No 382.

causa data ea non secuta. *Alleged*, This was a novelty, and though tochers returned in case of dissolution *intra annum*, yet it was *inauditum* that deeds in favours of the husband also returned; and that we had only custom for repeating tochers, and which being exorbitant *a jure communi*, it could not be extended, as laws may be, *ultra proprios limites, ad pares casus. Vid. Remarques du droit Francois, par Mercier, tit. de test, ord. p.* 184. 205. Yet the LORDS found "the father did return again to the fee of his estate in such a case." This would be more dubious and disputable, if the son had had creditors who had effected the estate, as the son's, either in his life, or after his decease, as he who stood last vest and seased therein, who would be preferred in a competition between them and the father's creditors; and this seems to alter the point much. This decision was wondered at by many.

Fountainhall, v. 1. *p.* 7.

1739. *November* 6. KATHARINE HOOD *against* JAMES JACK.

No 383.
A father in his son's contract of marriage became bound to pay him a sum. This sum not having been conveyed to the wife or the children of the marriage, was found due, although the marriage dissolved within year and day.

BY contract of marriage, dated in January 1736, betwixt Katharine Hood and George Jack, she and curators became bound to pay L.907 Scots, in name of tocher. 2*dly*, James Jack, father to George, therein obliged himself to pay to his son, the sum of 2000 merks against the Whitsunday thereafter. James the father, soon after the marriage, died, and before the term of payment of the 2000 merks; whereupon, George, his son, succeeded to him, and made a new settlement in favours of his wife, in which he assigns her, *inter alia*, to the two thousand merks due by his father. This marriage dissolved by the death of George, the husband, within year and day, without issue. Whereupon Katherine brought an action against the Representative of James, for payment of the 2000 merks. *Pleaded* for the defender, That the obligation assigned was granted by the husband's father to him, his only son, in contemplation of the marriage: That the marriage having dissolved within year and day, and without issue, the obligation was void in the same manner, as if the marriage had never been contracted; and as the assignation contained only warrandice from fact and deed, neither the husband nor his representatives were bound to make good the deed that so became void to the pursuer. In support of this defence, it was observed, 1*mo*, That all obligations entered into, in contemplation of a marriage, are properly conditional obligations, and have no effect, if the marriage never follow: That this takes place, not only in obligations entered into betwixt the persons to be married, but also in such as are granted by third parties to either of the married persons in a contract of marriage, *intuitu matrimonii*; such obligations are not simple, but conditional; they are granted with a view to the marriage, and in order to enable the parties to live more comfortably in that state: and if the marriage never follow,

No 383. the end of the obligation, and the condition upon which it was given, falls. Thus, it is believed, no body ever imagined, that when a father binds himself, in his daughter's contract of marriage, to pay a certain tocher, it is in her power to break up the marriage, and to force her father to pay the tocher. 2*do*, It is equally certain, and established by our ancient custom, that the condition of the marriage after-following, in these cases, is not to be considered as *in puncto*; that it is not understood to be fulfilled by the performance of the ceremony, or the parties living a day or two after it; but that it has been thought proper that it should subsist for some reasonable space of time, in order to give provisions made in contemplation thereof, whether by law or paction, their full effect; and that space of time has also, by our custom, been defined to be a complete year, or year and day; so that if the marriage dissolve within that space, the case is the same as if it had never followed; nor is there any exception to this doctrine, but where there is an express clause inserted in the contract that the provision should take place, though it should so dissolve.

Pleaded for the pursuer, That deeds granted in contemplation of a marriage, in favours of either of the parties-contractors, are understood to imply a condition, if marriage follow; and that if no marriage follow, the grants become void, and that possibly, without distinction, whether the grants proceed from the married parties themselves, or from third parties. But the case is quite different with respect to the after dissolution of the marriage; the contracting of the marriage purifies the condition, and makes the deeds granted, *intuitu matrimonii*, effectual: And there is nothing in the nature of things that can distinguish betwixt a marriage subsisting for six months, and for as many years; and if there is issue of the marriage, it is, even by the law of Scotland, as effectual an implement of the condition when it subsists but six days, as if it continued for six years; so that the effects given to the dissolution of the marriage within year and day, and without issue, are peculiarities in the law of Scotland. Now, if the origin of this matter, of the return of the provisions of the husband and wife made *intuitu matrimonii*, is looked into, it will be found to have been introduced from the civil law, without any foundation in the analogy of ours, as the tochers and provisions made to wives with us, whether by law or paction, have not the least resemblance to the *dos et donatio propter nuptias* of the common law. It is true, that, for a great while back, the provisions in favour of the wife have been considered to stand upon the same principles with the tocher; that both became ineffectual, and return to the granter upon the dissolution of the marriage within year and day; yet it is apparent, that the provisions made by the husband's father, not to the wife, nor to the issue of the marriage, but to the husband his own son, stand upon a quite different foundation, and fall to be governed by different rules; it is none of the mutual stipulations in the contract of marriage, but among the parties-contractors on the one side among themselves; and, therefore, it is not easy to conceive upon

what ground the dissolution of the marriage should dissolve such a contract that did not pass betwixt the married parties, but betwixt one of them and his own father; which is the case here, the father being bound to pay to his own son, his heirs, executors, and assigns, 2000 merks at Whitsunday ensuing, without any obligation on the father in favours of the wife, or the issue of the marriage; and that the son, and he only, is bound to secure the prestations to the wife; therefore no good reason can be given, why the dissolution of the marriage should affect the father's obligation to his own son, in which his son, and he only, was creditor. No 383.

And though it were to be supposed the father had a faculty to revoke this obligation in the event which afterwards happened, that faculty died with himself, and his eldest son, who survived him, had the right absolutely in him. In the next place, giving, but not granting, that this provision by the father to the son was to return to the son upon the dissolution of the marriage, without any revocation; yet, upon the father's death, before the dissolution, this conditional return descended to the son, his only child, and he had sufficient powers to dispense with the same. Now as, by the assignation in question, he has conveyed this specific debt in favours of his wife, with warrandice from fact and deed, it is impossible that he, or any claiming under him, can plead the return thereof, and so annul the conveyance which he has made. The assignation contains no condition, if the marriage shall subsist year and day; and none is implied in an assignation of this sort, whatever may be the case of a contract of marriage; and therefore, as he is barred by his warrandice from pleading the return of the debt assigned, so his heirs are in the same way bound. Warrandice from fact and deed implies *neque per se, neque per hæredes stare*, that neither he nor his heirs should stop the deed's being made effectual.

Replied for the defender, There is no distinction whether the provisions are granted by one of the married persons to the other, or by a third party, or to which of the married persons they are granted. The only characteristic to be looked for is, Whether they are granted in contemplation of the marriage; for if that is the case, from whomsoever they proceed, they must depend upon the condition of the marriage actually following, and subsisting for the legal space. And as to the argument, That the provision in question is only payable to George the husband, and as no liferent thereof is provided to the wife, nor fee to the children, they have no interest therein, consequently it is not to be considered as a part of the marriage-settlement, which falls to return upon the dissolution,

It was *answered*, That this must be considered as a part of the marriage settlement, being the only provision granted by the father to his son, and granted expressly in contemplation of the marriage, which, from the nature of the thing, implies a condition, that the marriage shall follow and subsist during the legal space, whether the wife and children are provided to it or no. Suppose a father dispones a greater estate to his son than is liferented by his wife or pro-

No 383. vided to his children; yet surely it will not be said, that the son could break off the marriage, and keep the remaining estate to himself, while that part, which was provided to the wife and children, is admitted to return to the father; there is no reason for such distinction.

Lastly, It was observed, that the assignation was no more than a gift of the provision promised by the father, such as it was, without warranting it to be good and effectual; if it is true, the assignee has right to it; if it is liable to objection, she must take it as it stands; she has right to it such as it is, but has no obligation upon her husband, or his representatives, to make it better than it is. In some events is might have been good, viz. if the marriage had subsisted for year and day, or if a child had been born; but the contrary event has happened, which makes it void; and the pursuer has no obligation upon her husband to warrant her against that event, and therefore must submit to the effect of it.

THE LORDS found, That the obligation by the father James Jack, to the son George, in his contract of marriage with Katharine Hood, became void, the marriage having dissolved within year and day without issue; and found, That the assignation by George to his wife was ineffectual; and therefore assoilzied. But, upon a reclaiming petition and answers, the LORDS found, That the obligation whereby James Jack the father was obliged to pay to George Jack the son, 2000 merks in his contract of marriage with Katharine Hood the pursuer, the same not being conveyed to the wife, or the issue of the marriage, did not become void by the marriage dissolving within year and day.

C. Home, No 132. *p.* 223.

*** Kilkerran reports the same case:

BY contract of marriage between Katharine Hood and George Jack, Katharine Hood and her curators became bound, in contemplation of the marriage, to pay to George Jack, in name of tocher, L. 907 Scots money; and on the other part, James Jack, father to George, obliged himself to pay to his son the sum of 2000 merks; for the which cause, George Jack obliged himself to add to the tocher as much as would make up in whole L. 2000 Scots, which he became bound to lay out on land or annualrent, and to take the securities to himself and spouse in conjunct fee and liferent, and to the children of the marriage in fee. Soon after the marriage, George Jack assigns to Katharine Hood his wife, the said 2000 merks payable by his father; and thereafter George Jack dies within year and day of the marriage.

In an action at the instance of the said Katharine against the heir of James Jack for the said sum of 2000 merks, the LORDS at first, upon the 6th November 1739, on report found, 'That the obligation by James Jack to his son George Jack, in his contract of marriage with Katharine Hood, became

void, the marriage having dissolved within year and day without issue, and that the assignation by George Jack was therefore ineffectual and assoilzied.' No 383.

But, upon the 7th November 1740, on advising petition and answers, they found, 'That the obligation, whereby James Jack the father was obliged to pay George Jack the son 2000 merks in his contract of marriage with Katharine Hood the pursuer, not being conceived in favour of the wife, or issue of the marriage, did not become void by the marriage dissolving within year and day.'

THE LORDS, who were for adhering to the former interlocutor, put their opinion upon this, That the father became bound to pay the said sum to the son *intuitu matrimonii*; and on the other part, the said James Jack obliges, &c. that it was therefore immaterial, whether he became bound directly to the wife and issue, or to his son to enable him to become bound to them, for still it was *intuitu matrimonii*.

The authority of this decision will be the less, when it is remembered, that it proceeded upon the narrowest majority, and when four of the Lords were absent.

Kilkerran, (HUSBAND AND WIFE.) *No 5. p. 257.*

SECT. III.

Marriage presents. Expenses laid out during Marriage.

1679. *January* 14. WAUGH *against* JAMIESON.

No 384.
Marriage dissolving within year and day, some pieces of plate and other things gifted by relations immediately after the marriage delivered to the wife, were found to divide equally betwixt the husband and wife.

SMITH and Waugh having been married together, shortly after the marriage, some gifts were given, as pieces of plate and the like, which were delivered to the wife; but the marriage dissolving within year and day, the question arose, to whom the goods did belong? It was *alleged* they did belong to the wife, because they were delivered to her, and the husband had no right thereto, but *jure mariti*, which failing by the dissolution of the marriage, these gifts remained with the wife, at least such gifts as were given by the wife's friends, behoved to belong to her; for seeing the donatars being partly friends to the husband, and partly to the wife, did not express whether they gifted to the husband or to the wife, but simply delivered the gifts to the wife, it must be presumed, that the wife's friends did gift to the wife, and the husband's friends to the husband; and accordingly the marriage being dissolved, the gifts of the husband's friends would belong to him, and the wife's to her; which the LORDS, upon the first representation, sustained. But it was *answered*, That all dispositions to