

father had acquired to himself and his heirs, of which he was certainly fiar, as was lately decided in the case of Ronald Graham against Sarah Rome, No 42. p. 12887, where the Lords preferred Graham's adjudication of the father's estate to the comprising led at Sarah Rome's instance, upon the obligation upon her mother's contract of marriage, by which the father was obliged to employ a sum in favour of the bairns to be procreated of the marriage, albeit there was an inhibition served upon the contract, before the contracting of Robert Graham's debt; which, in such a case, has only this effect, to secure the obligation, according to the nature thereof, which is only in the case of competition with other creditors, or in the case of gratuitous deeds; but does not prejudice lawful creditors of their just debts, albeit contracted after the obligation and inhibition; the father being still reputed fiar of the sum as to them; and, upon the same ground, albeit the defender's adjudication be within year and day of the creditors', yet she cannot come in *pari passu* with them; but they ought to be preferred as to the whole sum; and that brocard in law, That Qui habet actionem rem ipsam tenere videtur, takes place only in personal, but not in real obligations: And the defender ought not to be preferred to the 10,000 merks, which was her mother's portion, seeing the sum was paid to the father, and was only obliged the same to his own 20,000 merks, to be employed in manner foresaid; so that he was fiar of both the sums. THE LORDS found the obligation in the contract, in favour of the children of the marriage, both as to the fee of the 10,000 merks of tocher, and of 20,000 merks to be advanced by the father, was but of the nature of a destination; and that there being no special application for implement in favour of the defender, who was the only child of the marriage, nor diligence done for fulfilling to her the obligation and provision contained in the contract, before the contracting of the pursuer's debts; therefore, reduced the adjudication, and diligence done at the defender's instance, and preferred the creditors.

Sir P. Home, MS. v. 1. No. 255.

1686. *March.*

CREDITORS of DAVID MURRAY against Mr JAMES MURRAY.

DAVID MURRAY'S Creditors having adjudged his lands, and raised reduction of a prior adjudication, at the instance of Mr James Murray, for 6000 merks, provided by David, in his contract of marriage, by way of destination to the bairns of the marriage; to which provision Mr James had right by assignation from the only child of the marriage;

No 49.

THE LORDS found, that the daughter's right being but a destination, it could not compete with the father's true creditors; and, therefore, reduced Mr James's adjudication *in quantum* prejudicial to the true creditors.

Harcarse, (CONTRACTS OF MARRIAGE.) No 379. p. 98

1687. December 6.

FRASER *against* FRASER.

No 50.

A father had not expressly burdened the conquest with provisions to the children of his first marriage. was found, that, before the extent of the conquest provided to the children of a second marriage came to be calculated, the provisions to the first ought to be deducted.

A HUSBAND, in his contract of second marriage, having provided his wife to a liferent of the annualrent of 3400 merks, and of the half of the conquest; and it being expressly declared, that he had then lands and wadsets, extending to L. 11,000 Scots, which should not be reckoned conquest; the wadsets were redeemed, and lands sold, and the money employed upon personal security, bearing date after the marriage, and mentioning, that it was the product of the redemption or sale. After the husband's death, the wife claimed a liferent of all the sums in the securities bearing date after the marriage.

Alleged for the defender; The L. 11,000, and all debts due at the husband's death, whether contracted in the first or second marriage, must be first deducted; seeing conquest is only considered *debitis deductis*.

Answered; Although it be declared, that the wadsets, and others condescended on, extending to L. 11,000, were the husband's estate at the time, yet he might have spent that money; and the defender ought to prove, that the bonds in question were the product of the estate; *2do*, It is just that the debt contracted during the first marriage should affect the L. 11,000; *3tio*, The provision of 4000 merks to a daughter of the first marriage, paid after the second marriage, ought to be allowed in part of the L. 11,000, which probably was reserved for the children of the first marriage.

THE LORDS repelled the three answers; and found, that all debts resting at the husband's death ought to be paid before conquest can be considered; and that he might portion the daughter of the first marriage, which portion ought to be deducted, without diminishing the L. 11,000, before the extent of the conquest can be considered, although the father did not expressly burden the conquest with the provision, but indefinitely paid it. Here there was no obligation upon him to take the securities of what he should conquest to his wife in liferent; but the clause is, that she accepts of the jointure of the annualrent of 3400 merks, in full satisfaction of all, &c. excepting the liferent of the half of the conquest, which is provided to her.

Harcarse, (CONTRACTS OF MARRIAGE.) No 391. p. 102.

* * * Sir P. Home reports this case :

1687. November 30.—By contract of marriage betwixt Alexander Fraser and Christian Fraser, his second wife, the said Alexander is obliged to pro-