

means than by her father *qui tenetur eam dotare secundum vires patrimonii*; and so this tocher being *dos adventitia*, the brother had no repetition thereof, especially because the defender offers him to prove, that by a bond made by this pursuer to his umquhile sister, he was bound to pay to her within half-a-year after her marriage for brotherly love, for help to her marriage, and in contentation of her bairn's part of gear which she might claim by decease of her father and mother, the sum of L. 1000, and to pay to her the sum of L. 100 yearly for the annualrent thereof, as well not infest as infest; so it being her own gear depending upon a preceding bond, it could not be repeated after her decease, seeing she, by her testament, had nominated her husband her executor, and he had confirmed this same sum. It was *answered*, That in Scotland, by our law, there was no difference *inter dotem profectitiam et adventitiam*; and the father of the woman being deceased, if her brother tocher her, that same reason which brings back the tocher-good to the father, will give repetition to the brother, who paid the tocher with his own gear, if his sister die within year and day; and, albeit mention be made in the bond that it is given in contentation of her bairn's part of gear, yet she had no bairn's part of gear, because her father and mother were very mean, and had little or no gear at their decease; and if the defender would condescend upon the gear which she must have, fallen by her father and mother's decease, they should find it relevant to be admitted to probation *pro tanto*. THE LORDS found, that seeing this tocher good contained not only *dotis causam*, but *proprium defunctæ peculium* her bairn's part of gear through her father and mother's decease, that it was a cause onerous which made her brother debtor *ex necessitate et non ex libertate*, and therefore they would not astrict the defender to condescend upon the quantity of the bairn's part of gear; but found his exception relevant by the bond, contract, and testament produced; and found, that of the law, *peculium adventitium*, was not subject to restitution.

Fol. Dic. v. 1. p. 415. Haddington, MS. No 987.

1610. June 8.

THOMAS CALDER and ANDREW MORISON, *against* ELIZABETH ROSS and ALLAN M'INTOSH her Spouse, and SIR JOHN CAMPBELL of Calder.

THOMAS and Andrew, tenants of the lands of Easterdues, summon Elizabeth and Sir John to hear and see it found whilk of them they should answer and obey of the duties of the said lands. *Alleged* for Elizabeth, That she ought to be answered, and Sir John can have no right thereto; because, by contract matrimonial betwixt Sir John and umquhile Duncan and her they have conjunct-fee in the lands redeemable by 3000 merks; lykeas marriage followed, and the lands are not redeemed. *Answered* and *replied* for Sir John, The allegiance ought to be repelled, and he answered, because Sir John is infest and in possession, and

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the same by testament to her husband, and dying within the year, the Lords found the brother was not entitled to repetition, since the sum belonged to the wife, which she might dispose of at her pleasure with her husband's consent.

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Found, that the marriage dissolving by the husband's decease within the year, all things must return *hinc inde*, not only with respect to the defunct's heirs, but also with respect to a third

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party who
was bound to
infest the
wife, and ac-
cordingly did
infest her.

she can pretend no right to the contract, because the contract having respect to a subsequent marriage betwixt her and Duncan, true it is, that Duncan died within year and day after solemnizing thereof, whereby the marriage is dissolved, and quhilk decease must produce the same effect and benefit to Sir John as it would have produced to Duncan's heirs, if Duncan had been disponer himself *intuitu matrimonii*; in whilk case, the disposition would have ceased, and therefore, the said Sir John is in like manner free of the obligation of the contract; especially seeing, by the contract, the lands are disponed to Duncan and Elizabeth, and their heirs betwixt them, quhilks failzing, to return to Sir John; an also in respect that Alexander Campbell apparent heir of umquhile Duncan, personally present, is content to repone her against the contract, and Sir John becomes presently caution for Duncan's heirs and executors, to refund to Elizabeth whatsoever goods and benefit she can verifie Duncan to have received frae her, and to warrant her at their hands for whatever thing they may crave of her by the contract; the LORDS find the answer and reply relevant, and assign a term to Sir John to prove.

Fol. Dic. v. I. p. 413. Nicolson, MS. No 45. p. 24.

* * * Hadington reports the same case :

THE laird of pursued a double poinding against the laird of Caddell upon the one part, and Ross the relict of umquhile Duncan Campbell, his brother, on the other part, contending for the maills and duties of the saids lands. It was *alleged*, that Ross should be answered, because she offered to prove, that her umquhile husband and she were infest in the lands controverted in conjunct fee, by the laird of Caddell, and by virtue thereof in possession, and so could not be impeded by Caddell. To this was *answered*, That if any infestment her umquhile husband had, it was to himself and the heirs to be begotten of his body, whom failing, to return to the laird of Caddell; and the said Duncan has deceased without heirs of his body; and as to her conjunct fee it was expired, because her husband died within year and day after the marriage, no children being procreated of that marriage, and therefore she could bruik no conjunct fee of his lands. To this was first *answered*, that the provision contained in Duncan's infestment, that if he died without heirs of his body the lands should return to the Laird of Caddell, was not *modus habilis*, without a declarator; which the LORDS found not relevant; for seeing the lands were disponed to be holden of Caddell's self, with provisions of returning to himself in case of Duncan's decease without heirs of his body, and Caddell needed no other declarator nor service but the provision of the charter. Thereafter it was alleged by the said Ross, relict of the said Duncan, that she should be answered of the maills and farms of the said lands; because albeit her husband died within year and day after their marriage, without bairns procreated, yet the expiring of her conjunct fee could not come in

by way of exception in a double poiding, because that required declarator by way of action, consisting of many circumstances *in fact*, which behoved to be proved; likeas the declarator should be sought by the proper contradictor, viz. the heir of the defunct, which not being done, in this case, the laird of Caddell not being heir, and not having pursued any such declarator, and not having interest to pursue the same, she should be answered and obeyed. To this was answered by Caddell, that the practice was inviolably observed in this country, that the husband dying within year and day after the marriage without bairns, the contract, with the conjunct fee, tocher, and all other commodities resulting thereupon expired, and returned to the own former estate, as was practised betwixt the Abbot of Balmerino and the Laird of Coudland; the Earl of Eglintoun and the Laird of Bargany; the Laird of Garlies and my Lady Maxwell, and diverse others: and as to the declarator, it was noways necessary, especially ~~anent~~ the opposition and restitution of the said woman, because he was presently content to restore her to all that her husband got by her. She *answered*, that he was not habile to do it; because she being infest in lands before her marriage, she resigned the same for new infestment to be given to the said Duncan her spouse and her in conjunct fee, and to the heirs to be gotten betwixt them; which failing, to the said Duncan's heirs and assignees whatsoever; to the which the Laird of Caddell could not succeed as heir, and so he was not able to reponer her to her own right: Notwithstanding whereof the Lords accepted of Caddell's offer of caution for her reposition to all things which she had paid or gave to the defunct, or in favour of his heirs, by occasion of her marriage upon him; and in respect thereof, found it not necessary that any declarator should be pursued for the reposition of the parties to the state wherein they were before the contracting of their marriage; but that it might come in by way of exception in this double poiding; which in my private opinion I thought strange, and a novelty whereof I had not seen any preceding practick.

Haddington, MS. No 1886.

1627. July 13.

KING against KER.

IN a pursuit by Margaret King, relict of David Heriot goldsmith, against George Ker, taylor in Edinburgh, for refunding to the pursuer of certain sums paid by her to the said George in tocher with the pursuer's daughter, married upon the said George, seeing that her daughter died within the year after their marriage without children; and therefore the pursuer craved repetition of the sum paid by her, and also to be free of payment of the rest conditionate to be paid by her to him; this action was sustained at the mother's instance, who

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A mother having contracted for a tocher to her daughter, which was afterwards paid, demanded repetition, the marriage hav-