

THE LORDS found, that the infeftments were fraudulently granted by Tillifour, with intent to postpone Sir Archibald Grant, a lawful creditor; and reduced the same, to the effect of bringing him in *pari passu* with the other creditors. From the words of the interlocutor *vide* Grant against Grant, *voce* INFESTMENT.

No 71.

Reporter, *Shualton*.For Sir Archibald Grant *A. Macdowall & W. Grant*.Att. *H. Home*.Clerk, *Murray*.*D. Falconer, v. 2. p. 9.*

## S E C T. X.

## The Onerosity of Provisions in Favour of a Wife.

1635. June 19. WALKER against POLWARTH.

UMQUHILE Patrick Walker being married upon one Polwarth's wife, betwixt whom there were bairns procreate, he gives a bond *stante matrimonio* to Henry Polwarth, brother to his wife, and to her behoof, for payment of 2000 merks, she not being provided to any liferent or conjunct-fee, or any other benefit or means of maintenance by her husband; at the time of giving of the which bond, the defunct was debtor to fundry creditors, by fundry bonds, preceding this bond given to his wife, in more sums of money than all his goods or means extended to; thereafter, after his decease, the relict and the creditors contesting in a double pointing, raised by the executors of the defunct, which of them should be answered of the defunct's goods, which were not sufficient to pay the half of his debts:—The creditors *alleged*, That the bond given to the wife could give her no right to any of the saids goods, seeing the same were given to her long after these bonds, at which time he could do no deed to their prejudice, he being then in effect a bankrupt, seeing then he had not so much gear as might pay his debts, whereby he could not give to his wife any thing, but *deductis debitis, et post solutum æs alienum*; and so this being *donatio inter virum et uxorem*, and for no lawful onerous cause, it cannot be respected against them; and where the relict opposed that it was given for her maintenance and living, she having no other thing whereupon to live, and receiving no other provision, and that it is in effect *donatio propter nuptias*; they *answered*, That it is not *donatio propter nuptias*, because there is no contract of marriage can be shown betwixt them; likeas she gave no tocher nor other benefit to her husband, and so of law and reason can seek no recompence of his goods; for *dos et donatio propter nuptias in jure paribus passibus ambulant, et equaliter regulantur*: Notwithstanding whereof this allegation proposed for the creditors was repelled, and the relict was found ought to have her proportion with the rest of the creditors, according to the free goods in

No 72.

A bond granted after marriage, for a suitable liferent to a wife, by her husband, insolvent at the time, was sustained in competition with creditors, whose bonds were anterior. The wife was allowed to rank proportionally, although there was neither contract of marriage nor tocher given. Her claim arose *de jure nature*.

No 72. the testament, and according to the quantity of their debts; albeit there was neither contract of marriage nor tocher given; and albeit the creditors bonds were anterior to the relict's; seeing she had a debt owing to her, *de jure natura*, for her maintenance and living, which in its own proportion is as favourable as the creditors debts.

A&. *Hamilton.*

Alt. \_\_\_\_\_.

*Fol. Dic. v. 1. p. 70. Durie, p. 767.*

1676. *January 19.*

SIR JAMES STANSFIELD *against* LADY PITTACHOPE, (BROWN.)

No 73.

A husband, during marriage, gave a liferent provision of his whole estate, in lieu of a contract of marriage. Challenged by prior personal creditors, as thereby they would be postponed till after the death of the lifeentrix. The infestment of liferent, found reducible in so far as exorbitant and not correspondent with the husband's estate and wife's tocher.

SIR JAMES STANSFIELD being infest in the lands of Pittachope upon an apprising thereof, pursues the tenants for mails and duties. Compearance is made for Helen Brown, who produced her infestment upon a bond of provision by her husband, prior to the apprising, and thereupon defended the tenants.—Whereupon it was *alleged* for the pursuer, That this infestment granted to this relict, is fraudulent after contracting of the debts, whereupon the apprising proceeded, in respect that thereby the defunct provides his wife to the liferent of his whole estate.—It was *answered*, That this provision, although during the marriage, was in place of a contract of marriage, and it was never found that an infestment on a contract of marriage was quarrellable upon anterior personal debts, it being only a liferent-right, and onerous by the marriage, which would not have proceeded, if the contract had not been on such terms, and if it might be quarrelled upon anterior debts, all the provisions for women, which are most favourable and privileged, would be unsecured. *2do*, This provision bears expressly to be in satisfaction of an anterior contract of marriage, which the husband had cancelled; and it must be presumed, that this was less than the former, and he was in an entire condition when he granted it.—It was *replied*, That whatever be the case or privilege of contracts of marriage, perfected before the marriage, when it is entire for parties to contract or refile, albeit fraud may be incident and competent even in that case, yet provisions granted *stante matrimonio*, are noways in a like condition; for though they be not revokeable, as donations betwixt man and wife, because of the natural obligation for men to provide their wives, yet they may be most fraudulent, as this is; for the husband knowing his own debt, though he be not broken, by which it becomes known to the world, he may very readily give exorbitant provisions to his wife, in consideration of herself and the children, in prejudice of his creditors; and this provision is of the man's whole estate, and therefore it can be sustained no further than as to the legal provision of a terce. And as to the narrative, bearing a former contract, it cannot prove, being betwixt man and wife, who are the most conjunct and confident persons of any; and it were easy to forge such narratives to defraud creditors; and albeit the liferent be pretended not to make the defunct a bankrupt, seeing the