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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 obligement 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 practique; 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 practique 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 *debitur 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 Cambusnethan.

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,

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though greater, cannot be in satisfaction of that debt, and so he was *in mala fide* to cancel the bonds, and must be liable for the sum; *2do*, The bond, with the annualrent from the date to this time, will be more than the sum in the contract; *3tio*, The provision there given him is from his elder brother, and his father is no ways debtor in it. *Answered* to the *first*, *Debitor non præsumitur donare*, and though *l. ult. C. De dot. prom.* makes these distinct *liberalitates*, and all to subsist together, and the one not to be in satisfaction of the other; yet the LORDS now, by the constant tract of their decisions, as in the Lord Yester's case against Lauderdale, No 160. p. 11479.; and many others, always find, what is given in a contract of marriage must be in full of all former bonds and obligations. To the *second*, The 7000 merks ceased to bear annualrent, so soon as he had got the provision in his contract, and so it became extinct. The *third* militates against the pursuer, for the father conveyed the fee of his estate to his eldest son, with the burden of this debt to the second, and so it still flows from the father. THE LORDS found the father had paid the debt, and might warrantably cancel the bonds; and therefore assoilzied him from the pursuit.

The addition of two clauses would have prevented the debate on either hand. The *first* is, If the grandfather had qualified his legacy, that it should be over and above any portion he was to receive from his father, then an indefinite provision would not have extinguished it. Or, *2do*, If the contract of marriage had borne in full satisfaction of all former bonds or legacies, in that case there would have been no room for doubting.

Fol. Dic. v. 2. p. 146. Fountainhall, v. 1. p. 14.

1726. *February* 4.

Competition, Sir EDWARD GIBSON of Keirhill, AGNES ARBUTHNOT, Daughter to Mr George Arbuthnot, Rector of the High School of Edinburgh; and JOHN MAJORIBANKS of Hallyards.

No 162.
Found in conformity to Dows against Dow, No 158. p. 11477.

BY contract of marriage entered into *anno* 1685, betwixt Edward Marjoribanks of Hallyards, and Agnes Murray, daughter to Sir Robert Murray of Priestfield, the said Edward Majoribanks bound and obliged him "to ware and employ the sum of 30,000 merks upon land or annualrent, at the sight and by the advice of the persons therein named, and to take the securities thereof to himself and his said promised spouse, and longest liver of them two in liferent, and to him for the use and behoof of the children to be procreate betwixt them in fee; which failing, to his own nearest heirs and assignees whatsomever." This sum was to be divided amongst the children, as the said Edward Marjoribanks in his lifetime should appoint; and failing of such division, to be divided amongst them by the proportions therein mentioned. And in a