

No 48.

THE LORDS, by a plurality, found the obligation not being in the assignation, it was but personal; and so preferred Sir John, the husband's creditor, on his diligence.

Fol. Dic. v. I. p. 310. Fountainball, v. I. p. 520.

1698. *January 27.*KENNEDY *against* LYAL.

No 49.
Found as
above.

A COMPETITION arising between Sir Thomas Kennedy and Jean Lyall, for the mails and duties of some tenements in the Pleasants; Sir Thomas having adjudged the same from John Dawling her husband, her ground of preference was, the houses originally came by her as heiress to her father, proprietor of the same; and by the contract of marriage, whereby she disposes them to Dawling, he is with the same breath obliged to infest her in a liferent of 400 merks yearly; forth of these houses, and a tenement he had in Leith; and the one being the mutual cause of the other, his creditors cannot carry away the lands without first they secure her jointure, as he was obliged to do himself, the contract being a *synallagma*, and the obligations properly mutual causes each of the other. *Answered*, Though the contract runs in these terms, she disposes the lands simply and absolutely to her husband, and then it bears, 'for the which causes he obliges him to infest her in the said annuity,' which is merely a personal obligation, wherein the husband's singular successors are no way concerned, unless the disposition had been conditional, or expressly burdened with her liferent; and this conception can no more bind his creditors than if she had assigned her tocher, consisting of a bond of borrowed money, and the husband's assignee craving the same, the wife could never stop the payment on the pretence that she must be first secured in her jointure. — THE LORDS found the obligation but personal, and preferred Sir Thomas the creditor.

Fol. Dic. v. I. p. 310. Fountainball, v. I. p. 817.

No 50.

In a case similar to Galbraith against Lenox, No 47. p. 4387. the Lords found, that the tocher might be evicted by the husband's creditors upon finding security for the wife's liferent, without regard to the children of the marriage.

1703. *December 23.*CHALMER'S CREDITORS *against* HUTCHISON.

By articles of a contract of marriage betwixt William Chalmers of Blackcraig, brother to Gadgirth, and Anna Dunbar; the said William is to have in readiness 15,000 merks of his own means, and to take the securities thereof to the wife in liferent, and the children in fee; and, on the other part, Anna Hutchison, mother to the said Anna Dunbar, the spouse, obliges herself to dispoise, in name of tocher, to the said William, some lands and houses in Machlin. William deceases, leaving several children and his wife behind him, but never secured her in her jointure, not being able to perform his part of the contract; and his children and creditors insisting against Anna Hutchison to dispoise the tocher in the terms of her obligation in the contract, she raises a reduction and