

1681. December 15.

SIR WILLIAM BINNING and HUGH WALLACE *against* SIR WILLIAM MAXWELL
of Calderwood.

No 47.

By contract of marriage betwixt John Maxwell of Calderwood and the Lady Millhouse, the husband being obliged to provide the conquest to the heirs of the marriage, and failing heirs-male, to provide to the heirs-female, if there be one daughter, 18,000 merks, and, if two, 24,000 merks; the Lords found the only daughter and child of the marriage not obliged to make up her title to the 18,000 merks, by serving herself heir of the marriage; and that, by heirs-female, in this case, bairns are understood; because of these words, if there be one daughter, &c. seeing provisions to daughters use to be made as to bairns; although this was a contract of a first marriage, and the condition of the provision was in case of no heirs-male; but here the ancient estate of Calderwood was tailzied; and it was understood that the heirs-male of the marriage would succeed thereto, by virtue of the old tailzie, although there remained little of the estate then, but some reversions.

Fol. Dic. v. 2. p. 281. Harcarse, (CONTRACTS OF MARRIAGE.) No 338. p. 82.

1682. February.

CREDITORS of A. MARJORIBANKS *against* MARGARET MARJORIBANKS his Daughter.

No 48.

MR ANDREW MARJORIBANKS being obliged by contract of marriage, to provide L. 20,000 to himself in liferent allenary, and to the bairns of the marriage in fee, with a provision, that they should have right thereto without representing him; and he not having employed the sum, but contracted debt after the marriage, the bairns and those at whose instance execution was appointed to pass, for implement of the contract, adjudged his lands. His creditors having also adjudged, raised reduction of the bairns' right upon these grounds; *1mo*, The father's liferent must be understood a fee, and the children must be considered only as substitutes therein to him; for if destinations in contracts of marriage, which are private deeds, could state children creditors, except as to the father and his heirs, we might bid adieu to all commerce, and no man could deal secure; *2do*, Children in competition with creditors are always reputed heirs of provision *in quantum lucrati*; *3tio*, The father would have remained fiar, though he had implemented the obligation at the time of the marriage, otherwise *dominium* had been *in pendent*, till the bairns were born, which is absurd.

Answered, Children are liable in respect of creditors, as heirs of provision, where the mother is conjunct fiar; but here he hath but a liferent-allenary; *2do*, Mother's portions could not otherwise be secured to their children, which

One, in his contract of marriage, obliged himself to provide a sum to himself in liferent allenary, and to the children in fee, to which they were to have right without representing him. This found to import only a destination, in which the children were held to be creditors only from the date of their diligence upon the obligation.

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were a defect in law; *3tio*, *Dominium* may be *in pendent*, as was found in the Lord Rothes's case, (*See APPENDIX*); nor is this any thing more absurd than that *dominium* may be *in hereditate jacente*; and here the father may be understood to have been in the fee *fidei commissaria*, and that the fee accresced to the child when born. Again, had the father predeceased, the child needed not to serve heir; which implies, that the father died not last vested and seized.

THE LORDS found, That by the obligation in the contract of marriage, the father was not denuded of the sum to be employed, but was only under an obligation for that effect; and that the obligation being but by way of destination, the children were not to be looked upon as creditors from the date thereof, in competition with creditors for onerous causes, but only from the time that the father granted a bond of provision, or assignation *nominatim*, or that diligence was done against him upon the obligation in the contract; and so did not bring in the children *pari passu* with any creditors whose debts were contracted before the children's diligence, though the children's adjudication was within year and day of theirs, because the obligation *quoad* the children, being considered but as of the date of their diligence, was looked on as *post contractum debitum*; and the father was then bankrupt.

THE LORDS found no specialty as to the tocher in the contract, which *de facto* was paid to the father; but if the contract had contained an assignation *de presenti* to particular bonds, or if infeftment had been granted in favour of the children *nascituri*, the case had been more doubtful.

Fol. Dic. v. 2. p. 281. Hurd's Reports, (CONTRACTS OF MARRIAGE.) No 341. p. 83.

* * * P. Falconer reports this case :

1682. *November 22.*—MR ANDREW MARJORIBANKS, in his contract of marriage with Kinloch his wife, is obliged to employ 10,000 merks of tocher (which his mother-in-law, by that contract, was obliged to pay to him) with other 10,000 merks of his own money, to himself and his wife in liferent, and to the children to be procreated of the marriage in fee. And it is declared by the said contract, that it should be lawful for the children as creditors, to pursue the father's representatives, or to enter heir, as they thought fit. Francis Kinloch and Sir James Rothead are appointed by the said contract to be trustees, at whose instance execution is to pass. There being only one daughter of the marriage, the said trustees have adjudged the father's estate for the foresaid 10,000 merks. Sir John Nisbet, and other creditors of the father, have adjudged the same lands, and have intented reduction of the adjudication deduced at the trustees' instance, upon this reason, that the provision of the foresaid contract of marriage is but a naked destination, and that the father was fiar; and albeit the adjudication was led after a child was born, yet they were *in bona fide* to contract with the father, and to lend him money, there being no diligence done upon the contract of marriage, until after they became cre-

ditors to the father ; and albeit the child might be creditrix to the father, being in competition with his heirs, yet she could not compete with the pursuers, who were lawful creditors ; and that this case was decided betwixt Sarah Rome and Ronald Graham, No 42. p. 12887. where the Lords preferred Ronald, as being a creditor of Sarah Rome's father, albeit after Sarah's mother's contract of marriage with her father, and after inhibition had been served thereon. And it being *answered* for the defender, That the father was only liferenter, and the child creditrix by contract of marriage, and so having done diligence by adjudication, ought to come in *pari passu* with the pursuers, being within year and day to them ; *2do*, The 10,000 merks, which was the mother's tocher, was uncontravertible, seeing it was never the father's, but was paid to him, to the effect it might be employed as said is ;—it was *replied* for the pursuers, That this being a general obligation, and having no special assignation to a particular sum, and there being no actual employment of the money in the terms of the contract, neither any diligence done before the contracting of the pursuers' debts, the pursuers are preferable, the subject matter now adjudged being a land estate, which was the proper estate of the father. As to the tocher, it was in the same case with the 20,000 merks foresaid, it being payable to the father, and actually paid to him, and the father was only obliged to employ it as he was the other 10,000 merks in the terms foresaid. THE LORDS found, that the obligation in the said contract was but a destination, there being no actual employment of the money, or diligence done before contracting of the pursuers' debts : They preferred the creditors to the child and her trustees, and reduced the adjudication following upon the contract of marriage.

P. Falconer, No 30. p. 15.

. Sir P. Home also reports this case :

1682. *November*.—By contract of marriage betwixt Mr Andrew Marjoribanks, merchant in Edinburgh, and Magdalen Kinloch his spouse, Mr Andrew having gotten 10,000 merks of tocher with her, he was obliged to add thereto 20,000 of his own, and employ the hail 30,000 upon good and sufficient security upon himself and his wife in liferent, and the children of the marriage in fee ; and it is declared that the children shall succeed to the sums as creditors by the contract, or as heirs of the marriage, in their option. And Mr Andrew having only one daughter, who had led an adjudication of his lands for the 30,000 merks provided to the children of the marriage conform to the contract, Mr Andrew's creditors raised a reduction against the daughter, of her adjudication, containing a declarator of preference, upon this ground, that they being just and lawful creditors, and Mr Andrew being fiar of the lands, and they having adjudged the same for payment of the debts, albeit the daughter by the obligation in her mother's contract of marriage was so far a creditor that

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she might pursue for implement thereof against the general heir, or in the case of competition of children of several marriages, might have a ground of preference for reducing of fraudulent and gratuitous deeds, yet notwithstanding, by any such obligations in contracts of marriage in favour of children or bairns to be procreated, or any diligence done thereupon, the lawful creditors are always preferred; especially seeing the competition is not concerning the sums provided by the contract of marriage, but concerning lands that Mr Andrew had acquired to himself and his heirs, without relation to the contract. *Answered*, That the sum by the contract of marriage being to be employed to the father and mother in liferent, and to their children of the marriage in fee, the father being but a liferenter, his creditors could not affect the fee of the same in prejudice of the children; and albeit the children should only be considered as creditors, yet seeing not only the contract is prior to the creditors' debts, but the defender was born and existing before the debt was contracted, so that she being a prior creditor by the contract of marriage, she ought to be preferred, and may reduce the creditors' rights upon the act of Parliament 1621, as being done in defraud of the defender, who is a prior lawful creditor; and albeit the same was not actually employed, yet seeing the father was obliged to employ that sum, it is equivalent as if it had actually been employed according to that rule in law, Leg. 15. Digest. De reg. jur. Qui habet actionem ad rem, ipsam habere videtur; especially the obligation having taken effect by adjudication, which is equivalent as if the father had actually disposed the lands for implement of the contract of marriage; which albeit it be posterior to the creditors' adjudication, yet the defender ought to be preferred as being a prior creditor, at least the pursuer's diligence being within year and day with other creditors, she must come in *pari passu* with them; and as to the 1000 merks of tocher, she ought to be simply preferred, because that was never the father's money, seeing as it was to be paid, so it was to be employed to the father and mother in liferent, and to the children in fee. *Replied*, That the obligation in the contract of marriage to employ the sum to the father in liferent, and to the children in fee, being but a naked destination, the father was still fiar of the sum before it was actually employed; and even if it had been employed, yet the father was still fiar, the termination of the fee being in his heirs; and so the same might have been effected by his creditors; especially seeing when any persons lend their money, they cannot be supposed, nor are they obliged to know what obligation the parent lies under in favour of his children by his contract of marriage, which is but a private and latent deed; and it is sufficient to the creditors that they were *in bona fide* to lend their money, seeing the father had an estate for the time; so that if the sum had been actually employed, and the competition had been in relation to the sum itself, the creditors, albeit their debts were posterior to the contract of marriage, yet they would have been preferred; much more in this case, where the competition was not in relation to the sums, but to the lands that the

father had acquired to himself and his heirs, of which he was certainly fiar, as was lately decided in the case of Ronald Graham against Sarah Rome, No 42. p. 12887, where the Lords preferred Graham's adjudication of the father's estate to the comprising led at Sarah Rome's instance, upon the obligation upon her mother's contract of marriage, by which the father was obliged to employ a sum in favour of the bairns to be procreated of the marriage, albeit there was an inhibition served upon the contract, before the contracting of Robert Graham's debt; which, in such a case, has only this effect, to secure the obligation, according to the nature thereof, which is only in the case of competition with other creditors, or in the case of gratuitous deeds; but does not prejudice lawful creditors of their just debts, albeit contracted after the obligation and inhibition; the father being still reputed fiar of the sum as to them; and, upon the same ground, albeit the defender's adjudication be within year and day of the creditors', yet she cannot come in *pari passu* with them; but they ought to be preferred as to the whole sum; and that brocard in law, That Qui habet actionem rem ipsam tenere videtur, takes place only in personal, but not in real obligations: And the defender ought not to be preferred to the 10,000 merks, which was her mother's portion, seeing the sum was paid to the father, and was only obliged the same to his own 20,000 merks, to be employed in manner foresaid; so that he was fiar of both the sums. THE LORDS found the obligation in the contract, in favour of the children of the marriage, both as to the fee of the 10,000 merks of tocher, and of 20,000 merks to be advanced by the father, was but of the nature of a destination; and that there being no special application for implement in favour of the defender, who was the only child of the marriage, nor diligence done for fulfilling to her the obligation and provision contained in the contract, before the contracting of the pursuer's debts; therefore, reduced the adjudication, and diligence done at the defender's instance, and preferred the creditors.

Sir P. Home, MS. v. 1. No. 255.

1686. *March.*

CREDITORS of DAVID MURRAY against Mr JAMES MURRAY.

DAVID MURRAY'S Creditors having adjudged his lands, and raised reduction of a prior adjudication, at the instance of Mr James Murray, for 6000 merks, provided by David, in his contract of marriage, by way of destination to the bairns of the marriage; to which provision Mr James had right by assignation from the only child of the marriage;