

No 48.

THE LORDS, by a plurality, found the obligation not being in the assignation, it was but personal; and so preferred Sir John, the husband's creditor, on his diligence.

Fol. Dic. v. I. p. 310. Fountainball, v. I. p. 520.

1698. *January 27.*KENNEDY *against* LYAL.

No 49.
Found as
above.

A COMPETITION arising between Sir Thomas Kennedy and Jean Lyall, for the mails and duties of some tenements in the Pleasants; Sir Thomas having adjudged the same from John Dawling her husband, her ground of preference was, the houses originally came by her as heiress to her father, proprietor of the same; and by the contract of marriage, whereby she disposes them to Dawling, he is with the same breath obliged to infest her in a liferent of 400 merks yearly; forth of these houses, and a tenement he had in Leith; and the one being the mutual cause of the other, his creditors cannot carry away the lands without first they secure her jointure, as he was obliged to do himself, the contract being a *synallagma*, and the obligations properly mutual causes each of the other. *Answered*, Though the contract runs in these terms, she disposes the lands simply and absolutely to her husband, and then it bears, 'for the which causes he obliges him to infest her in the said annuity,' which is merely a personal obligation, wherein the husband's singular successors are no way concerned, unless the disposition had been conditional, or expressly burdened with her liferent; and this conception can no more bind his creditors than if she had assigned her tocher, consisting of a bond of borrowed money, and the husband's assignee craving the same, the wife could never stop the payment on the pretence that she must be first secured in her jointure. — THE LORDS found the obligation but personal, and preferred Sir Thomas the creditor.

Fol. Dic. v. I. p. 310. Fountainball, v. I. p. 817.

No 50.

In a case similar to Galbraith against Lenox, No 47. p. 4387. the Lords found, that the tocher might be evicted by the husband's creditors upon finding security for the wife's liferent, without regard to the children of the marriage.

1703. *December 23.*CHALMER'S CREDITORS *against* HUTCHISON.

By articles of a contract of marriage betwixt William Chalmers of Blackcraig, brother to Gadgirth, and Anna Dunbar; the said William is to have in readiness 15,000 merks of his own means, and to take the securities thereof to the wife in liferent, and the children in fee; and, on the other part, Anna Hutchison, mother to the said Anna Dunbar, the spouse, obliges herself to dispose, in name of tocher, to the said William, some lands and houses in Machlin. William deceases, leaving several children and his wife behind him, but never secured her in her jointure, not being able to perform his part of the contract; and his children and creditors insisting against Anna Hutchison to dispose the tocher in the terms of her obligation in the contract, she raises a reduction and

declarator of the nullity of her part of the obligation, and craves to be free, on this reason, that it was *causa data causa non secuta*, yea was *sine omni causa*, William never having fulfilled his part, and now being dead *obærat*, it was become imprestable; and it being a *synallagma*, and the one the mutual cause for granting the other, he having failed who was *primus in obligatione*, she cannot be compelled to perform her part; for, *condictio sine causa* takes place, *sive ab initio sine causa promissum est, sive fuit causa promittendi, quæ vel est finita vel non secuta*, l. 1. § 2. *D. de condict. sine causa*. Answered, That mutual contracts, like those called in law *do ut des, facio ut facias*, where *res* is *integra*, and the one cause dependent on the other, one party cannot crave implement till he perform his own obligations; but it is not so in contracts of marriage, where the marriage itself is the principal thing to be performed; and as a wife will get her jointure though her tocher should never be paid, so the husband, with his heirs and creditors, may claim the tocher though the wife should never be secured in her liferent, the one not being pendent on the performance of the other; and if the mother has neglected to get her daughter secured, and did no diligence against William Chalmers, the husband, in his lifetime, to perform his part, *sibi imputet*; her negligence can be no ground for her retention of the tocher; neither are the obligations *inter eosdem*, for the mother here intervenes as a third party, and the daughter having relied on her husband's security, it can afford the mother no pretence to take away the husband's *jus quæsitum* to the tocher. Replied, That contracts of marriage being *uberrimæ fidei*, natural equity must rule them; and if William had charged for the tocher in his own lifetime, this exception would have debarred him, You must fulfil your own part ere you crave implement from me; and the same will meet the husband's heir and creditors, ay till they offer to perform: And this is no novelty, for the Lords decided thus, Dick *contra* Murdoch, *voce* MUTUAL CONTRACT; and found they were not bound to denude till the mutual obligation in favour of the heirs of the marriage were first performed.—THE LORDS, on Whitelaw's report, found Anna Hutchison the mother not liable to perform her part of the contract of marriage till her daughter were secured in her jointure, in the terms of the articles of contract; but the husband's heir and creditors may claim the fee after her liferent.

The tocher stands affected to make up the defects of the wife's liferent, and when she dies, what is then extant of the stock of the tocher goes to the husband's heirs or creditors; but the non-implement of provisions to bairns or heirs of a marriage, will not stop the payment of a tocher, or give retention thereof.—See MUTUAL CONTRACT.

Fol. Dic. v. 1. p. 310. Fountainball, v. 2. 6. 204.