

proven; but granted certification against any right of the vassal to the superiority.

But it was not condescended, whether this apparent heir was immediate, or if there intervened any person that was, or might be heir; for certification might have been craved against their infeftments.

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1676. *July 14.* JEAN LOCKHART and Her HUSBAND *against* JAMES BONNER.

By contract of marriage betwixt umquhile John Bonner and Jean Lockhart, there is contracted, in name of tocher, 2000 merks by Cleghorn, her father, and she assigns a bond of 6000 merks granted to her by Allan Lockhart, her uncle. And it is provided, that if the said John Bonner should die without children of that or the former marriage surviving, that 4000 merks shall revert and return, and should be forthcoming to the said Jean Lockhart. Whereupon she pursues James Bonner, as representing the said John, his brother, for payment of the 4000 merks.

The defender ALLEGED, Absolvitor; because his brother was not liable to pay 4000 merks, but that the same should revert and return; which, therefore, could not oblige him, unless he had received the sums: which he denies.

It was ANSWERED for the pursuers, That all provisions in favours of wives are effectual, though the tocher be not paid; for the wife, being *sub potestate viri*, and not obliging to pay any tocher, the failing thereof cannot make her liferent fail, as *causa data non secuta*; because the marriage is the cause of the wife's provision.

It was REPLIED for the defender, That, though the allegiance may hold in jointures, yet there is in this contract a large jointure of £100 sterling, which is not quarrelled. But this clause pursued on is not to pay, but is conceived *passivè*, that 4000 merks shall revert and return, and be forthcoming, not expressing by whom: so that the pursuer can only have access against those representing her father and uncle, unless she prove that her husband received the tocher; for he was obliged to do no diligence to recover it; and, although he had, it could be no more than such diligence as was used for himself: so that all he can do is, to assign her 4000 merks of that which is due by her uncle; which he is willing to do; and, though he had received her father's part, he ought to repay no part of it, being less than the husband's half.

It was DUPLIED for the pursuers, That the wife, having a joint interest, and being *sub potestate viri*, the husband was obliged to do such diligence for her as provident men used to do; and, after so long time, when the contractors are dead, it must be presumed that he obtained payment.

The Lords found, That the husband was obliged to do such diligence as provident men used, and that he was liable for 4000 merks, unless he prove that he used diligence, and instruct the reason of not recovering the sum.

The defender then ALLEGED, That he had done diligence against Allan Lockhart, the uncle.

Which the Lords sustained relevant to be proven as to Allan's sum; but, seeing no diligence was alleged against Cleghorn, they decerned the defender liable for the half thereof.

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