

No 72. the testament, and according to the quantity of their debts; albeit there was neither contract of marriage nor tocher given; and albeit the creditors bonds were anterior to the relict's; seeing she had a debt owing to her, *de jure natura*, for her maintenance and living, which in its own proportion is as favourable as the creditors debts.

A&. *Hamilton.*

Alt. ———.

*Fol. Dic. v. 1. p. 70. Durie, p. 767.*

1676. *January 19.*

SIR JAMES STANSFIELD *against* LADY PITTACHOPE, (BROWN.)

No 73.

A husband, during marriage, gave a liferent provision of his whole estate, in lieu of a contract of marriage. Challenged by prior personal creditors, as thereby they would be postponed till after the death of the liferentrix. The infestment of liferent, found reducible in so far as exorbitant and not correspondent with the husband's estate and wife's tocher.

SIR JAMES STANSFIELD being infest in the lands of Pittachope upon an apprising thereof, pursues the tenants for mails and duties. Compearance is made for Helen Brown, who produced her infestment upon a bond of provision by her husband, prior to the apprising, and thereupon defended the tenants.—Whereupon it was *alleged* for the pursuer, That this infestment granted to this relict, is fraudulent after contracting of the debts, whereupon the apprising proceeded, in respect that thereby the defunct provides his wife to the liferent of his whole estate.—It was *answered*, That this provision, although during the marriage, was in place of a contract of marriage, and it was never found that an infestment on a contract of marriage was quarrellable upon anterior personal debts, it being only a liferent-right, and onerous by the marriage, which would not have proceeded, if the contract had not been on such terms, and if it might be quarrelled upon anterior debts, all the provisions for women, which are most favourable and privileged, would be unsecured. *2do*, This provision bears expressly to be in satisfaction of an anterior contract of marriage, which the husband had cancelled; and it must be presumed, that this was less than the former, and he was in an entire condition when he granted it.—It was *replied*, That whatever be the case or privilege of contracts of marriage, perfected before the marriage, when it is entire for parties to contract or refile, albeit fraud may be incident and competent even in that case, yet provisions granted *stante matrimonio*, are noways in a like condition; for though they be not revokeable, as donations betwixt man and wife, because of the natural obligation for men to provide their wives, yet they may be most fraudulent, as this is; for the husband knowing his own debt, though he be not broken, by which it becomes known to the world, he may very readily give exorbitant provisions to his wife, in consideration of herself and the children, in prejudice of his creditors; and this provision is of the man's whole estate, and therefore it can be sustained no further than as to the legal provision of a terce. And as to the narrative, bearing a former contract, it cannot prove, being betwixt man and wife, who are the most conjunct and confident persons of any; and it were easy to forge such narratives to defraud creditors; and albeit the liferent be pretended not to make the defunct a bankrupt, seeing the

fee is entire and sufficient to pay the debts; that was expressly repelled in the case of the Lord Lourie *contra* the Lady Craig, No 56. p. 931. seeing the creditor must ly out during the liferenter's life; and albeit the anterior contract were proven, yet the lady passing therefrom, and taking this new provision *ex intervallo*, the intervening creditors have interest to reduce the same; as was found in the case of Mr James Reid *contra* the Countess of Dundee. Stair, v. 2. p. 74. *voce* BASE INFESTMENT.

THE LORDS found this bond of provision reducible, in so far as it was exorbitant; and found the same valid, only in so far as it was competent for such persons, according to the condition of the husband's estate and the wife's tocher; and ordained the same to be condescended on and instructed: And found that the narrative of this bond of provision did not prove that there was an anterior contract, having the equivalent provision; but found that allegiance relevant to be proven, to sustain this provision against any personal debts, anterior to the contract or provision; for in the case of Reid *contra* the Lady Dundee, albeit he was infest in an annualrent before the lady's infestment, in lieu of her former infestment by her contract, yet her infestment was preferred, seeing the creditor's prior infestment was base, not clad with possession, and the lady's was clad with the possession of a liferent, reserved to her grand-mother. See PROOF.

*Fol. Dic. v. 1. p. 70. Stair, v. 2. p. 401.*

\* \* \* Gosford reports the same case thus:

IN a reduction at Sir James's instance against the Lady, upon the act of Parliament 1621, upon these reasons; 1<sup>mo</sup>, That he had right to a comprising of the lands of Pittachope from the Lord Lyon; and so being a lawful creditor, had right to reduce to the Lady's liferent infestment, which was granted *stante matrimonio*, with a provision that she should aliment her children, and so was in law *donatio inter virum et uxorem*, and was revokable at the instance of lawful creditors before the last infestment; seeing a husband cannot give any thing to his wife and children by way of provision, but *deductis debitis*; and the infestment being affected with a power to dispoise the same, being a private and latent deed, the creditors were in *bona fide*, to contract, and by comprising did come in the husband's place. 2<sup>do</sup>, As the wife hath nothing in law but a right of terce, which belonged to her husband, and the children a portion natural *deductis debitis*, so albeit the wife was provided by a former contract of marriage, yet the same being cancelled and destroyed with her consent, she can crave nothing by virtue of this contract, but what the law allows; and cannot prejudge any lawful creditor, being but a mere donation, as said is.—It was answered for the Lady, That she having brought with her a very considerable tocher, and being provided more amply than she is now by this contract, whereby she burdened herself with the children's aliment, this is not a donation, but it is remuneratory, and comes in place of the first jointure, and so cannot be questioned by any creditor, who had not a prior right by infestment or inhibition, before her first contract. It was answered to the second, That albeit the first contract was destroyed of consent,

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 life rent 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 life rent 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