representing the said Sir William Hamilton, to implement the provision in the foresaid contract of marriage.

Alleged for the defender; No process could be sustained on the contract, be-

No 149.
bond was imputed in satisfaction of the obligation in the contract, *quia debitor non præsumitur donare.*

cause the L. 7000 bond was granted in satisfaction; seeing debitor non præsumitur donare, et nemo præsumitur rei suæ jacturam facere; which is a principle confirmed by a continued tract of decisions, February 4. 1623, Guild *contra* Guild, No 77. p. 6521.; November 11. and 13. 1624, Wallace *contra* Wallace of Ellerslie, *voce* Writ; February 17. and 24. 1632, Kinnaird *contra* Yeaman, No 143. p. 11463.; November 1682, The Children of Walter Law *contra* Liddel, No 371. p. 6160.; February 2. 1686, Selkirk *contra* Inglis, No 147. p. 11465.; November 27. 1685, Robertson *contra* her Father's Heirs, *voce* Parent and Child.

Replied for the pursuer; The L. 7000 bond could not be understood in satisfaction of the obligement in the contract, because the granter doth not, as in the contract, bind all his heirs, but only his extraneous heirs not of his own body; and the bond must be reckoned gratuitous, seeing it bears not to be granted for onerous causes, but only for important considerations; which, in a deed granted by a man to his wife, imply no more than a motive of extraordinary affection; so that the bond was only a conditional gratuity to the Lady, failing heirs of the granter's body, without any relation to the contract; and, had he designed it in satisfaction of his obligement in the contract, it was easy to have expressed so much. As to the cited decisions, they are not to the purpose; for it is owned, that a posterior may comprehend a prior obligement; but the present question is, If a person having the free disposal of his own, may not stand under different compatible obligations when the *quæstio voluntatis* is cleared by so pregnant circumstances as do sufficiently take off the brocard *debitor non præsumitur donare?*

Duplied for the defender; The defunct's not expressing the L. 7000 bond to be in satisfaction of his former obligement, doth not elide the presumption, which, had that been expressed, could not take place, but plainly makes way for it, seeing Whitelaw was a lawyer who knew the import of the brocard. It is trifling to pretend, That because extraneous heirs are bound in the bond, it cannot be in implement of the contract, which the heirs of the defunct's own body were obliged to make effectual; seeing these extraneous heirs are no otherways bound than as they are una et eadem persona cum defuncto; and it is ridiculous to distinguish betwixt onerous and important causes.

The Lords found, That the L. 7000 is to be imputed in satisfaction of the obligement of the contract of marriage, seeing *debitor non præsumitur donare.* (See p. 5914.)

Fol. Dic. v. 2. p. 145. Forbes, p. 280.

*** Fountainhall's report of this case is No 118. p. 5911., *voce* Husband & Wife.