

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

some security for the said 8000 merks, at least so much of it as the Lords shall think suitable to his circumstances, to take effect only at his death: A contract of marriage being a *synallagma*, containing mutual prestations, the wife bringing a tocher, and the husband making a proportional settlement for her and the children of the marriage, and it ought not to be in the father's power to frustrate and evacuate these obligations. THE LORDS considered they have oft reduced exorbitant provisions made in posterior contracts, where they were prejudicial to the first, and that the children of the first bed had a *jus quæsitum*, except where he came in as heir, which tied him *præstare factum paternum*; and if this contract had nominated persons at whose instance execution might pass, they could have charged for implement; but the father here being a merchant, and having reserved to himself a power not only of administration, but of disposal for carrying on his trade, and that it was not pretended he was *vergens ad inopiam*, (in which case the Lords would have obliged him to secure her), therefore they refused to sustain action against him during his life; for they thought merchants might be straitened by such processes, and forced to give over their trade; and it was *pessimi exempli* for children to pursue their parents in such a circumstantiate case, and that it was refused both to John Kennedy's children and Thomas Wylie's.

*Fol. Dic. v. 2. p. 286. Fountainhall, v. 2. p. 222.*

1709. June 28.

HAY and CARRUTHERS against HAY.

MR JOHN HAY of Lethem; doctor of medicine, in his contract of marriage with Jean Law receives 8000 merks of tocher, and obliges himself, that if there be only daughters procreate of that marriage, and he have no son of any subsequent marriage, then that daughter shall succeed to the sum of 20,000 merks left him by Sir John Nisbet of Dirleton, his granduncle; but if he had sons, then the daughter of the said first marriage should have 8000 merks, viz. 4000 merks at her marriage or majority, and the other half at his death; and then follows a clause, consenting that execution shall pass for seeing the obligations in favour of the children fulfilled, at the instance of some of the wife's friends therein named. Jean Law, the wife, dying, left one daughter, viz. Margaret Hay. Her father marries again, and sells the lands of Lethem to Doctor Stirling, and retires all his money and effects to London, where he sets up; so there is nothing left in Scotland for implementing the 8000 merks obligation; which moves the friends named in the contract to charge him, and use inhibition and arrestment against him, for securing the said Margaret's provision, who is now married to William Carruthers, and claims the 4000 merks made payable at her marriage, and so as to that moiety, *dies solutionis tam cessit quam venit*. Doctor Hay being alarmed with this diligence, he raises against his

No 93.

No 94.

In this case, in circumstances resembling the above, but where there were friends named to sue for implement of the contract, the father was found obliged to secure the sum.