

1688. *January 28.* AYTON of Inchderny *against* NAPIER.

A FATHER gives a bond of provision to his daughter; the brother retires it, and gives his own bond; afterwards, in the sister's contract of marriage, he binds for 4000 merks, without mentioning or relating to the said bond. The debate was, if he was liable in both? THE LORDS found it came in place of his bond, and must be interpreted in satisfaction thereof.

Fol. Dic. v. 2. p. 146. Fountainhall, v. 1. p. 495.

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Found again
in confor-
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Cockburn a-
gainst Cam-
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1688. *February 2.* LORD & LADY YESTER *against* LORD LAUDERDALE.

My Lord Yester, who married Lady Mary, only child to the Duke of Lauderdale, having, after the Duke's decease, got up a bond of provision of L. 10,000 Sterling, (granted to her by her father) from the heir of James Chalmers, advocate, to whom it was sent to be entered in the Court of claims, and pursued thereon; compearance was made for the Duke's Creditors, who *alleged*, That the Duke having, in the pursuer's contract of marriage with his daughter, after the bond, provided her to L. 12,000 Sterling, a greater sum, *debitur non præsumitur donare*; for, albeit more bonds of provision of small sums have been sustained, where the whole do not exceed a rational provision; yet, in a contract of marriage, a wife's whole estate is mentioned, for getting suitable provisions to her and her children; and so great a sum of L. 20,000 Sterling would not have been forgot, (when all parties were alive,) had the Duke intended both provisions should stand.

Answered; The brocard *debitur non præsumitur, &c. habet tot sententias quot exempla*, and is regulated by practice, according to the rational interest and presumed intention of the granter; now, what could be more rational than that Lady Mary, the only child of the marriage, who had many hopeful children, should have both provisions, when the estate was put by her by a tailzie? and my Lord Duke never insinuated any thing to the contrary; and the contract bore not the usual clause of acceptance in full of all provisions. *2do*, By a clause in the Duke's contract of marriage with Lady Mary's mother, it is provided, That what lands, heritage, or annualrents, should fall to her, by the death of her mother the Countess of Hume, should be provided to her in life-rent, and to Lady Mary and her heirs in fee; which failing, to the mother's heirs and assignees; and, by the Lady Hume's death, L. 25,800 Sterling fell to the Lady Lauderdale.

Replied; The practice, in case of a posterior tocher in a contract, is regular; and it had been absurd for the Duke to have burdened his lands and honour, entailed with a daughter's provision L. 22,000 Sterling, which would destroy the estate; and the clause of acceptance in full of all former provision, has been

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omitted, through the Duke's forgetting that there was such a former bond in Chalmers's hand; *2do*, The pursuer and his Lady have granted a full renunciation of all things, which cuts off the bond in question. As to the Lady Hume's estate, *1mo*, It is denied; *2do*, The obligation mentions not sums of money, or goods and gear, but lands, &c.; and any estate that the Lady is alleged to have had, consists only of sums of money; and the brocard *debitor non præsumitur donare* is now established by practice; March 3. 1629, Carmichael *contra* Gibson, No 134. p. 11459; 29th June 1680, Young *contra* Paip, No 157. p. 11476; November 1685, Robertson *contra* M'Intosh of Davie, No 2. p. 9619; December 17. 1687, Moir *contra* Moir. (See APPENDIX).

Duplied; It is presumeable that the Duke gave the bond in question as a remuneration for the considerable sums that fell to him, *stante matrimonio*, by the Lady Hume; and so the bond, not being altogether gratuitous, is not in the terms of the cited decisions; and so a stronger presumption than the brocard is found by the pursuer; and the practice in this point hath varied, as appears from what was decided 24th July 1623, Stuart *contra* Fleeming, No 116. p. 11439; and February 20. 1639, Lord Cardross *contra* Lord Marr, No 118. p. 11440; December 5. 1671, Dickson *contra* Dickson, No 167. p. 11490; and January 25. 1681, Lady Craigleith *contra* Laird of Prestongrange, No 47. p. 6450.

THE LORDS, notwithstanding of the answer and duply, sustained the defence of the *debitor non præsumitur donare*, reserving to the pursuer to insist on the Lady Lauderdale's contract of marriage, and the defender to found on the renunciation, as accords.

Fol. Dic. v. 2. p. 146. Harcarse, (BONDS.) No 221. p. 50.

1698. November 12.

JOHN SYDSERF *against* ARCHIBALD SYDSERF of Ruchlaw.

No 161.

Found again
in conformity
with
Cockburn
against Cam-
busnethan.

JOHN SYDSERF pursues Archibald Sydserf of Ruchlaw, his father, for exhibition and delivery of a bond of 7000 merks conceived in his favour, and left him by his goodsire, and put in his father's hands. And having referred it to his father's oath, he deponed with this quality, that he had received 7000 merks of a legacy left by the grandfather betwixt the said John, and William his brother, (who being dead, his part accresced to John,) and had divided it into two bonds; but when the said John married, in his contract of marriage he gave him 12,000 merks of patrimony, and 4000 merks in houses, which was more than double of the foresaid provision, and so he cancelled the bonds as fully implemented. This oath coming to be advised, it was *alleged* for the pursuer, That the 7000 merks being *peculium adventitium*, and not *ex bonis paternis*, any subsequent provision by the father, in his son's contract of marriage,