

1670. February 8. DANIEL CATHCART *against* M'CORQUODAIL and MIRK.

M'CORQUODAIL having married the daughter of Mr James Mirk, he, and the Baron of M'Corquodail his brother, are obliged to pay yearly 600 merks to the wife, after the husband's death; and Mr James Mirk is obliged to pay to M'Corquodail 7000 merks of tocher. M'Corquodail being debtor to Daniel Cathcart writer in Edinburgh, in 600 merks, he arrests the tocher in Mirk's hand's, and pursues to make furthcoming, and for instructing, produces the foresaid contract of marriage. It was *alleged* for Mirk, That he is not obliged to pay, or make furthcoming the tocher, unless his daughter were secured in her jointure; for the tocher and jointure being the mutual causes of the contract, neither M'Corquodail nor any deriving right from him by assignation, or arrestment, can demand the tocher till they secure the jointure; and that exception is relevant both against M'Corquodail and his assignees. It was *answered* for the pursuer, That if it had been provided by the contract, that the tocher should have been employed for the wife's security, the defence had been relevant, or there might be some pretence, if there were an obligation upon the husband to secure the wife in land or annualrent for 600 merks. But the contractors having agreed for no security for the future, but having agreed upon a personal security, viz. of the husband and his brother, the husband's part of the contract is performed, and the husband is no ways creditor till his death.

Which the LORDS found relevant, and in respect of the conception of the contract as aforesaid, repelled the defence, and decerned.

Fol. Dic. v. 1. p. 595. Stair, v. p. 668.

* * * Gosford reports this case :

In an action to make arrested goods furthcoming, at Cathcart's instance, as creditor to M'Corquodail, to whom Mirk was debtor by contract of marriage, in the sum of 7000 merks of tocher with his daughter, it was *alleged*, That the tocher was obliged to be paid for a jointure, and an instrument to be given to his daughter, which was never done, and so was *causa data causa non secuta*. THE LORDS having considered the contract of marriage, which did bear payment of the tocher at a certain term, without any condition, or suspension until his daughter should be infest in a liferent, or that the tocher should be employed for her security, they did decern the sums arrested to be made furthcoming to the pursuer, who was a lawful creditor to Mirk's son-in-law.

Gosford, MS. No 248. p. 103.

No 20.
By a contract of marriage, the wife's father was bound to pay a certain sum, and the husband and his heirs to pay an annuity to the wife, after the husband's death. The tocher attachable by the husband's creditors. The father must pay them, the husband being only bound to pay when the term should come, and not having stipulated to give any security in the mean time.