

No 49.

THE LORDS found, that the daughter's right being but a destination, it could not compete with the father's true creditors; and, therefore, reduced Mr James's adjudication *in quantum* prejudicial to the true creditors.

*Harcarse*, (CONTRACTS OF MARRIAGE.) No 379. p. 98

1687. December 6.

FRASER *against* FRASER.

No 50.

A father had not expressly burdened the conquest with provisions to the children of his first marriage. was found, that, before the extent of the conquest provided to the children of a second marriage came to be calculated, the provisions to the first ought to be deducted.

A HUSBAND, in his contract of second marriage, having provided his wife to a liferent of the annualrent of 3400 merks, and of the half of the conquest; and it being expressly declared, that he had then lands and wadsets, extending to L. 11,000 Scots, which should not be reckoned conquest; the wadsets were redeemed, and lands sold, and the money employed upon personal security, bearing date after the marriage, and mentioning, that it was the product of the redemption or sale. After the husband's death, the wife claimed a liferent of all the sums in the securities bearing date after the marriage.

*Alleged* for the defender; The L. 11,000, and all debts due at the husband's death, whether contracted in the first or second marriage, must be first deducted; seeing conquest is only considered *debitis deductis*.

*Answered*; Although it be declared, that the wadsets, and others condescended on, extending to L. 11,000, were the husband's estate at the time, yet he might have spent that money; and the defender ought to prove, that the bonds in question were the product of the estate; *2do*, It is just that the debt contracted during the first marriage should affect the L. 11,000; *3tio*, The provision of 4000 merks to a daughter of the first marriage, paid after the second marriage, ought to be allowed in part of the L. 11,000, which probably was reserved for the children of the first marriage.

THE LORDS repelled the three answers; and found, that all debts resting at the husband's death ought to be paid before conquest can be considered; and that he might portion the daughter of the first marriage, which portion ought to be deducted, without diminishing the L. 11,000, before the extent of the conquest can be considered, although the father did not expressly burden the conquest with the provision, but indefinitely paid it. Here there was no obligation upon him to take the securities of what he should conquest to his wife in liferent; but the clause is, that she accepts of the jointure of the annualrent of 3400 merks, in full satisfaction of all, &c. excepting the liferent of the half of the conquest, which is provided to her.

*Harcarse*, (CONTRACTS OF MARRIAGE.) No 391. p. 102.

\* \* \* Sir P. Home reports this case:

1687. November 30.—By contract of marriage betwixt Alexander Fraser and Christian Fraser, his second wife, the said Alexander is obliged to pro-

vide his wife to an yearly annuity in liferent, in full of what she could claim by her husband's decease, except the half of the conquest; but it is declared, that what arable field, land, tenements in burgh, and sums of money, the husband had then belonging to him, that these should noways be reputed any part of the conquest, by which the wife by the foresaid provision was to claim right; as also, a sum due by wadset, and another by an apprising, extending to L. 11,000; which two rights, with what other estate the husband had then, are reserved out of the provision of conquest in the contract of marriage. And Christian Fraser being married to a second husband, and having pursued her first husband's heir for the half of the sums of money, conquest during her first marriage; *alleged* for the defender, That the reserved estate being first deducted, and then the debts due by the defunct, the superplus can only be understood to be conquest. *Answered*, That no debts can be deducted to exhaust the conquest, but only such debts contracted during the marriage, and not anterior debts. THE LORDS having considered the contract of marriage, and the condescendence of the husband's estate, therein contained, extending to L. 11,000, they found, that the import of the clause of the contract is, that, in the first place, there ought to be deducted out of the husband's estate, extant the time of his decease, the debts then due by him, and that the L. 11,000 is to be deducted, and what remains is only to be reputed conquest.

No 50.

*Sir P. Home, MS. v. 3.*

1688. *June.* KENNEDY and FERGUSON *against* MARTIN.

No 51.

A WIFE being provided to the liferent of lands, with a provision, that, in case there shall be an heir-male of the marriage surviving his father, she should be so much restricted in favour of the heir-male during his life; and such an heir-male having survived his father, the father's Creditors sought to affect the superplus of the relict's liferent, over and above the restricted quantity, during the heir-male's lifetime, as being a provision of aliment to him.

*Alleged* for the Heir male; That it could not be claimed by his father's Creditors, seeing it proceeded from his mother.

*Answered*; If such a preparative were allowed, parents might easily disappoint their Creditors, by providing their wives largely, with an obligation upon them to restrict in favour of children.

THE LORDS inclined to think, that if the wife's jointure was anywise exorbitant, the excess provided for the children would be liable to the father's Creditors; but the point was not voted.

*Harcarse, (CONTRACTS OF MARRIAGE.) No 394. p. 103.*