

No 73.

yet she offers to prove the verity thereof, and that she was as amply provided thereby; and so the second coming in place thereof, can never be interpreted a donation, but being remuneratory, cannot be reduced upon the act of Parliament.—It was *replied*, That by diverse practiques, new infeftments given *stante matrimonio*, by excambion or otherwise, out of the same lands, were found not to prejudge creditors, as was lately decided in the case of the Countess of Dundee against the Earl's Creditors, Stair, v. 2. p. 74. *voce* BASE INFESTMENT, in the case of an excambion; as likewise of the Lady Greenhead against the Lord Lourie, No 56. p. 931. where an additional jointure was reduced; as likewise in the case of Haliburton against Porteous. Stair, v. 1. p. 229. *voce* HUSBAND and WIFE.

THE LORDS having considered the debate and practiques, did find, that none of these cases decided did quadrate with this, which were either debates upon additional jointures or upon excambions, where creditors had affected the lands granted in exchange, before any new infeftment; and therefore admitted to the Lady's probation, the quantity of the tocher and first provision, that it might be known if this right under debate, was for a just and necessary cause; and so being remuneratory could not be reduced.

Gosford, MS. No 840.

1714. January 14.

GEORGE LOCKHART of Carnwath against EUPHAN DUNDAS and MR JOHN DUNDAS of PHILPSTON, her Husband.

No 74.
A wife assigned the price of lands to her husband by contract of marriage, as tocher. He contracted for suitable provisions to her and her children. The assignment found not reducible upon the act 1621, at the instance of an anterior creditor.

GEORGE LOCKHART of Carnwath, in January 1693, obtained a decreet against Katharine Swynton, daughter and heir of George Swynton of Chesters, and David Dundas of Philpston, her husband, for his interest, for payment of L. 1000 principal, annualrent and penalty, contained in a bond granted in *anno* 1680, by the Lord Merfington as principal, and the said George Swynton, his brother, as cautioner, to Sir George Lockhart, President of the Session, the pursuer's father. The lands of Chester, then affected with a lifeferent annuity of 600 merks, in favours of Euphan Brown, Katharine Swynton's mother, being sold to a third party for 12,000 merks, there was a contract of marriage perfected, 20th December 1693, betwixt the said David Dundas and Katharine Swynton, whereby the husband got the 12,000 merks, the land's price, in name of tocher, to be applied for payment of his debts; in recompence whereof, he secured his wife in a lifeferent annuity of 8 chalders of victual, out of his own estate of Philpston, and Euphan Brown his mother-in-law, another annuity of 600 merks, in lieu of the equivalent renounced by her out of the lands of Chester, and disposed his estate with these burdens to the heirs male of the marriage, and provided the daughters to L. 1000 Sterling; which contract expressly referred to marriage articles formerly communed upon. No diligence having been done upon the decreet against David Dundas, as husband to Katharine Swynton, *stante matrimonio*; Carnwath pursued Euphan Dundas his heir, and Mr John Dundas her husband, for payment of the sums decerned, upon these grounds; *imo*, That David Dundas

was *lucratus* by the marriage with Katharine Swynton. *2do*, Seeing Katharine, as heir to her father, was liable before the marriage for the debt claimed by the pursuer, she could not *stante matrimonio* dispense, or her husband, a conjunct person, except of a right to the price of her lands, in prejudice of an anterior lawful creditor; therefore the pursuer repeated a reduction of the said fraudulent deed, upon the act 18th, Parliament 23d, James VI. (1621.)

Fol. Dic. v. 1. p. 71. Forbes, MS. p. 16.

No 74.

1738. January 11. ROBERTSON against HANDYSIDE.

A HUSBAND, during the marriage, having infest his wife in an annuity L. 72 Scots a-year, upon a narrative that she was not otherwise provided: In a reduction after the husband's decease, at the instance of his prior creditors, upon the first branch of the act 1621, it was *pleaded* for them, that though a husband is naturally bound to provide his wife in a jointure, this obligation ceases by his insolvency, equally with the obligation to aliment her during the marriage. *2do*, At any rate a liferent provision, granted in the circumstances of insolvency ought never to exceed a *rationalis tertia*, which the present does.—To the *first answered*, Though the obligation on the husband to provide his wife in a jointure, cannot be made the foundation of a process at common law, it is yet a *debitum naturale*, which he is bound to fulfil, and there is no law to bar him from applying his effects to this purpose, as well as towards the fulfilling of his engagements to any other of his creditors, seeing the doing justice to one creditor, in preference to another, is in the power even of a bankrupt, who is not interpellated by diligence; and the law in this case makes no distinction betwixt creditors, whether more or less onerous; and therefore the liferent infestment must stand as not being a gratuitous deed; unless the creditors could say further, that it was done with a view to prefer the wife to the other creditors; so as to found a reduction upon the head of fraud, of which there is no presumption in the present case.—To the *second answered*, If the liferent were immoderate, it would be reducible *quoad excessum*, and restricted to a *rationalis tertia*; but where the estate is so small, that the terec is not sufficient for a moderate aliment, there is no reason for making it a rule.—THE LORDS found the provision in question granted to the wife, after marriage, there having been no precedent contract, a rational and onerous deed, and therefore does not fall under the act 1621.

Fol. Dic. v. 1. p. 70.

No 75.

A husband granted an annuity as jointure to his wife, not previously provided for, which exceeded a third of the value of his estate. Having become insolvent, his creditors claimed preference. The annuity sustained as a rational and onerous deed.