

was *lucratus* by the marriage with Katharine Swynton. *2do*, Seeing Katharine, as heir to her father, was liable before the marriage for the debt claimed by the pursuer, she could not *stante matrimonio* dispense, or her husband, a conjunct person, except of a right to the price of her lands, in prejudice of an anterior lawful creditor; therefore the pursuer repeated a reduction of the said fraudulent deed, upon the act 18th, Parliament 23d, James VI. (1621.)

*Fol. Dic. v. 1. p. 71. Forbes, MS. p. 16.*

No 74.

1738. January 11. ROBERTSON against HANDYSIDE.

A HUSBAND, during the marriage, having infest his wife in an annuity L. 72 Scots a-year, upon a narrative that she was not otherwise provided: In a reduction after the husband's decease, at the instance of his prior creditors, upon the first branch of the act 1621, it was *pleaded* for them, that though a husband is naturally bound to provide his wife in a jointure, this obligation ceases by his insolvency, equally with the obligation to aliment her during the marriage. *2do*, At any rate a liferent provision, granted in the circumstances of insolvency ought never to exceed a *rationalis tertia*, which the present does.—To the *first answered*, Though the obligation on the husband to provide his wife in a jointure, cannot be made the foundation of a process at common law, it is yet a *debitum naturale*, which he is bound to fulfil, and there is no law to bar him from applying his effects to this purpose, as well as towards the fulfilling of his engagements to any other of his creditors, seeing the doing justice to one creditor, in preference to another, is in the power even of a bankrupt, who is not interpellated by diligence; and the law in this case makes no distinction betwixt creditors, whether more or less onerous; and therefore the liferent infestment must stand as not being a gratuitous deed; unless the creditors could say further, that it was done with a view to prefer the wife to the other creditors; so as to found a reduction upon the head of fraud, of which there is no presumption in the present case.—To the *second answered*, If the liferent were immoderate, it would be reducible *quoad excessum*, and restricted to a *rationalis tertia*; but where the estate is so small, that the terec is not sufficient for a moderate aliment, there is no reason for making it a rule.—THE LORDS found the provision in question granted to the wife, after marriage, there having been no precedent contract, a rational and onerous deed, and therefore does not fall under the act 1621.

*Fol. Dic. v. 1. p. 70.*

No 75.

A husband granted an annuity as jointure to his wife, not previously provided for, which exceeded a third of the value of his estate. Having become insolvent, his creditors claimed preference. The annuity sustained as a rational and onerous deed.