

No 84. the 9000, which was the defender's tocher, at the receipt and payment thereof, which was never made to the defender's husband during lifetime. It was *duplied*, That William Cunningham being burden-taker for the said Margaret for payment of the tocher, her husband ought to have done diligence against him, and recovered payment, and his omission thereof cannot prejudice the defender of her liferent.

THE LORDS, as to the *first*, found, That a gift of bastardy was no title to moveables without confirmation; and therefore found, that there should be a confirmed testament before extracting; as to the *second*, Having considered the contract of marriage, whereby the defender, and William Cunningham, her brother, as burden-taker for her, were obliged to pay the tocher at a certain day, conjunctly, but not severally, and that the husband was not obliged to employ the same before payment; they found, That she was not creditor as to her own half, for which her husband could do diligence against her, being his own wife; but sustained the defence for the other half due by William, as conjunct debtor, against whom he might have done diligence.

Gosford, MS. No 537. p. 284.

1674. June 6.

LAW against MUIR.

No 85.

THE LORDS found, That there is a great difference betwixt an obligation by a woman in her contract of marriage, to pay a sum of money in name of tocher, and her being obliged to enter her husband to the possession of goods and gear, extending to a sum named; for, in the first case, they found, that the parties having lived long together, although the wife had gotten no discharge, it was not sufficient to prejudice her of her liferent; but, in the other case, the affirming that she had goods and gear to a certain value, and it being offered to be proved, that they were evicted from her, it was found, that she ought to condescend and prove, that she had goods of her own to the extent of the sum named in the contract.

Fol. Dic. v. 2. p. 140. Gosford. Dirleton.

*** This case is No 336. p. 6119.

1682. December 21.

SCOTLAND against REID.

No 86.

JOHN SCOTLAND, as executor to Henry Bairdner, who was first husband to Jean Reid, pursued her and her second husband, for payment of 2000 merks, which she was obliged in her contract of marriage to pay to her deceased husband, in name of tocher; the LORDS found, in regard the wife was only party contractor for herself, and that none was burden-taker for her, or obliged with her for

payment, and that the marriage did subsist for the space of 11 years, that the tocher was presumed to be paid, or that the husband had as much of the wife's means as did amount to the sum pursued for.

No 86.

Fol. Dic. v. 2. p. 139. P. Falconer, No 35. p. 19.

* * * Sir P. Home reports this case :

1683. *March.*—By contract of marriage betwixt Henry Bairdner of Coultmill and Jean Reid his wife, she being obliged to pay to her future husband 2000 merks of tocher, at a certain term after the marriage, for which he provided her to a liferent out of his lands; and the said Henry Bairdner being deceased, and Thomas Bairdner, his brother, having acquired right to several debts, and having confirmed the foresaid 2000 merks, as executor-creditor to his brother, and having pursued the said Jean Reid and John Scotland her husband, for payment; the LORDS found, that the marriage having continued for the space of 11 years, that it did presume the tocher was paid, seeing the husband all that time did not reclaim, or that the husband had gotten as much of the wife's means as did satisfy the tocher contracted; and, therefore, assoilzied the defender.

Sir P. Home, MS. v. i. No 444.

1685. *March.*COLTERALLERS *against* WEIRS.

No 87.

ONE having pursued the Laird of Colterallers, as executor to his Lady, for a legacy left by the defunct to the pursuer; *alleged* for the defender, That there were 4000 merks of the tocher contracted by the defunct still unpaid, which debt must be satisfied before any legacy can be claimed.

Answered for the pursuer; That law presumes that was paid, seeing the marriage stood seven or eight years, and the defunct had an opulent estate in goods and money.

Replied; The defender knowing that his wife had the subject of the executy, he was the less careful to get payment of what he wanted; and he is willing to make faith, that so much of the tocher remained unpaid at her death.

THE LORDS sustained the allegiance and reply made for the defender, he giving his oath, &c.

Fol. Dic. v. 2. p. 139. Harcarse, (CONTRACTS OF MARR.) No 373. p. 96.