

1681. December 15.

SIR WILLIAM BINNING and HUGH WALLACE *against* SIR WILLIAM MAXWELL
of Calderwood.

No 47.

By contract of marriage betwixt John Maxwell of Calderwood and the Lady Millhouse, the husband being obliged to provide the conquest to the heirs of the marriage, and failing heirs-male, to provide to the heirs-female, if there be one daughter, 18,000 merks, and, if two, 24,000 merks; the Lords found the only daughter and child of the marriage not obliged to make up her title to the 18,000 merks, by serving herself heir of the marriage; and that, by heirs-female, in this case, bairns are understood; because of these words, if there be one daughter, &c. seeing provisions to daughters use to be made as to bairns; although this was a contract of a first marriage, and the condition of the provision was in case of no heirs-male; but here the ancient estate of Calderwood was tailzied; and it was understood that the heirs-male of the marriage would succeed thereto, by virtue of the old tailzie, although there remained little of the estate then, but some reversions.

Fol. Dic. v. 2. p. 281. Harcarse, (CONTRACTS OF MARRIAGE.) No 338. p. 82.

1682. February.

CREDITORS of A. MARJORIBANKS *against* MARGARET MARJORIBANKS his Daughter.

No 48.

MR ANDREW MARJORIBANKS being obliged by contract of marriage, to provide L. 20,000 to himself in liferent allenary, and to the bairns of the marriage in fee, with a provision, that they should have right thereto without representing him; and he not having employed the sum, but contracted debt after the marriage, the bairns and those at whose instance execution was appointed to pass, for implement of the contract, adjudged his lands. His creditors having also adjudged, raised reduction of the bairns' right upon these grounds; *1mo*, The father's liferent must be understood a fee, and the children must be considered only as substitutes therein to him; for if destinations in contracts of marriage, which are private deeds, could state children creditors, except as to the father and his heirs, we might bid adieu to all commerce, and no man could deal secure; *2do*, Children in competition with creditors are always reputed heirs of provision *in quantum lucrati*; *3tio*, The father would have remained fiar, though he had implemented the obligation at the time of the marriage, otherwise *dominium* had been *in pendent*, till the bairns were born, which is absurd.

One, in his contract of marriage, obliged himself to provide a sum to himself in liferent allenary, and to the children in fee, to which they were to have right without representing him. This found to import only a destination, in which the children were held to be creditors only from the date of their diligence upon the obligation.

Answered, Children are liable in respect of creditors, as heirs of provision, where the mother is conjunct fiar; but here he hath but a liferent-allenary; *2do*, Mother's portions could not otherwise be secured to their children, which