

S E C T. XIV.

Father's Power of distributing among his Children, or the Heirs of a Marriage, the Subjects provided to them.

1681. November 19.

PAIP *against* YOUNG.

No 123.

A WOMAN having disposed, in her contract of marriage, some tenements to her husband and her in conjunct-fee, and heritably to the heirs of the marriage, he disposed these to his son of a former marriage, and, in lieu thereof, obliged himself, *in anno* 1626, to dispose other tenements of his own to his daughter and heir of the second marriage then born, to whom also he granted afterwards a bond of 12,000 merks, with the same narrative; and, after all, he contracted several tenements and lands exceeding the value of the 12,000 merks, in favour of the said daughter at her marriage; and both the tenements and bond being claimed;

THE LORDS found, That the provision in the daughter's contract of marriage was in implement of the 12,000 merks bond, unless she had right otherwise to the tenements contracted, although the contract did not recal former provisions, *quia debitor non præsumitur donare*; nor would they sustain the right given *in anno* 1626, as a separate right to maintain her title to the tenements and the bond, in respect both were granted for the same specific cause, *viz.* that the daughter had right, by her mother's contract, to the tenements disposed to her brother of the first marriage, which ought not to be twice satisfied, and were to be looked on as corroborative rights; so as the satisfying one did satisfy both.

Harcarse, (CONTRACTS OF MARRIAGE.) No 337. p. 82.

* * * Sir P. Home reports this case :

1681. November.—BY contract of marriage betwixt James Crawford, goldsmith, and Margaret Wallace his spouse, the said Margaret Wallace having disposed a tenement of land to the said James Crawford and her in liferent, and to the heirs of the marriage in fee; thereafter, he having disposed the same tenement; with consent of his wife, to a son of another marriage, and, in lieu thereof, he having granted a bond of provision of 12,000 merks to Margaret Crawford, daughter and heir of that marriage; and thereafter, the said James Crawford, the father, in the said Margaret's contract of marriage with William Hog, provides certain tenements and acres of land, without any relation

No 123.

to the bond of provision, and without infefting the said William Hog the husband, the said James Crawford disposes the same to William Crawford his oye, and Thomas Young, tailor in Egger, as having right to the same from William Hog the father, pursues a reduction of the disposition made by James Crawford to William Crawford his oye, which by progress came in the person of Mr John Paip, as being granted in defraud of William Hog the father's contract of marriage. THE LORDS found, That both the bond of provision, and the obligation in the contract of marriage, did subsist as being distinct securities, and that the defender might have the benefit of either; but, that the obligation in the contract of marriage absorbed and satisfied the bond of provision *pro tanto*; and therefore allowed a probation of the value of these acres and tenements, except Young the pursuer will allege, That James Crawford, by his contract of marriage, or by any other obligation, was obliged to dispose certain tenements to his daughter, the heir of that marriage.

Sir P. Home, MS. v. 1. No 6.

* * * Fountainhall reports the same case :

1679. *January 17.*—MR JOHN PAIP, and Mr John Wans, pursue a reduction against Thomas Young, tailor, of an adjudication led by him of some tenements, against one Hog in the Pleasance; which being debated *in presentia*, “ the LORDS repelled the reason of reduction founded upon the prescription of the bond granted by James Crawford, to his daughter Margaret in 1630, for 12,000 merks, in respect of the interruptions produced in process; and find the said bond of 12,000 merks bearing no annualrent, was therefore moveable, and so fell under the *jus mariti* of the husband, and was assignable by him at any time, *etiam in lecto*, at least for the dead's part thereof. And before answer to that point, if the provisions in the contract of marriage of Margaret Crawford were in satisfaction of the prior bond of 12,000 merks, or by and attour; ordain the contract of marriage to be produced, and any infeftments following thereupon in favour of Margaret Crawford and William Hog her husband. And ordain either party to be examined anent their having of the said contract, and also ordain the parties to condescend, and instruct, if the father, the time of his daughter's contract of marriage, had any other children besides her, and what condition he was then in, as to his fortune and estate.” Whether the brocard of law, *debitor non præsumitur donare*, which holds among extraneous debtors and creditors, does not also militate in bonds of provision granted by a father to his children, in contracts matrimonial, or otherwise; and if the last be in satisfaction, or if they be distinct liberalities? See Durie, 20th Feb. 1639, Cardross, No 118. p. 11440. Yet Durie on the 13th Nov. 1624, Wallace, No 14. p. 6344. tells, the LORDS interpreted the last to be in satisfaction of the former; and the LORDS, in examining the father's condition, whether opulent or not, have followed the Emperor Justinian's method, in L. ult. C. De dot. pro-

missione, &c. where he also determines more provisions to children to be compatible; especially where one of them is given in contemplation of the *bona materna*, as was here in Crawford's case; as appears from the narrative of the 12,000 merk bond, see *infra* 26th Nov. 1681. Generally the brocard *debitor non præsumatur donare*, is only thought to take place *inter extraneos*, and not in provisions by a father to his own bairns before their contract; but a provision in a contract matrimonial may justly be thought the *maximam quod sic*, that the father intends, and so in satisfaction of preceding provisions. See Fachinæum contravers. jur. lib. 10. c. 39. De Novella leonis altering the L. ult. C. De dot. promis.

1681. November 26.—THE question Paip and Wans *contra* Thomas Young taylor, was this day decided.

There were several interlocutors pronounced in this cause; the first is inserted *supra*. The second, dated 29th June 1680, was in these terms: "THE LORDS find, unless it can be proved that the provisions in the contract of marriage betwixt William Hog and Margaret Crawford were better than the 12,000 merks contained in her prior bond, that the same cannot be in satisfaction of the said 12,000 merks, but only *pro tanto*; and find, that the narrative of the 12,000 merks bond doth import no more but a destination to the daughter to succeed, and no obligation upon the father not to alter, unless there was a prior contract of marriage, or obligation upon the father to grant an infeftment in these terms; in which case the LORDS find the father could not *pro arbitrio* dispoñe to a bairn of the second marriage in prejudice of a bairn of the first marriage; and if such a prior contract of marriage or obligation be made appear, the LORDS find the daughter has right to the tenements *pro tanto* if they be short of the bond, and has access to the bond for the superplus; and if they be worth more, that she has right to the tenements *quoad* the excesce above what the bond amounts to; and assign the 15th of July to prove the value and worth of the tenements the time of the contract of marriage." After pronouncing of which interlocutor, the procurators for Thomas Young resumed their reasons of reduction of the right granted by James Crawford to James Hog his grandson, founded on the 18th act of the Parliament 1621, as being granted for love and favour by a grandfather to his grandchild after the contract of marriage with William Hog, Thomas Young's author; and therefore, that Paip's right must fall *in consequentia*. "THE LORDS found the reason of reduction foresaid relevant, and instructed by the writs produced, and therefore reduced."

The third interlocutor pronounced this day runs thus: "THE LORDS considering, that the bond granted by James Crawford, in favour of Margaret Crawford his daughter in 1626, whereby he is obliged to dispoñe to her the houses and acres therein mentioned, proceeds upon the same narrative with the bond of 12,000 merks; they find that the value of all the tenements and acres provided to the said Margaret Crawford by her contract of marriage, is to be

No 123.

computed for absorbing of the said 12,000 merks, as well those which her father was obliged by the said bond in 1626 to dispone to her, as the rest not mentioned therein. And having considered the probation as to the worth and value of the tenements and acres, they find the same, deducting the liferent, to have been worth 10,000 merks, the time of the said Margaret Crawford's contract of marriage; and therefore sustain Thomas Young's diligence as to 2000 merks of principal, and a proportionable part of the penalty of the said 12,000 merks bond effecting to 2000 merks; which 2000 merks the LORDS find the said tenements and acres were short in value of the 12,000 merks contained in the bond of provision granted to the said Margaret Crawford; and that the tenements and acres stand affected therewith; and reduce the said Thomas's rights and diligences as to the superplus more than the said 2000 merks." So that, upon the whole matter, they found in this case, as it was circumstantiate, that the father being his daughter's creditor ob bona materna non præsumberetur donare by his second provision in her posterior contract matrimonial, but rather *debitum dissolvere*. Yet the maxim holds in other cases, 23d Feb. 1682, Forbes, (*see* APPENDIX.) 24th July 1623, Stewart, No 116. p. 11439.

Fountainhall, v. I. p. 34. & 164.

* * * See No 157. p. 11476.

1706. July 19.

EDMONSTON *against* EDMONSTON.

No 124.

AN obligation in a contract of marriage, to provide a certain sum to the granter and his spouse in conjunct-fee and liferent, and to the children of the marriage in fee, implies a discretionary power in the granter to provide the subject among his children, giving to one more and to another less.

Fol. Dic. v. 2. p. 289. Forbes.

* * * This case is No 45. p. 3219. *voce* DEATH-BED.

1724. July 10.

JAMES DOUGLAS, eldest lawful Son to the deceased John Douglas of Tilliwhillie, *against* JOHN DOUGLAS the second Son.

No 125.

In a contract of marriage, the estate being provided to the heir of the marriage; if in any case the father can pass by the heir, and give the estate to another son of the marriage?

JAMES DOUGLAS of Inchmarlo, in his son John Douglas's contract of marriage, settled the lands of Inchmarlo, "upon him and wife in conjunct fee and liferent, and to the heirs-male to be procreated of the marriage." Of this marriage were two sons, James and John, the parties in this debate; the eldest of whom, James, for his weakness and folly, was neglected by his father; who, notwithstanding the provision in his contract of marriage to heirs-male, settled the estate upon John, second son of the same marriage. Of this settlement James raised reduction, after the father's decease, upon this *medium*, That it was *ultra*