

with her, the young woman deceases before year and day. The mother, who had paid a part of the tocher, pursues for repetition. It is *alleged*, That the tocher was the young woman's own gear, and that she had made her husband's brother assignee thereto, to the behoof of her husband. THE LORDS ordain to pay back the tocher-good again to the mother contractor, and ordain the mother to find caution to make the sums forthcoming to all parties having interest.

No 380.

*Auchinleck, MS. p. 125.*

1672. November 9.

GUTHRIE against GUTHRIE.

By contract of marriage betwixt John Menzies and Agnes Guthrie, Thomas Guthrie her brother is obliged to pay to the said John 500 merks of tocher, and that in satisfaction of her portion-natural, and all provisions made to her, whereof she discharges her brother. The marriage having dissolved within year and day, by the death of the husband without children, the said Agnes pursues her brother for payment to her of the tocher; who *alleged* absolvitor, because his obligation being in contemplation of the marriage, the same being dissolved, the obligation ceaseth, even though he had been obliged to pay, and employ for his sister the said sum; whereas he is only obliged to pay it to the husband, who was to ware and bestow a sum for his wife; and if a voluntary concession of a tocher, upon the account of a marriage, should be obligatory, though that marriage dissolved without effect, it would be of very evil consequence to parents and others. It was *answered*, That if the brother's obligation had been, or borne to be, for love and favour, this ground might have been with some probability *alleged*; but here the sister discharges her portion-natural, and all provision; for which if she were now pursuing, this contract would exclude her from any further than this 500 merks, whatever the value of her interest were, notwithstanding the dissolution of the marriage. It was *replied*, That the contract did not bear, that there was any thing due to the sister; and the clause 'in satisfaction, &c.' is of mere style, and the dissolution of the marriage puts both brother and sister in the case they were in before the contract.

THE LORDS would not sustain this action, but found the contract dissolved, even as to the brother and sister, unless there had been a portion or provision due to the sister, and that the clause 'in satisfaction' had not been adjected in course of form, without communing or consideration.

*Fol. Dic. v. 1. p. 414. Stair, v. 2. p. 116.*

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No 381.

A marriage having been dissolved within year and day, a tocher provided by a brother to his sister, payable to her husband, who was to employ it for her use, was found void.

Gosford's report of this case, next page, is different.

No 381.

\*.\* Gosford reports the same case :

IN a pursuit at Agnes her instance; against Thomas Guthrie her brother for payment of 500 merks, *super hoc medio*, That the said Thomas, in the contract of marriage betwixt the pursuer and John Menzies, became obliged to pay in name of tocher to the said John the foresaid sum, for which the said Agnes and her future husband did accept the same, in full satisfaction of all portion-natural which might befall to her through her father's decease, and did discharge her brother thereof; and seeing the marriage was now dissolved by the death of the said Menzies within year and day, therefore her brother was obliged to pay her the foresaid sum. It was *alleged*, That the marriage being dissolved, no action could be founded upon that contract of marriage, bearing that the same was to be paid in name of tocher to the husband; and therefore, as to any portion-natural, or provision due by the father, the defender must be pursued *via ordinaria* upon these titles.

THE LORDS did sustain the action, notwithstanding of the defence, and found, that albeit as to the obligation for tocher payable to the husband and his heirs, the same was extinct by the dissolution of the marriage; yet *quoad* the pursuer, who had given a sufficient discharge of all portion-natural and provisions, against which she can never be reponed, albeit they did far exceed the sum of 500 merks, that the contract was still obligatory against the defender for payment of that sum which was due upon another just cause than for tocher.

Gosford, MS. No 516. p. 273.

No 382.

A marriage dissolved within a year by the wife's death. The infeftment by the father to the son, of his estate, in contemplation of the marriage, was found also to be void.

1678. July 16. The LORD BURLEIGH *against* ARNOT of FAIRNIE.

THE Laird of Fairnie, by contract of marriage, disposed his whole estate to his son Sir Robert Arnot, and his future spouse, Carnock's daughter, in conjunct fee, as to a part of the estate, and the rest to Sir Robert in fee, reserving his father's liferent, with a power to burden the estate with L. 10,000. The tocher being 16,000 merks, is payable to the father, whereof eight was paid, whereupon the marriage followed, but the Lady died within the year. Carnock renounces the 8000 merks paid, providing Fairnie secure the same for Sir Robert, or accept thereof as a part of the L. 10,000, or burden the estate with the L. 10,000. Shortly after, Sir Robert died also, and Fairnie did thereafter contract his second son, James Arnot, and disposed his whole estate to him, in contemplation of the marriage; and James contracts many debts, whereupon the estate was affected with diligences; and after his death, his son entered heir to Sir Robert, his uncle, passing by his father, supposing thereby to shun his father's debt, and bruik his estate, as heir to his uncle.