

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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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 acceptation in full of all former provision, has been

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