

1663. July 3.

GORDON *against* FRASER.

No 41.

ONE, in his contract of marriage, having become bound to infest his wife in five chalders of victual for the aliment of his younger children, till their age of fourteen, and having, in implement of this obligation, disposed certain moveables to his wife; in a competition betwixt her, in behalf of the children, and the executors-creditors of the husband, whose debts were contracted after the said dispositon, the LORDS preferred the creditors, unless the defunct were *solvendo* at the time of his decease.

*Fol. Dic. v. 2. p. 280. Stair.*

\* \* \* This case is No 42. p. 2800. *voce* COMPETITION.

1677. January 24. RONALD GRAHAME *against* SARAH ROME.

No 42.

JOHN ROME being obliged by his contract of marriage with his second wife to provide 10,000 merks in favours of himself, and his spouse in conjunct-fee, and the heirs of the marriage; whom failing, to his own heirs and assignees; and to provide also 5000 merks in favours of the remanent bairns of the said marriage;

THE LORDS found, That the father was fiar of the said sums, and that the heir of the marriage and remanent bairns had an interest only to succeed to him as heirs of provision in the same; and that the creditors might affect the said sums, and would be preferable to the bairns, notwithstanding their debts were contracted after the said contract of marriage, and inhibition thereupon, seeing the inhibition could not take away his fee: And the import and effect both of the said obligements and inhibition, is only that the father should do no fraudulent deed, without an onerous cause, in prejudice of the same.

*Reporter, Gosford.*

*Fol. Dic. v. 2. p. 280. Dirleton, No 437. p. 214.*

\* \* \* Stair reports this case:

JOHN ROME, by his contract of marriage with his second wife, is obliged to provide himself and his wife by security in 10,000 merks, and to the eldest son of the marriage, and 5000 merks to the remanent bairns. Upon which contract inhibition was used against the father by the wife's brother. Thereafter he borrows a sum of money from Ronald Grahame, and the bairns of this marriage, beside the heir, obtained decret against the heir of line, and thereupon apprise. Ronald Grahame doth also apprise; and both are within year

No 42.

and day, and are now competing for mails and duties. It was *alleged* for Ronald Grahame, That he ought to be preferred, because Sarah Rome's apprising, proceeding upon a provision in a contract of marriage, in favours of the bairns of the marriage, which if it had taken effect conform to the contract, it would have been by a bond or infestment to the man and wife, the longest liver of them two in conjunct-fee, and to the bairns of the marriage beside the heir; who therefore are heirs of provision, and can exclude no creditors, though contracting after; who, after the other heirs were discussed, would have action against the bairns, as heirs of provision, or as heirs substitute to their father, in so far at least as might be extended to the provision. It was *answered*, That bonds of provision granted to bairns, if delivered, are valid rights, if the granter had an estate sufficient for his debts and these provisions, and will be preferable to posterior creditors, though the bonds of provision be merely voluntary; much more ought provisions in contracts of marriages, which cannot be quarrelled as clandestine or latent, because there was inhibition published, and registrate thereupon, which would reduce Ronald Grahame's bond as posterior.

THE LORDS found the creditor, though posterior, preferable, seeing there were no bonds granted to the children *nominatim*, but a general provision ere they were born; and found that not only the eldest son, but all the bairns of the marriage were heirs of provision to their father, and that they could not come in *pari passu* with the creditor, but only after him, and such provisions and inhibitions thereon could only hinder the father to do any voluntary or fraudulent deed, in prejudice thereof, without a cause onerous; but could not reduce his bonds granted after the inhibition, for sums truly received; yet, upon desire of the children, they allowed them to be further heard *in presentia*.

*Stair, v. 2. p. 497.*

1677. July 10.

CARNEGIE *against* SMITH. (CLARK.)

No 43.

A MAN being bound in his contract of marriage to infest himself and his wife in conjunct-fee, and the heirs of the marriage in fee, in certain subjects, but restricting the wife to the liferent of the half in case of children, a discharge of that restriction during the marriage was found not good against the children, as being gratuitous.

*Fol. Dic. v. 2. p. 282. Stair.*

\*.\* This case is No 2. p. 12840.