

in conjunct-fee; and to the heirs to be gotten betwixt them; and that because no bond was made for employment thereof before his decease.

Fol. Dic. v. 1. p. 369. Kerse, MS. fol. 132.

No 56.

1635. February 7.

CAPTAIN WATSON *against* AITON.

By contract of marriage betwixt Captain Watson and his daughter on the one part, and Mr Andrew Aiton on the other part, Captain Watson is obliged to pay in tocher with his daughter, to the said Mr Andrew Aiton, 10,000 merks, at the receipt whereof, the said Mr Andrew is obliged to employ 5000 merks thereof upon land or annualrent, to himself and his said future spouse, in liferent, and the longest liver of them two, and to the heirs gotten betwixt them in fee; which failing to his heirs whatsoever. After the marriage, and before the payment made of this sum by the Captain, the said Mr Andrew assigns the said sum to his said spouse, and the heirs gotten betwixt them, (she being then great with child) conform to the contract; which failing, *eo casu* he assigns 3000 merks of the said 5000 merks to his said spouse, and the other 2000 merks he assigns to his sister's bairns. This assignation, after the decease of the said Mr Andrew, there being no bairns on life procreated betwixt him and his said spouse, is desired to be reduced as done in *lecto ægritudinis*, at the instance of his heirs; wherein his relict, and the Captain her father being defenders, alleged that this sum was moveable, and so the disposition thereof could not be quarrelled; and the pursuer *answering*, that it was heritable, being destinated for infestment upon land, the LORDS found, that the sum remained a moveable sum, even unto the time the same was employed upon land, conform to the destination; and that the destination of the employment, whereto the creditor was obliged, when it was paid to him by the debtor, made not the sum to be of the nature of an heritable sum, seeing the debtor was not obliged in annualrent therefor, neither was he obliged in the employment, but only the creditor at the receiving thereof; and albeit he had been so obliged, yet it remained ever moveable so long as it remained unemployed upon land, as the destination appointed, whether it were in the hands of the creditor or debtor, and far more while it remained in the debtor's hand unpaid by him.

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 369. Durie, p. 753.

No 57.

An obligation to lay out money when paid on heritable security, does not make it heritable till it be actually settled on land.

1637. January 19.

ROBERTSON *against* SETON.

THOMAS ROBERTSON and Janet Seton contracting marriage together, in their contract, Seton, father to his future spouse, is obliged to pay to Robertson the

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A father, on his daughter's marriage,

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bound himself to pay a certain sum of tocher without annualrent till paid; the husband became bound to settle it and an additional sum heritably to himself and wife in life-rent, and to the heirs of the marriage in fee; whom falling, to the husband's heirs whatsoever. The father having died before payment, his executor was found liable to pay the tocher, in respect of its not bearing interest; but it was also found, that it was payable to the husband's heir, and not his executor, in respect that it was to be heritably secured by him, and to pay annualrents to the relict.

future husband, in name of tocher, 2000 merks at the term appointed, to be employed as follows, and the husband is obliged to employ the same and other 4000 merks therewith of his own, 'to himself and his said future spouse in life-rent, and to the heirs to be begotten betwixt them heritably, which falling to the husband's heirs whatsoever.' The husband dying without bairns, his brother is served heir to him, and charges the father, who was obliged to pay the 2000 merks in tocher as said is to him as heir, alleging the sum was only due to the heir in respect of the said destination; whereupon the father of the relict suspending, as being distressed for that sum by the heir on the one part, and by the executor of the deceased brother on the other part, claiming the same as a moveable sum, and so pertaining to the executor; and it being confirmed by the executor, and the heir and the executor contending therefor, the Lords found, that seeing this sum was appointed by the contract to be paid for that end, to be employed, and that the creditor, viz. the son-in-law, to whom it should have been paid, was obliged to employ the same *ut supra*, whereby both parties had agreed upon this destination of employment of this particular sum *in hoc individuo*, viz. of the 2000 merks obliged to be paid in tocher, therefore that the sum did pertain to the heir of the deceased husband, and not to his executor; and that albeit the executor had recovered the same from the father-in-law as a moveable sum *quoad debitorem*, which his executors might have been liable to have paid, if himself were dead, yet the executors of the creditor would ever have been subject to repay the same to the heir as due to him, and to whom the fee thereof pertained after the death of the relict, who had the right of the life-rent thereof, conform to the contract foresaid, and because the heir would be subject to pay annualrent for this sum to the relict, of all terms since her husband's decease. THE LORDS found, that the father of the relict who was debtor of the tocher, albeit he was not obliged to pay annualrent by the contract, and albeit he was not, nor could not be charged to pay annualrent, and notwithstanding that he was never interpellated for payment, until lately since Martinmas last by the heir of the defunct, there being two other terms to run since the term of payment and since the husband's decease, whereby she might seek payment from the heir of the annualrent of these terms, the Lords found, that albeit the father was not obliged in annualrent as said is, yet seeing he retained the money after the term all this time in his own hand, that he ought to pay as much expenses to his heir, who is liable in the annualrent to the relict, conform to the contract, as effects to the quantity of the said annualrent for the said terms, according to the Lords modification, which they modified to L. 100 for the same, being three terms of all, for which the LORDS decerned.

Act. Mowat.

For the Executor, Nisolson.

For the Heir, King's Advocate & Gilmor.

Clerk, Hay.

Fol. Dic. v. 1. p. 369. Durie, p. 824.