

No 156. for provident men than to take obligations *ad majorem cautelam* to procure renunciations of rights though paid; and Barns took the same for his other two sisters their infeftments, as well as this. This being reported, "the LORDS found it competent and omitted, and therefore assoilzied." Thereafter she gave in a bill, and reformed her allegiance thus, viz. That they offered to prove by that contract in Barns's own hands, he accepted the right of the estate, with the burden of her infeftment, and that *eo nomine* to get a renunciation of it, he granted his father a power to burden the estate with 10,000 merks. This was found relevant of consent; but the contract bears no such thing, but, on the contrary, hath an express declaration, that nothing therein contained shall be a homologation or acknowledgment thereof; so that if it was satisfied before this contract, it draws no force nor ratification from it.

Fol. Dic. v. 2. p. 146. Fountainhall, v. 1. p. 103. & 105.

No 157.

Found again
in conform-
ity with
Cockburn a-
gainst Cam-
busnethan.

1680. June 29.

YOUNG *against* PAPE & VANS.

UMQUHILE James Crawford, goldsmith in Edinburgh, having had two wives, and a daughter by the second wife, called Margaret, he gave her a bond of provision of 12,000 merks, on this narrative, that he had disposed some tenements to the eldest son of the first marriage, which would have fallen to Margaret, if he had not disposed them; thereafter, he contracts the said Margaret to William Hog, and disposes with her some tenements and acres in Edinburgh; and thereafter, he disposes to James Hog, his grandchild of that marriage, some of the same tenements wherein James was infeft, and after him, his brother William, as heir, who disposed the same to Mr John Pape; but Thomas Young adjudges the said tenements, and the bond of 12,000 merks, as creditor to William Hog the father, and thereupon pursues reduction of the right granted by Crawford, the common author, upon this reason, that Crawford's disposition to young Hog his oye, was without a cause onerous, in defraud of old Hog his goodsire, his lawful creditor by the contract of marriage, as also as having right *jure mariti* to the bond of 12,000 merks, granted by Crawford to his daughter Margaret Crawford, spouse to William Hog. The defender *alleged*, Absolvitor from the reason, in so far as it is founded upon the bond of 12,000 merks, as being evacuated by the posterior contract of marriage, wherein the tenement is disposed in tocher to the same daughter to whom the bond was granted, and so is presumed to be in full satisfaction of any former provision granted by her father, *quia debitor non præsumitur donare*. It was *answered*, That that brocard holds not in provisions to children, to whom it is ordinary to give several bonds of provision, and to take them in the children's name, which are never presumed to be in satisfaction of former bonds, unless it were so expressed, and Hog's contract does not bear in satisfaction of former provisions. It was *replied*, That though the presumptions hold not ordinarily in

bonds of provision, yet it does always hold in contracts of marriage, wherein parents are still presumed fully to express all their children's provisions, that they may have a suitable meeting, for though the clause in satisfaction be omitted, yet it is implied. It was *duplied*, That that presumption is elided by the narrative of the bond of 12,000 merks, bearing, "That it was granted for tenements, whereunto the heir of the second marriage would have succeeded, if they had not been disposed to the heir of the first marriage;" which must import, that these tenements came by the second wife, and that they were so provided by her contract of marriage, after which, the husband contractor could do no fraudulent deed without an onerous, at least a reasonable cause, especially in favour of children of a second marriage. It was *triplied*, That the narrative of the first bond does not alter the case, for it does neither instruct nor presume that these tenements belonged to the second wife, it being ordinary for husbands having several wives to take infeftments in tenements to them and their wife in conjunct fee, and to the heirs of the marriage, which left no obligation upon them not to alter, but they may dispose at their pleasure, unless there had been an anterior contract obliging them to take the tenement so, and though that were proved, yet the tenements in the contract must be in satisfaction, especially where the disponent had no such fortune as to give both these provisions, having other children, as is instructed; *2do*, The tenements attained to by the contract are less than the bond, and so can never be understood to be in satisfaction thereof.

THE LORDS found, That the destination mentioned in the narrative of the bond of 12,000 merks did not presume that there was a prior contract of marriage, appointing that destination, in which case, the father could not alter the destination *ad arbitrium*, but for a reasonable cause, and though a prior contract was proved, they found, that Hog could not both have the 12,000 merks, and the acres and tenements, in the contract of marriage; but if the acres and tenements were proved to be more than the 12,000 merks, they should be in full satisfaction thereof, and if of lesser value, that the husband should have the acres and tenements by the contract, and the excesse of the 12,000 merks over and above these acres and tenements.

Fol. Dic. v. 2. p. 146. Stair, v. 2. p. 778.

1681. June 24.

Dows against Dow.

THE deceased John Dow of Ironhall gave a bond of provision in favour of his children, bearing, That he had disposed his whole estate, heritable and moveable, in favour of his eldest son, and his other heirs male, whereby his other children would have no provisions; therefore he obliges him and the heir-male of his body, to pay them such sums in full satisfaction of all portion-natural, and bairn's part, to which they could succeed by his death, and in

No 158.

Found again that a tocher granted by a father to his daughter is to be interpreted as in satis-