1688. *July.* BROWN *against* YOUNG and Sir MARK CARSS.

No 52.

A HUSBAND being obliged to employ the tocher on security to his wife in liferent, and to the bairns in fee, he, after her death, assigned it for onerous causes; and the assignee pursuing the cedent's father-in-law for payment;

It was *alleged* for the defender; That the husband was obliged to implement the contract; and albeit he might uplift the money, there being no obligement upon him to re-employ, or Creditors might affect it, yet it could not be assigned before implement.

Answered; The wife being now dead, and the obligement to employ being but a simple destination *quoad* bairns, it is *frustra* to implement.

THE LORDS decerned the money to be paid to the assignee, upon his finding caution to be liable to the bairns for any pretence or right they had to the money after the father's death.

Harcarse, (CONTRACTS OF MARRIAGE.) *No* 397. *p.* 104.

1696. *July* 24. NAPIER *against* IRVINE.

No 53.
An obligation in a contract of marriage, to provide a certain sum to the children of the marriage, was found not to establish any *jus crediti* in the children, to enable them to compete with their father's creditors.

PHESDO reported the competition between Napier of Tayoch and Irvine of Kincoussie, about a sum provided to the bairns of the marriage, in their mother's contract; Whether that clause did so constitute them creditors, as that they could thereupon crave preference to other extraneous creditors? It was *contended*, This ought to prefer them, at least, bring them in *pari passu*, in regard provisions to bairns did not infer a representation, but stated them *tanquam quilibet;* and the Lords had found so in the case of the Children of Preston, 5th July 1691, *See* APPENDIX.—*Alleged*, There was a great disparity; for in Preston's case, there was a bond of provision granted in implement of their mother's contract; and here nothing was founded on but the destination in the contract itself. THE LORDS found the cases not equivalent; and, therefore, preferred the extraneous creditors to the bairns.

THE LORDS were partly moved by these subtile points, that a fee cannot so properly be given to bairns *in spe;* for, at what period shall their *jus crediti*, or obligation as creditors begin? Not at their birth; because the provisions are made greater or less, according to the number of the children, the fixed number of whom cannot be known till the dissolution of the marriage; because some may die, and others come in their place; and it were absurd, that an obligation to bairns, not obligatory till the father's death, can ever be equal, much less preferable, to onerous creditors. Others said, this was to confound two things very different in law, to wit, the disparity between *cedere diem*

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 obligement 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 obligement 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. *Fountainhall, v.* 1. *p.* 729. & 776.

1697. *January* 19. LAWS *against* TOD.

No 54.

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-