

obligationis, et venire. But the LORDS found, *ut supra*, the creditors preferable to the children, unless they could prove the father was solvent the time of his decease.

No 53.

1697. *June 17.*—I REPORTED Napier of Tayoch against James Irvine of Kincoussie.—THE LORDS (24th July 1696) had preferred Tayoch to the daughters; they reclaiming by a bill, were allowed another hearing *in præsentia*; when it was *alleged*, That though provisions in contracts are pendulous till the existence of the children, and their arriving at such an age, yet how soon these conditions were purified, they became simple, true, and real creditors, especially against all debts contracted after the obligation in their favour; and the L. 9. § 1. D. Qui potior. in pign. says very well, Creditorem sub conditione tuendum esse adversus eum cui postea aliquid deberi incipit. It is confessed, where clauses are conceived by way of substitution, or destination, they are no more but a regulation of the succession among children of several beds, in which respect they are onerous also; but where the clause runs by way of obligation to pay, whether in his own life or after his death, the same are neither gratuitous nor revokable deeds, but may compete with extraneous creditors, according to the date of the diligence they have done. *Answered*, Contracts of marriage are favourable and onerous, in so far as concerns the liferents provided to wives; but *quoad* children's provisions, they are never reckoned onerous but in competition with the father or children of another marriage, and noways restrain or bind up the father from contracting posterior debts, (else they would have the force of an interdiction,) but only that he shall do no voluntary, gratuitous, or fraudulent deed, to their prejudice; and that it was so found, 24th January 1677, *Graham contra Rome*, No 42. p. 12887.; where the LORDS preferred an extraneous creditor to a bairn, though there was a decree obtained, and an inhibition served upon the contract of marriage, and that the purging the condition was not retro-binding, to the prejudice of the intervening debts. Only the decision marks, that it was stopped till farther hearing. But the LORDS having reconsidered this case of Tayoch's, they generally (none dissenting save one or two) preferred him to the daughters, and would not so much as bring them in *pari passu*; though it was *urged*, That her husband was a singular successor, and *in casu favorabili*, having *intuitu* of this granted a jointure to his wife. Kincoussie protested for remeid of law against this interlocutor.

Fol. Dic. v. 2. p. 281. Fountainball, v. 1. p. 729. & 776.

1697. *January 19.*

LAWS against TOCHERS.

A MAN, in his contract of marriage, " obliging himself to take the securities of a sum of his own, and some lands he got in name of tocher with his wife, to himself and her in liferent and conjunct-fee, and to the children of the mar-

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riage, whom failing, the said money and lands to be equally divided betwixt her and his heirs ;” this marriage dissolving without issue, in a competition betwixt an only daughter of the second marriage and the first wife’s heirs, the father having provided his whole lands to the heirs of the second marriage, this was found to be a voluntary deed, which could not evacuate the substitution in the first contract in favour of the wife’s heirs *quoad* their half.

Fol. Dic. v. 2. p. 282. Fountainhall.

* * * This case is No 30. p. 4236. *voce* FIAR.

1708. July 16.

Sir ROBERT HOME *against* Sir PATRICK HOME Advocate.

No 55.
A clause in a contract of marriage, obliging a person to resign his estate in favour of himself and the heir-male of the marriage with inhibition used thereon by the friends at whose instance execution was appointed to pass, found to disable that person from disposing gratuitously in prejudice of the heir-male of the marriage.

SIR ALEXANDER HOME of Renton, in his contract of marriage with Dame Margaret Scot, being obliged to provide the lands of Renton, and others therein mentioned in favour of himself and the heirs-male to be procreated of the marriage, and to grant all rights, titles, and securities thereanent, whereupon inhibition was used by the friends *in anno* 1690 ; Sir Robert Home, heir-male and of provision of the marriage, pursues a reduction and declarator against Sir Patrick Home, for reducing a contract of alienation of the estate made betwixt Sir Alexander and him in October 1694, upon this ground, That the pursuer had good interest to reduce all voluntary deeds made by his father after executing of the inhibition in defraud of the obligation and provision conceived in his favour as a creditor by the contract of marriage.

Alleged for the defender ; The disposition to him could never be quarrelled upon the foresaid clause and inhibition ; because, *imo*, That obligation is but a simple tailzie and destination of succession, alterable at pleasure, even by gratuitous deeds ; seeing Sir Alexander was still fiar, and not tied up from the free disposal of the estate by prohibitory and irritant clauses. He being obliged to resign, failing heirs-male of the marriage, in favour of his heirs-male of any other marriage, and failing of these, in favour of his heirs whatsoever ; the clause doth equally relate to them as heirs substituted to him ; so as he might alter the destination in favour of the first member of the tailzie, as well as the destination in favour of the subsequent members ; yea, a mutual tailzie, which is much more binding, doth not hinder either party to dispose of their estates as they please ; as Hope in Lesser Practicks observes to have been decided betwixt Spence against Spence, and betwixt the Earl of Home against Coldingknows, (See APPENDIX.) *2do*, There is a difference betwixt a clause obliging a father to resign his estate in favour of himself in the first place, and to the heirs of the marriage as substituted to him, and a clause providing the estate to the heirs of the marriage simply ; for, in the first case, the father as absolutely fiar, may dispose as he thinks fit, even by gratuitous deeds ;