

This same case being brought in upon 17th January 1627, before the Lords, to be disputed betwixt the same parties, and they heard upon this same reason *de novo*; the LORDS over again found, as it is here set down.

No 46.

Act. *Lawtie.*

Alt. ———.

Clerk, *Gibson.**Fol. Dic. v. 1. p. 310. Durie, p. 82.*

1637. June 28.

GALBRAITH *against* LENOX.

No 47.

IN a case similar to the above, where the tocher was arrested by the husband's creditors, the LORDS decerned in the furthcoming, upon the creditor's finding caution to make the liferent effectual to the wife, and the fee to the children of marriage; but avoided determining if the fee of the subject could be evicted by the husband's creditors, in prejudice of the heirs of the marriage; for the arrester's debt being small, it might possibly be paid by the annualrents of the sum arrested before the husband's decease; in which event there would be no occasion for the question.

Fol. Dic. v. 1. p. 310. Durie.

* * * See This case, No 37. p. 700.

1692. November 22.

SIR JOHN HALL of Dunglass, *against* ELIZABETH LORIMER, Relict of JOHN SANDILANDS.

No 48.

SHE contended the sum craved to be made furthcoming by Sir John, as a creditor to her husband, behoved *primo loco* to stand affected for her liferent-use, as a part of her jointure of 1200 merks yearly, to which she was provided; because, by her contract of marriage, her husband was obliged to lay 10,000 merks of his own money to the 10,000 merks he received with her in tocher, making up 20,000 merks, and to secure it to her in liferent; and by the destination she had right to it.—*Answered*, That the husband's obligation to employ the tocher for her liferent use was but personal, and, notwithstanding thereof, he might have assigned it to whom he pleased; and that her assignation of the tocher to him was simple and absolute, and nowise clogged with the burden of her liferent, which only would have made it a correlative obligation; whereas here the assigning the tocher was not in contemplation of the jointure, but of the marriage.—*Replied*, That the obligations were all *in eodem corpore et contextu* of the writ; and though it might hinder commerce, to make it hypothecated during the husband's life, who might freely uplift and trade with it, yet the marriage being now dissolved by his death, so that it can answer no end of trading, and being yet extant unuplifted, she ought to be preferred.—

The obligation on a husband to employ the tocher for the wife's liferent use, was not mentioned in that part of the contract of marriage, by which the tocher was assigned to him, but was only personal. His creditors, who had attached the subject, were found preferable.

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 dispoise, 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 dispoise the tocher in the terms of her obligation in the contract, she raises a reduction and