

No 270.

A wife was infest in a liferent with this condition, that she should have no benefit by her infestment till her tocher should be paid. Found that neither her husband nor his singular successors could obtrude this provision, unless it could be instructed that the husband did diligence, or that the debtor of the tocher was known to be insolvent.

1671. November 21. MENZIES against CORBET.

By contract of marriage betwixt John Maxwell of Wreath, and Mary Menzies, she is infest in certain lands in liferent; but the contract contains a clause, that neither she nor her children should have benefit thereby until the tocher were fully paid; but she is not the person obliged for the tocher. John Corbet having apprised the lands from her husband's apparent heir, the tenants call them both in a double pointing. The relict craves preference upon her infestment, as being anterior. The appriser excepts upon the suspensive clause in the contract. The relict answers, that the appriser in this point can be in no better case than the husband's heir, who would be excluded by this objection, that the wife not being obliged to pay the tocher, but a third party, it was the husband's duty to have pursued for the same, and his wife being *sub potestate viri*, could nor should not pursue therefor; and the husband, nor none succeeding to his right, can obtrude the want of that provision, which was through his own fault;

Which the Lords found relevant, unless the apprisers instruct that the husband did diligence, or that the debtor of the tocher was known to be insolvent; the husband having lived seven years after the marriage.

*Fol. Dic. v. 1. p. 407. Stair, v. 2. p. 5.*

1678. July 25. STEWART and IRVINE against STEWART,

No 271.

Found in conformity with Wolf against Scott, No 268. p. 6064.

A WOMAN pursuing for her liferent; *alleged*, The tocher cannot be employed, because it was never paid.—THE LORDS repelled this, since the husband had not done diligence to recover it, and the wife could not, being *sub potestate viri*; which the Lords had decided before, between Joan Lockhart and James Bonar, and between Daniel and the Relict of Menzies of Castlehill.\* and it agrees with the civil law, *l. 26. C. De jure dotium*, unless it was promised *ex liberalitate et animo donandi*, and he become *lapsus*, *l. 28. D. De regulis juris; Et tunc tenetur in tantum quantum facere potest.*

*Fol. Dic. v. 1. p. 407. Fountainball, MS.*

1710. February 3. LAIRD and LADY AIRTH against HAMILTON of Grange.

No 272.

Where the wife herself was the only person bound to pay the tocher, she

JOHN HAMILTON of Grange, and Mrs Jean Bruce, daughter of Mr Alexander Bruce of Airth, with consent of her father and Mrs Ann Van Eik, her mother, having, 22d September 1659, at Teyll, in the province of Guelderland, entered into a contract of marriage, bearing, ' That the bride brings with her to the

\* Examine General List of Names.