

1680. *March 10.* Lady WEMYSS *against* APPLECROSS.

No 45.

A HUSBAND in his contract of marriage being obliged to employ, by the advice of his two brother's-in-law, 12,000 merks to his wife in liferent, and to her heirs, or any she should name, in fee; it came to be the subject of debate, whether the wife was only a liferenter, and her heirs heirs of provision to the husband, and so liable to his debts; or if she was fiar, or if her heirs, who were her children of a former marriage, were fiars, and so creditors who might compete with the husband's creditors.

THE LORDS did not determine this point, but they inclined to think that the wife was fiar. Applecross, the defender, had married her daughter, to whom the father had given a bond of provision.

Harcarse, (CONTRACTS OF MARRIAGE.) No 344. p. 84.

1680. *July 28 & December 1.* BAILIE ANDERSON *against* ANDREW BRUCE.

No 46.

A person in his contract of marriage was bound to provide a sum to himself and wife, and the heirs of the marriage, whom failing, the one half to her heirs. There were no heirs of the marriage. Found that the father might lawfully contract for this sum to a second wife and children.

AT Exchequer, Alexander Anderson, Bailie in Edinburgh, was preferred to Andrew Bruce merchant, in the escheat of — Biccarton, who was nearest of kin to Andrew's first wife, and so laid claim to a third of the conquest during her time, conform to her contract matrimonial.

BAILIE ANDERSON *against* Andrew Bruce (28th June 1680) "THE LORDS found, notwithstanding the conception of Andrews first contract of marriage providing the half of the conquest to his wife, and her mother, called Biccarton, and to her mother's heirs, failing of children of the marriage, yet that Andrew Bruce was fiar, and that he might dispose of it not only for onerous causes, but even as he pleased." For the Lords thought it hard to give away a man's own industry and conquest to his wife's friends, and to render a father a mere liferenter by such a destination; and this were to embolden children to be prodigal and disobedient, "and therefore they found he might not only provide a second wife, but also children of another marriage, notwithstanding of the said clause," They had sustained the like before in Katharine Mitchell's case, 16th June 1676, No 11. p. 3190, *voce* DEATH-BED. *In dubio* conjunct fees are interpreted to make the man fiar, and the wife liferentrix. But the wife will be fiar, if her heritable estate be provided to him and her and the heirs between them, which failing to him. In this case of A. Bruce's, the LORDS found the contract-matrimonial made the wife only liferentrix, and there being no children of that marriage, that Andrew might take sums acquired during that marriage, to provide children of another posterior marriage.

Fol. Dic. v. 2. p. 282. Fountainhall, v. 1. p. 111. & 119.

* * Stair's reports of this case are No 3. p. 607, *voce* APPROBATE AND RE-PROBATE, and No 27. p. 4232, *voce* FIAR.