

No 92.

1699. January 20.

DUNCAN *against* SMEITON.

It being provided in a contract of marriage, that if the wife happened to die without children, the half of the tocher should return to her father, his heirs and assignees; and the husband, on his part, having become bound to add a certain sum to the tocher, and to employ the whole on land or annualrent to himself and spouse in conjunct-fee and liferent, and to the heirs of the marriage, which failing, to the husband's heirs, upon the provisions and conditions always above mentioned; the case having existed, the question occurred as to the time of the return, it being contended, that it should be at the wife's decease, because no term of payment was expressed, and therefore *presenti die debetur*; the LORDS found the husband ought to liferent the sum.

Fol. Dic. v. 2. p. 286. Fountainhall. Dalrymple.

*** This case is No 21. p. 6354. *voce* IMPLIED CONDITION.

1704. February 10.

OLIPHANT *against* OLIPHANT.

No 93.

A man was bound by contract of marriage to secure a sum to the children. There was one daughter. He married again.—Action refused on the contract to the daughter during the father's life.—There were no friends named in the contract at whose instance execution should pass.

MARGARET OLIPHANT, and Charles Robertson her husband, and John Stewart their assignee, pursue William Oliphant, merchant in Edinburgh, her father, on this ground, That, by the contract of marriage betwixt the said William, and Christian Scott, her mother, he, for the tocher received, obliged himself to stock and secure to the bairns of the said marriage 8000 merks; and subsuming, that she is the sole child of that marriage, conclude that he may be decerned to perform to her the said obligation. *Alleged*, This being only a destination of succession in a contract of marriage, it is not obligatory during his life, nor can it produce any effectual action till his decease, especially he being fiar of the sum, and can uplift and dispose at pleasure. *2do*, By an express clause in the said contract it is specially provided, that the obligation in favour of the bairns shall not hinder and obstruct the said William to employ it in the exercise of his trade as he thinks fit. *Answered*, These provisions in favour of children of a first marriage, cannot be elusory and of no effect, else a father, by marrying a second wife, may *delinimentis novercalibus* give all to the second bairns, and defraud the first, though law does not so bind up parents from second marriages but they may give moderate and rational provisions to a second wife and her children; for contracts-matrimonial are *uberrimæ fidei*, and ought to be punctually and faithfully performed; and, in a competition, the first contract and first bairns ought always to be preferred, as being the first creditors; and here the father's aversion arises from the influence of his second wife, though they design no straitening to him, but only that he may give them