

to the liferent of the whole means and moveables; she pursues her husband's heirs for implement, who *alleged*, Absolvitor, because she has not fulfilled her part of the contract, and instructs not that she delivered to her husband 4000 merks in worth or ware. It was *answered*; It must be presumed that she has done it after so long a time, seeing all she had came in possession of her husband.

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THE LORDS found the presumption not sufficient; but before answer, ordained the pursuer to condescend by witnesses, or otherwise, how she would prove, that she had that means the time of the marriage, and ordained these to be examined *ex officio*.

*Fol. Dic. v. 2. p. 139. Stair, v. 1. p. 302.*

1672. December 11. CALDERWOOD against CUNNINGHAM.

No 84.

ALEXANDER CALDERWOOD, as donatar to the bastardy of Robert Menzies, pursues Margaret Cunningham his relict, for delivery of his goods, who *alleged*, That she was executrix-creditrix confirmed for implement of her contract of marriage. It was *replied*, That she could not retain for 3000 merks, which was her tocher, because herself was obliged to pay the tocher, and the husband was only obliged to employ it when he received it. It was *answered*, That the clause being, that she, and a friend who contracted with and for her, being obliged to pay conjunctly and severally, and he not being cautioner, or having any clause of relief, the husband ought to have put him to it, and the wife during the marriage, was not in capacity to do any thing; and it is ordinarily sustained for relicts to have their jointure, though their tocher be not paid.

THE LORDS found, That the wife and her friend being bound as co-partners, if the husband failed in diligence as to her friend, it should not prejudice the wife, and therefore gave her allowance as to the one half of the tocher, and not to the other part, in regard that her friend might have had recourse to her for that half, in case he had been distressed.

*Fol. Dic. v. 2. p. 139. Stair, v. 2. p. 131.*

\* \* Gosford reports this case.:

ALEXANDER CALDERWOOD, as donatar to the estate of Robert Menzies, by reason of bastardy, did pursue Margaret Cunningham, as vitious intromissatrix with her husband's goods, who was debtor to Menzies. It was *alleged*, *imo*, That the gift of bastardy could be no title to the donatar, but he ought to confirm, the sums being moveable; *2do*, The defender was confirmed executrix-creditrix to her husband by her contract of marriage, whereby he was obliged to employ 9000 merks to him and her in liferent, and so had right to the whole goods confirmed during lifetime. It was *replied* to this last defence, That by the contract of marriage, the husband was to employ 3000 merks of

No 84. the 9000, which was the defender's tocher, at the receipt and payment thereof, which was never made to the defender's husband during lifetime. It was *duplied*, That William Cunningham being burden-taker for the said Margaret for payment of the tocher, her husband ought to have done diligence against him, and recovered payment, and his omission thereof cannot prejudice the defender of her liferent.

THE LORDS, as to the *first*, found, That a gift of bastardy was no title to moveables without confirmation; and therefore found, that there should be a confirmed testament before extracting; as to the *second*, Having considered the contract of marriage, whereby the defender, and William Cunningham, her brother, as burden-taker for her, were obliged to pay the tocher at a certain day, conjunctly, but not severally, and that the husband was not obliged to employ the same before payment; they found, That she was not creditor as to her own half, for which her husband could do diligence against her, being his own wife; but sustained the defence for the other half due by William, as conjunct debtor, against whom he might have done diligence.

*Gosford, MS. No 537. p. 284.*

1674. June 6.

LAW against MUIR.

No 85.

THE LORDS found, That there is a great difference betwixt an obligation by a woman in her contract of marriage, to pay a sum of money in name of tocher, and her being obliged to enter her husband to the possession of goods and gear, extending to a sum named; for, in the first case, they found, that the parties having lived long together, although the wife had gotten no discharge, it was not sufficient to prejudice her of her liferent; but, in the other case, the affirming that she had goods and gear to a certain value, and it being offered to be proved, that they were evicted from her, it was found, that she ought to condescend and prove, that she had goods of her own to the extent of the sum named in the contract.

*Fol. Dic. v. 2. p. 140. Gosford. Dirleton.*

\*\*\* This case is No 336. p. 6119.

1682. December 21.

SCOTLAND against REID.

No 86.

JOHN SCOTLAND, as executor to Henry Bairdner, who was first husband to Jean Reid, pursued her and her second husband, for payment of 2000 merks, which she was obliged in her contract of marriage to pay to her deceased husband, in name of tocher; the LORDS found, in regard the wife was only party contractor for herself, and that none was burden-taker for her, or obliged with her for