

No 4.

A husband being obliged to eik a sum to the tocher, and employ both to his wife in liferent, and to the children in fee, found not entitled after his wife's decease, to charge for the tocher, unless he would eik thereto his part, and once employ the whole for the children.

1073. July 2. DAVID JAFFREY *against* THOMAS COLLISON.

IN a suspension raised at the instance of Thomas Collison, for payment of three thousand merks, which he was obliged to pay in tocher with his daughter, in the contract of marriage betwixt him and the charger, upon this reason, That in that same contract, the charger, upon the payment of the tocher, was obliged to eik three thousand merks thereto, and employ the same for his wife's liferent, and his own, in conjunct fee, and the bairns to be procreated betwixt them; it was *answered* for the Charger, That the reason was noways relevant, because his wife being now dead, who was liferenter, the charger is now absolute fiar of the said sum, and, if it were employed, might uplift and assign the same It was *replied*, That the payment of the tocher, and the charger's obligation in a contract ought to be *sumul et simel* performed; and as to the event and import thereof, that it is not now in question. THE LORDS did find the reason relevant, and decerned the suspender to make payment, and the charger immediately to eik thereto the sum wherein he is obliged, and to employ the same, conform to destination, to himself and the children of the marriage, after his decease, his wife being now dead, that the children might be once secured therein, seeing there was no more here in question.

Fol. Dic. v. 1. p. 594. Gosford, MS. No 608. p. 133.

No 5.

A party having become bound in his contract of marriage, to infest the heir-male in the fee of his lands, with absolute warrandice and assignation to mails and duties, was found obliged to do so, before receiving a part of the tocher, which had remained unpaid.

1724. February 5. SUTHERLAND of Little Torboll *against* Ross of Aldie.

IN a contract of marriage betwixt Mr Sutherland and Aldie's daughter, Mr Sutherland became bound to infest the heir-male of the marriage in the fee of certain lands; and this contract contained clauses of warrandice and an assignation to mails and duties after his decease. On the other part, Aldie stipulated a certain sum in name of tocher with his daughter payable at three different terms.

The marriage dissolved by the death of the wife, but there existed a son procreated of it; and some part of the tocher being unpaid, Mr Sutherland brought an action for payment against Aldie; for whom it was pleaded in defence, That the obligations in the contract were mutual; and Mr Sutherland not having implemented his part, by infesting the heir of the marriage in the lands contained in the contract, the defender could not be liable in payment of the tocher which he had stipulated.

To which it was *answered*, That there could be no immediate resignation, because though there did exist a son of the marriage, yet he could not with any propriety be said to be the heir-male of it, since his title as such depended upon the predecease of his father.