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 Crawfurd'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 effeiring 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 Crawfurd; 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 præsumebatur 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.* 1. *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*

vires of his father to alter the settlement made in his favour, contracts of marriage being so far onerous, that they cannot be gratuitously disappointed; especially here, where the estate came from the grandfather, and was not the father's *ab ante*. No 125.

To which it was *answered*, That the import of such provisions to the heir-male of a marriage, does not limit the succession to the eldest, more than any other son of the marriage; being only intended to provide against fraudulent and gratuitous dispositions in favour of children of another marriage; so that the contract settling the succession to the heirs-male of a marriage is duly implemented, when the father dispones the estate to any of the sons he thinks best deserving. The reason is, that contracts of marriage, though onerous as to the wife's interest, are noway onerous as to the children; so that though her interest will exclude gratuitous alienations in defraud of her children, it will never weigh in favour of one son more than another; the legal presumption being, that they are all equally in her favour. But whatever may be in the general point, the decision must go for the defender, upon this *medium*, That if it should be allowed the father cannot do merely gratuitous and arbitrary deeds, which might be interpreted in defraud of the marriage-settlement, no body denies a power of doing rational deeds; whence he has a power of providing a second wife and children, and must have a discretionary power of settling the estate upon a second son, where the eldest is undeserving; and in this case, there is sufficient evidence that the pursuer is a weak, foolish, extravagant person.

"THE LORDS found, That in this circumstantiate case, the father might dispose of the estate to either of the sons of the same marriage; and therefore assoilzied from the reduction."

Fol. Dic. v. 2. p. 289. Rem. Dec. v. 2. No 50. p. 98.

*** Edgar reports this case:

1724. *July* 23.—JAMES DOUGLAS of Inchmarlo, grandfather to these parties, made a settlement of his estate of Inchmarlo, in his son John's contract of marriage, "upon him and his wife in conjunct-fee and liferent, and the heirs-male to be procreate of the marriage."

Of this marriage there were two sons, James and John, and the father, notwithstanding of the settlement, passed by the eldest son, and granted a disposition of the estate in favour of the younger, upon a narrative of the undutiful and disobedient behaviour of his eldest son, but with the burden of 300 merks yearly of aliment to him.

After the father's decease, James *insisted* in a reduction of the disposition granted in favour of his younger brother, and *contended*, That his father had no power, by the contract, to make a settlement in prejudice of him; nor could he, by the law of Scotland, divert the succession at his discretion, since

No 125. it was provided to the heir-male; and the rather, that he himself was not *ab ante* fiar, but had the estate settled upon him by the same deed. And as to the narrative of the disposition, with respect to his undutiful behaviour, it was *alleged*, That neither that simple assertion, nor any thing that appeared in process, could be deemed a legal proof.

It was *answered*, That the father was fiar of the estate, and could have disposed of it for onerous, necessary, or reasonable causes; that he had done nothing *contra fidem tabularum nuptialium*, having sufficiently implemented the contract, by giving the estate to one of the sons of the marriage, though he neglected the eldest, upon very just grounds, which were not only instructed by the narrative of the disposition, but from attestations of his uncles and nearest relations, giving the same account of his conduct.

The Lord Newhall Ordinary found, "That in this circumstantiate case, the father might dispose of the estate to any of the sons of the same marriage." And the LORDS "adhered."

Act. *Ja. Graham*, sen. Alt. *Jo. Horn.*

Edgar, *p.* 100.

No 126. 1728. *January* 9. DOWIE *against* DOWIE.

IN a provision of sums, lands, and conquest, to children, in a contract of marriage, the LORDS found, That the father had a power of making an unequal division of the sums, lands, and conquest among the children of the marriage, but that he could not totally exclude any of them, without a cause, from a share thereof.

Fol. Dic. v. 2. *p.* 289. *Rem. Dec.*

*** This case is engrossed in a case Henderson against Henderson, 1728 February, No 33. p. 8199. *voce* LEGITIM.

No 127. 1738. *December* 16. CAMPBELLS *against* CAMPBELLS.

COLONEL CAMPBELL being bound in his contract of marriage to secure the sum of 40,000 merks, and also the conquest during the marriage, to himself and spouse in conjunct-fee and liferent, and to the children to be procreated of the marriage in fee, did purchase the estate of Burnbank during the marriage, taking the rights thereof to himself, his heirs and assignees, and, upon death-bed, did execute a deed, settling both the heritable and moveable estate upon his eldest son, with the burden of certain provisions in favour of the younger