fenders *alleged*, ought now to be found as good as an express consent, after intervening of 25 years and more, and that long possession by the tack since, during which space it was never quarrelled by the husband of this pursuer, which allegeance was repelled, and the express consent required. No 22.

Act. *Craig.* Alt. *Belshes.* Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 189. *Durie, p.* 474.

1663. *January* 8. GORDON *against* The LAIRD of LEYES.

No 23.
Marriage being free, the Lords refused to sustain conditions and limitations regarding it, adjected to bonds of provision to daughters.

SIR THOMAS BURNET of Leyes (now deceast) gives a bond of 9000 merks to Margaret Burnet his daughter; of which bond, she and John Gordon of Brachlie her spouse, pursue exhibition and delivery against this Laird of Leyes, and Mr Robert Burnet advocate haver. It was *alleged*, That the bond is conditional, that she should marry with consent of the Laird of Leyes for the time; but so it is that she married without consent of Leyes, or any of her father's friends; 2. That by an agreement after the marriage in writ, her husband and Leyes condescended upon a lesser sum in satisfaction of the said bond, and so the bond is innovate and taken away. It was *answered* to the *first*, That *matrimonia sunt libera*, and such conditions should be holden *pro non adjectis*, as has been often found; and that the first bond is acknowledged by the second agreement. And as to the said agreement, and allegeance founded thereupon, it was *answered*, it was conditional, if the sum condescended on were punctually paid at Whitsunday 1661, the former bond should stand in force. It was *replied*, That the condition resolved only in a failzie, which the defender might yet purge, considering especially the time and scarcity of money, and that the said Margaret had so far miscarried against her friends; and the bond was never a delivered evident, but put in her uncle's hand to be furthcoming to her, if she should carry a-right.

THE LORDS found the second allegeance or reply relevant, and that the defender might yet purge. *See* IRRITANCY.

Fol. Dic. v. 1. *p.* 189. *Gilmour, No* 60. *p.* 43.

1672. *February* 22. FOWLIS *against* GILMOURS.

No 24.
A wife being substituted by a husband to a provision left to a child, in case of the child's death.

IN a declarator pursued at the instance of Dame Margaret Fowlis, relict of Sir Andrew Gilmour, againt Alexander Gilmour, eldest son to Sir John Gilmour late Lord President of the Session, and Annes Gilmour, his sister, upon this ground, That Sir Andrew having disponed, in favours of Margaret Gilmour his only daughter, his whole estate, which he then had, or should acquire, with this provision, that in case his daughter or her children should decease be-

No 24.
upon condition *si vidua manserit et non nupserit*, the Lords found the condition lawful.

fore her mother, the said estate should belong to her mother, she remaining unmarried; as likewise by a testament of that same date, he appoints his daughter his universal legatar, and failing of her by decease, her mother to succeed upon the same terms; whereupon it was craved to be declared, that the said Dame Margaret only had right to the bonds or sums of money that belonged to Sir Andrew, his daughter being now dead, and he having no other children. It was *alleged* by the defenders, That the disposition and testament being qualified, as said is, she could thereby have no right, but, in case she should die unmarried again; and if she should uplift the sums of money belonging to her husband, she ought to be decerned to re-employ the same with that same quality and condition; so that if hereafter she should marry, they ought to belong to the nearest of kin of her husband. It was *replied*, That such conditions being reprobate by the law, whereby *matrimonia debent esse libera;* and it being the meaning of the defunct, that the said restraint of not marrying should only be in force during the lifetime of his daughter or children; she being now dead, and there being no children of the marriage, that condition and the restraint is void, specially seeing the mother's substitution to the children is burdened with the provision of 500 merks to be paid to Sir Andrew's natural daughter; which certainly he had never done, if he had not intended that his Lady should have right failing of his children, seeing that provision was payable at her marriage whensoever it should happen.

THE LORDS albeit they found, that the condition *si vidua manserit et non nupserit* be consonant to law and not reprobate, yet they decerned that the relict should have right to the whole estate, by virtue of that substitution, notwithstanding of the qualification; and, that it was the meaning of the defunct that it be so, not only because that it was burdened with a paction to his natural daughter, but likewise because, by a former bond when he had no lawful children, he had provided his Lady to his whole estate.

Fol. Dic. v. 1. *p.* 191. *Gosford, MS. No* 485. *p.* 254.

1673. *January* 17. RAE *against* GLASS.

No 25.
One having granted a bond to his niece, under condition, that she should marry with his consent; the clause was strictly interpreted, and it was found that his

JAMES RAE having assigned to Alexander Glass several sums of money, about L. 10,000 principal, and many annualrents, he pursues the said Alexander Glass, *alleging* the assignation was in trust to his own behoof, and that Alexander promised to compt for what he should recover; and the said Alexander having *alleged* that he was obliged for no account, and having been appointed to give his oath what was the true cause of the assignation, and having begun to depone, being prest with several interrogatories, he took up the same, and offered a qualified oath in writ; whereupon the LORDS, before they determined anent the oath, ordained an accompt to proceed what the sums were that were