

No 324. 1710. July 25. CHALMERS *against* Her HUSBAND'S CREDITORS:

A POSTNUPTIAL contract found to be not reducible as *donatio inter virum et uxorem*, though it was so far unequal, that it was reducible by the wife upon minority and lesion.

Fol. Dic. v. 1. p. 410. Forbes.

* * * See this case, No 265. p. 6056.

1714. November 12. BLAIR *against* HAMILTON.

No 325.

Although a postnuptial contract of marriage was found not revocable, yet the husband was found entitled to do rational deeds which might affect it.

MR WILLAM BLAIR of Auchinvole, having in a postnuptial contract, provided the heirs of his first marriage in 18000 merks; thereafter he enters into a second contract with Bethia Hamilton his second wife (also after marriage) whereby she is provided in 5000 merks in liferent, and the children of the marriage in fee. After his decease, Elizabeth Blair, one of the two daughters of the first marriage, adjudges his estate for 8000 merks only remaining of the above 18000 merks, and Bethia Hamilton the relict also leads an adjudication, for implement of the provisions in her contract: and in the ranking of his creditors a competition having arisen betwixt them, and the relict's oath having been taken, and she owning that she had got some other rights from her husband *stante matrimonio* after the contract of marriage,

It was *alleged* for Elibabeth Blair, that these rights ought to impute in satisfaction of her claim *pro tanto, quia debitor non præsimitur donare*, as was found in the case of the Lord and Lady Ormistoun, *contra* Hamilton of Bangour, 16th November 1708. No 118. p. 5909. *2do*, That the relict's adjudication was null, being led against the husband's representatives for more, and in other terms, than he was liable, in so far as, by the conception of her contract, her tocher could not be uplifted by the husband without her consent; only in case it were uplifted, the husband was bound to re-employ it in the same terms; but *non constat*, that the money was uplifted, and not re-employed, and therefore the Lady could not adjudge, without making this previously appear. *3tio*, That the first contract, though post-nuptial, was not revocable, not being of the nature of a donation, because the husband and father as such was obliged to provide his relict and children, the provision being moderate, and effiering to the tocher, as was found 25th July, 1710, Jean Chalmers, *contra* Lyon of Banchry. No 265. p. 6056.

Answered for the relict to the first, that the creditors might reduce these rights, but could never impute in payment of sums. To the second, that the defunct had declared under his hand, that he had received the tocher; and accordingly many years before his death, delivered up the securities for

it to Orbistoun, in whose hands it was. To the third, it was *answered*, that by the first contract of marriage, the defunct still continued fiar of his own fortune; and what he thereby got in tocher was still obnoxious to his lawful debts; as has been often found. As Creditors of Marjoribanks against Marjoribanks, *voce* PROVISION TO HEIRS AND CHILDREN. So that Elizabeth Blair, coming in but as an heir of a marriage, could not be preferred to the relict, who is a just and onerous creditor for her own portion, provisions to a wife being in the strictest sense onerous, but not so as to children of a marriage. And it is certain, that notwithstanding any provision in a prior contract of marriage, the husband still remains *dominus*, may contract debts, or enter into any onerous contract, which may eventually render the provisions ineffectual; and is of the nature of a tacit revocation, the prior children having only a destination of succession; and so can draw nothing till their father's debts and onerous deeds be satisfied.

THE LORDS found, that any deed in the relict's favour, is imputable in payment of the debt she adjudged for, unless she instruct a separate onerous cause; and repelled the allegiance against the adjudication, she instructing the tocher was uplifted by her husband. And found the first contract of marriage, though after the marriage, was not revocable, but that the husband being fiar, might do rational deeds; and that the liferent provision in the second contract of marriage, was a rational deed.

For Hamilton, *Boswel.*

Alt. *Alexander.*

Clerk, *Duric.*

Bruce, v. I. No. 4. p. 5.

1716. July 31.

JOHN STIRLING *against* MARY CRAWFURD.

THE deceased Bethia Crawford, Lady Darleith, having been married to the said John Stirling, and no contract of marriage, she nevertheless having a jointure by her first husband, and he a post bearing some proportion thereto, they made a post-nuptial matrimonial settlement, whereby each of them made a testament, and thereafter mutual dispositions for the more security, whereby they dispo, each to the other who should survive, their whole goods and means that should belong to the predeceasing at the time of such decease, so that the longest liver was to bruik all; and, in the husband's disposition, mention is made of his cloaths, watch, sword, &c. as well as plenishing, goods, and sums; the wife also, in her's, expressly dispo, the paraphernalia; and both dispositions are of the same date, and before the same witnesses: The wife doth nevertheless thereafter revoke, and grants disposition of the said subject in favour of the said Mary Crawford, her sister; and after the wife's decease, Stirling the husband, pursues the sister for certain sums.

No 326.

A general disposition betwixt a wife and her husband during the marriage, no contract having preceded, is not *donatio inter virum et uxorem*, even *quoad excessum*.