

1687. November 10.

CREDITORS of OGILVIE of Newgrange *against* SCOTT of Hetherwick.

SCOTT of Hetherwick having in his contract of marriage, disposed his lands to heirs-male, and obliged himself, failing sons of the marriage, to pay to one daughter 8000 merks at her age of sixteen years; and the daughter, after her mother's death without a son, having married Ogilvie of Newgrange without a contract, or the father's consent, the husband's creditors arrested the tocher in the father's hands, as falling under the *jus mariti*, and pursued a furthcoming.

Alleged for the defender; That the provision being made by him, with a prospect of getting his daughter a match, it must be liable to the implied condition of a tocher, viz. that she be secured in a jointure; especially here, where the sum was not assigned by the daughter, but fell by the marriage under the husband's *jus mariti*, it ought to be liable to such rational provisions as might have been demanded and agreed to, if there had been a contract.

Answered for the pursuers; That marriage being a legal assignation, it effectually transmits the right of moveables; and the wife having betaken herself to the legal provision of terce and third, she cannot have the benefit of the conventional; so the right of the 8000 merks, which was in the wife's person, must fall under the husband's *jus mariti*; for although he hath no estate to afford her a jointure out of, he may acquire one, and *utcunque* the tocher is his, even as she would get a terce or third though she had no tocher.

THE LORDS considered this as a new case, and found, That the tocher was due to the husband; but that it was liable for a provision of jointure to the wife, not exceeding the annualrent of the 8000 merks, in case she was not otherwise secured the time of her husband's death; but did not subject any part of the fee to that burden. The father was here debtor and contractor; but the interlocutor may be drawn to the case of wife's having no parents alive, or widows; though this difference would appear, that a wife, at her own disposal, by marrying, seems to pass from all conventional, express or implied security, and to betake her to the legal.

Fol. Dic. v. 1. p. 395. Harcarse, (CONTRACTS OF MARRIAGE.) No 387. p. 100.

* * * This case is reported by Fountainhall, No 106. p. 5892.

No 116.

A young woman having married against her father's consent, and without a contract, her husband's creditors arrested her tocher, as due to their debtor, *jure mariti*. The Lords found the tocher belonged to the husband, with the burden of a jointure not exceeding the annualrents.