

No 45.

of their portions as by their bonds of provisions are provided to return in the case of their decease unmarried, provided only they have so much free estate over and above the payment of their debts. - See APPENDIX.

Fol. Dic. v. 1. p. 309.

S E C T. VII.

Husband's power of disposal over Tocher provided in a Contract of Marriage.

No 46.

1623. November 21. LOGAN against L. KINBLECHMONT.

A husband, to whom the tocher was payable by his wife's father, to be employed, with as much of his own, upon land, 'to the husband and wife, and the heirs of the marriage;' with consent of his wife, assigned the same to his creditors. It was found, that the debtor was not obliged to pay the tocher to the creditors, nor to any other effect than to be laid out in terms of the contract of marriage.

THE Goodman of Kinblechmont being obliged by contract of marriage betwixt his daughter and Mr John Hamilton, to pay to the said Mr John the sum of 4000 merks in tocher, to the effect that the same, and as much to be furnished by the said Mr John, might be employed upon land to the said Mr John and his spouse, and to the heirs to be begotten betwixt them; and Logan, as assignee made by the said Mr John and his spouse to that same sum, which was obliged to have been paid by Kinblechmont, as said is, for satisfying of a debt owing to the assignee by the said Mr John, charges Kinblechmont for payment thereof, who suspends upon this reason, viz. That he was not obliged to pay the sum, but to the effect it might be employed upon land to his son-in-law and daughter, and to their heirs, with the like sum to be furnished by the cedent, as said is; and therefore he could not be holden to pay it to the charger, for satisfying of the cedent's debt, being otherwise destinate, by the tenor of the clause of the contract, which constituted him debtor therein. This reason was found relevant; for the LORDS found, That the assignee could not charge the suspender to pay the sum to any other effect, than according as he was obliged in the contract, seeing the cedent could not ask the same himself, but to that use; and this was found relevant, albeit it was *answered* by the assignee, charger, That he was made assignee both by the husband and the wife, who had the only interest to seek the employment, and who might have discharged the same, being conceived in their favours; for if the sum were employed conform to the contract, the husband might uplift the same, and was master thereof; and so seeing he might uplift the same, if it had been laid upon land, he might also effectually make assignation thereof; which was repelled by the LORDS, seeing the tenor of the parties obligation, who was only obliged to pay for a special end destinate by him, could not be altered without his own consent, who was so obliged.

This same case being brought in upon 17th January 1627, before the Lords, to be disputed betwixt the same parties, and they heard upon this same reason *de novo*; the LORDS over again found, as it is here set down.

No 46.

Act. *Lawtie.*

Alt. ———.

Clerk, *Gibson.**Fol. Dic. v. 1. p. 310. Durie, p. 82.*

1637. June 28.

GALBRAITH *against* LENOX.

No 47.

IN a case similar to the above, where the tocher was arrested by the husband's creditors, the LORDS decerned in the furthcoming, upon the creditor's finding caution to make the liferent effectual to the wife, and the fee to the children of marriage; but avoided determining if the fee of the subject could be evicted by the husband's creditors, in prejudice of the heirs of the marriage; for the arrester's debt being small, it might possibly be paid by the annualrents of the sum arrested before the husband's decease; in which event there would be no occasion for the question.

Fol. Dic. v. 1. p. 310. Durie.

* * * See This case, No 37. p. 700.

1692. November 22.

SIR JOHN HALL of Dunglass, *against* ELIZABETH LORIMER, Relict of JOHN SANDILANDS.

SHE contended the sum craved to be made furthcoming by Sir John, as a creditor to her husband, behoved *primo loco* to stand affected for her liferent-use, as a part of her jointure of 1200 merks yearly, to which she was provided; because, by her contract of marriage, her husband was obliged to lay 10,000 merks of his own money to the 10,000 merks he received with her in tocher, making up 20,000 merks, and to secure it to her in liferent; and by the destination she had right to it.—*Answered*, That the husband's obligation to employ the tocher for her liferent use was but personal, and, notwithstanding thereof, he might have assigned it to whom he pleased; and that her assignation of the tocher to him was simple and absolute, and nowise clogged with the burden of her liferent, which only would have made it a correlative obligation; whereas here the assigning the tocher was not in contemplation of the jointure, but of the marriage.—*Replied*, That the obligations were all *in eodem corpore et contextu* of the writ; and though it might hinder commerce, to make it hypothecated during the husband's life, who might freely uplift and trade with it, yet the marriage being now dissolved by his death, so that it can answer no end of trading, and being yet extant unuplifted, she ought to be preferred.—

No 48.

The obligation on a husband to employ the tocher for the wife's liferent use, was not mentioned in that part of the contract of marriage, by which the tocher was assigned to him, but was only personal. His creditors, who had attached the subject, were found preferable.