

No 270.

A wife was infest in a liferent with this condition, that she should have no benefit by her infestment till her tocher should be paid. Found that neither her husband nor his singular successors could obtrude this provision, unless it could be instructed that the husband did diligence, or that the debtor of the tocher was known to be insolvent.

1671. November 21. MENZIES against CORBET.

By contract of marriage betwixt John Maxwell of Wreath, and Mary Menzies, she is infest in certain lands in liferent; but the contract contains a clause, that neither she nor her children should have benefit thereby until the tocher were fully paid; but she is not the person obliged for the tocher. John Corbet having apprised the lands from her husband's apparent heir, the tenants call them both in a double pointing. The relict craves preference upon her infestment, as being anterior. The appriser excepts upon the suspensive clause in the contract. The relict answers, that the appriser in this point can be in no better case than the husband's heir, who would be excluded by this objection, that the wife not being obliged to pay the tocher, but a third party, it was the husband's duty to have pursued for the same, and his wife being *sub potestate viri*, could nor should not pursue therefor; and the husband, nor none succeeding to his right, can obtrude the want of that provision, which was through his own fault;

Which the Lords found relevant, unless the apprisers instruct that the husband did diligence, or that the debtor of the tocher was known to be insolvent; the husband having lived seven years after the marriage.

Fol. Dic. v. 1. p. 407. Stair, v. 2. p. 5.

1678. July 25. STEWART and IRVINE against STEWART,

No 271.

Found in conformity with Wolf against Scott, No 268. p. 6064.

A WOMAN pursuing for her liferent; *alleged*, The tocher cannot be employed, because it was never paid.—THE LORDS repelled this, since the husband had not done diligence to recover it, and the wife could not, being *sub potestate viri*; which the Lords had decided before, between Joan Lockhart and James Bonar, and between Daniel and the Relict of Menzies of Castlehill.* and it agrees with the civil law, *l. 26. C. De jure dotium*, unless it was promised *ex liberalitate et animo donandi*, and he become *lapsus*, *l. 28. D. De regulis juris; Et tunc tenetur in tantum quantum facere potest.*

Fol. Dic. v. 1. p. 407. Fountainball, MS.

1710. February 3. LAIRD and LADY AIRTH against HAMILTON of Grange.

No 272.

Where the wife herself was the only person bound to pay the tocher, she

JOHN HAMILTON of Grange, and Mrs Jean Bruce, daughter of Mr Alexander Bruce of Airth, with consent of her father and Mrs Ann Van Eik, her mother, having, 22d September 1659, at Teyll, in the province of Guelderland, entered into a contract of marriage, bearing, ' That the bride brings with her to the

* Examine General List of Names.

' marriage, likeas her father and mother do give with her obligations amount-
 ' ing to the sum of 18,600 guilders, with the following conditions and stipula-
 ' tions, in case the bridegroom die before the bride, leaving children of the
 ' marriage, she should possess the house of Grange, and enjoy yearly during
 ' her lifetime 4000 merks out of the bridegroom's readiest effects; all which the
 ' parties contractors promise to perform to each other upon faith and honour, and
 ' further, under obligation, submission, and renunciation according to justice, &c.
 Which contract is not signed by the Laird of Airth, but only by his wife, the
 bridegroom and bride, and the friends accompanying them at the marriage.
 Grange having died before the Lady, leaving children of the marriage, she mar-
 ried Richard Elphingston of Calderhall, who got the estate of Airth disponed
 to him and his heirs. Elizabeth Elphingston, now Lady Airth, as representing
 Calderhall her father, with the concurrence of William Dundas her husband, pur-
 sued Hamilton of Grange, as representing the first husband of Mrs Jean Bruce,
 the pursuer's mother, for payment of 32,000 merks of bygone jointure due to
 Calderhall her second husband, *jure mariti*.

Alleged for the defender, No process can be sustained for the jointure, till it
 be instructed, that the 18,600 guilders of portion stipulated by the contract as
 the cause thereof, is paid.

Answered for the pursuer, No tocher is due by the contract; for it doth not
 bind the bride for it, since it bears only a narrative that she brings so much with
 her; nor was her father bound, who did not sign the contract.

Replied for the defender, The bride was bound for the tocher, not only by
 her signing the contract, but also as heir to her father, who was bound. *2do*,
 The pursuer, as deriving right from her father, cannot claim the bygone liferent
 annuities, without paying the tocher, the mutual cause thereof, 9th Feb. 1673,
 Dick *contra* Murdoch, *voce* MUTUAL CONTRACT; 15th June 670, Raith and
 Wauchop *contra* Wolmet and Biggar, *IBIDEM*.

Replied for the pursuer, The implement of a wife's provision doth not depend
 upon payment of the tocher, July 1665, Mackie *contra* Stewart, *voce* PRESCRIP-
 TION; 11th June 1670, Hunter *contra* Creditors of Peter, No 2. p. 1687; Stair,
 Inst. Tit. CONJUGAL OBLIGATION, § 22; because, though a tocher be an ordinary
 motive and concomitant of marriage, the completing the marriage is the true
 cause that makes the provisions effectual. So that arguments drawn from other
 mutual contracts do not meet the present case; and in none of the decisions cited
 by the defender, was there a pursuit for jointure, at the instance of a wife, or
 any representing her.

Duplied for the defender, Though marriage is favourable, yet *pacta nuptialia*
eatenus tantum procedunt, quatenus respondent legibus; and law hath prescribed
 general rules to all mutual contracts without exception. It is true, Grange
 might have effectually secured his Lady in a jointure without getting any to-
 cher; as marriage is often solemnized without thoughts of a jointure to the wife;
 and tochers have been given where the husband had no equivalent to give in

No 272.
 was found to
 have no ac-
 tion for her
 jointure, un-
 til she per-
 formed her
 part.

No 272. jointure; and are frequently due, when the jointure takes no place by the husband's surviving his wife. But since the jointure here was provided in contemplation of a suitable tocher stipulated, tocher and jointure are *correlata, quæ mutuo se ponunt, et tollunt*, the latter cannot be claimed, unless the former be paid; and far less when the father, who should have paid it, did not sign the contract, and might resile, whereby there was also *locus penitentiae* as to the jointure.

THE LORDS found, That the pursuer, as heir to her father, is under no obligation to pay the tocher, in respect her grandfather did not subscribe the contract, and there was no separate obligation for the tocher; but found, That albeit the contract is not null for not being subscribed by the bride's father, mentioned therein as a contractor for the tocher; yet the pursuer cannot insist against the defender for payment of the jointure, without paying the tocher, except in so far as the jointure exceeds the tocher. See LOCUS PENITENTIAE.

Fol. Dic. v. I. p. 408. Forbes, p. 394.

DIVISION IX.

The wife's personal privileges.

BRUNTISLAND *against* COBB, OR BROWN *against* MONTEIR.

No 273. A HUSBAND has no action of spuilzie against his wife, but *rerum amotarum*; yet in case he make cession of certain goods and gear, intromitted with by her, the assignee has action of wrongous intromission *ipsorum corporum*, although it was objected that no person *plus juris in alium conferre potest quam in se habet*.

Fol. Dic. v. I. p. 408. Appendix to Pitmedden's copy of Colwill, p. 63.

BELL *against* Hog, &c.

No 274. IN an action of double poinding, pursued by John Bell of Bell's Mills, *contra* Janet Hog, relict of umquhile Walter Bell his father, on the one part, and the Ministers and Elders of St Cuthbert's kirk on the other part, anent the sum of 4000 merks, addebted to the said Janet Hog by the said John Bell, and whereof L. 400 was arrested by the session of the kirk, in the said John Bell's hands, for satisfaction of a penalty of L. 400 incurred by the said Janet Hog, *stante matrimonio*, betwixt her and her said uncle, his band, for the slanderous conversing with ane David Houison against the tenor of an act, whereby she in person, in presence of the Session, acted herself, (her husband consenting), to abstain from the said Houison's company, under