

## No 4.

A husband being obliged to eik a sum to the tocher, and employ both to his wife in liferent, and to the children in fee, found not entitled after his wife's decease, to charge for the tocher, unless he would eik thereto his part, and once employ the whole for the children.

1073. July 2.

DAVID JAFFREY *against* THOMAS COLLISON.

IN a suspension raised at the instance of Thomas Collison, for payment of three thousand merks, which he was obliged to pay in tocher with his daughter, in the contract of marriage betwixt him and the charger, upon this reason, That in that same contract, the charger, upon the payment of the tocher, was obliged to eik three thousand merks thereto, and employ the same for his wife's liferent, and his own, in conjunct fee, and the bairns to be procreated betwixt them; it was *answered* for the Charger, That the reason was noways relevant, because his wife being now dead, who was liferenter, the charger is now absolute fiar of the said sum, and, if it were employed, might uplift and assign the same It was *replied*, That the payment of the tocher, and the charger's obligation in a contract ought to be *sumul et simel* performed; and as to the event and import thereof, that it is not now in question. THE LORDS did find the reason relevant, and decerned the suspender to make payment, and the charger immediately to eik thereto the sum wherein he is obliged, and to employ the same, conform to destination, to himself and the children of the marriage, after his decease, his wife being now dead, that the children might be once secured therein, seeing there was no more here in question.

*Fol. Dic. v. 1. p. 594. Gosford, MS. No 608. p. 133.*

## No 5.

A party having become bound in his contract of marriage, to infest the heir-male in the fee of his lands, with absolute warrandice and assignation to mails and duties, was found obliged to do so, before receiving a part of the tocher, which had remained unpaid.

1724. February 5.

SUTHERLAND of Little Torboll *against* Ross of Aldie.

IN a contract of marriage betwixt Mr Sutherland and Aldie's daughter, Mr Sutherland became bound to infest the heir-male of the marriage in the fee of certain lands; and this contract contained clauses of warrandice and an assignation to mails and duties after his decease. On the other part, Aldie stipulated a certain sum in name of tocher with his daughter payable at three different terms.

The marriage dissolved by the death of the wife, but there existed a son procreated of it; and some part of the tocher being unpaid, Mr Sutherland brought an action for payment against Aldie; for whom it was pleaded in defence, That the obligations in the contract were mutual; and Mr Sutherland not having implemented his part, by infesting the heir of the marriage in the lands contained in the contract, the defender could not be liable in payment of the tocher which he had stipulated.

To which it was *answered*, That there could be no immediate resignation, because though there did exist a son of the marriage, yet he could not with any propriety be said to be the heir-male of it, since his title as such depended upon the predecease of his father.

No 5.

*Replied* for the defender, That it appeared from the contract, that the pursuer was obliged to denude himself of the fee in the most express terms, having bound himself 'to infest the wife and heir-male in liferent and fee of the lands; 'to grant, subscribe, and deliver to them sufficient charters containing precepts 'of sasine, upon his own proper charges; to warrant the infestments and lands 'to be good, sufficient, and free from all prior infestments, inhibitions, adjudications, &c. at all hands and against all deadly. He assigned them to the mails 'and duties of the lands after his own decease, and to the whole writs, evidents, 'and securities of them.' From the whole tenor of which contract it was plain that the father only reserved his liferent. To allege that in this case it could not properly be said that there was an heir, since the father was still alive, was nothing but a quibble; for the marriage being dissolved, and a son existing, it most certainly and undoubtedly appeared who was the heir-male of the marriage. That it was a duty incumbent on the grandfather to see his grandson get justice, and to prevent the dilapidation of the estate, before he could be obliged to perform his reciprocal part of the contract.

THE LORDS found, That Mr Sutherland ought to resign the lands in favour of himself, and, failing of him, in favour of his son *nominatim* in fee, with absolute warrandice and assignation to mails and duties, as mentioned in the contract, before payment of the remainder of the tocher.

Act. Alex. Hay.

Alt. Jo. Forbes.

Reporter, Lord Polton.

Clerk, Gibson.

*Edgar, p. 20.*

1731. July 16. DALZIEL of Binns *against* CREDITORS of FALCONER.

No 6.

A PURCHASER of a land estate having taken the disposition in name of a trustee, who granted back-bond, declaring the trust, and obliging himself to denude; and the trustee having thereafter advanced several sums to the purchaser, brought at last a declarator against the purchaser's creditors, concluding, that he was not bound to denude until he should be satisfied of his debts. The creditors *answered*, Whatever might be said, were they insisting upon the back-bond to oblige him to denude, the pursuer in the present situation of affairs, had no hold of the estate, to force payment: The creditors had the possession derived to them from their debtor; and, for a title, they wanted none from the pursuer: A simple declarator of trust, which the trustee could not oppose, was as good to them as a conveyance from the trustee. THE LORDS assoilzied from the declarator.—*See APPENDIX.*

*Fol. Dic. v. 1. p. 594.*