

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 1836.

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-

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ing dissolved within year and day, by the death of the wife.

Found entitled, upon finding caution to make furthcoming to the executors of the deceased.

was contractor, and obliged to pay the tocher, neither was it respected what the defender alleged, that he ought not to repay that which he had received and employed as his own money; and also what he alleged, that this and the like actions were competent to fathers who tochered their daughters, it being *peculium profectitium*, in the which the father had *plenum dominium*, yet it was not so privileged to the mother, who paying with her daughter sums in contentation of her portion natural, and other goods which might fall to her by decease of her father, the like action could not be competent to her; for in this case the defender alleged, the money was the proper money of the deceased daughter, and pertained to herself, which, if any repetition thereof could be granted, was only competent to the heirs and executors of the daughter, and not to this pursuer. This allegiance was repelled, and the pursuit was sustained at the mother's instance, who contracted only for the tocher and paid it, for the defender was found ought not to retain the money, nor have any benefit by that marriage, it being so dissolved within the year without children, *quo casu, restitutio hinc inde est bona fide facienda, tanquam nunquam fuisset matrimonium*. But the LORDS ordained the pursuer to find caution, to liberate the defender at the hands of the heirs and executors of the defunct, and all others who might pretend interest in this sum libelled, or trouble him thereanent. See **JUS TERTII**.

Act. King & Heriot.

Alt. Gray.

Clerk, Hay.

Fol. Dic. v. I. p. 414. Durie, p. 309.

* * * Spottiswood reports the same case :

By our practick, if a woman die within year and day after she is married, without children procreated between her and her husband, the husband must restore the tocher-good again to her father if he be alive, because then it is counted *profectitia*, (*hoc non est sine ratione, non est enim æquum ut parentes et filia et dote simul priventur, nam afflicto non est superaddenda afflictio ait textus*) but if he was dead the time of making the marriage, her mother nor any other has repetition of the same, as having proceeded from them, because they are but accounted as strangers: but it must be sought by the executors of the woman deceased, and will appertain to them. Conform hereunto between George Ker and Margaret King his good-mother, the LORDS ordained him to deliver his tocher back to her, she finding caution to make it forthcoming to the executors and all others having interest.

Spottiswood (HUSBAND AND WIFE), p. 155.

* * * This case is also reported by Auchinleck :

MARGARET KING, widow, having contracted her daughter with George Ker, taylor, and having by the said contract promised a certain sum in tocher-good

with her, the young woman deceases before year and day. The mother, who had paid a part of the tocher, pursues for repetition. It is *alleged*, That the tocher was the young woman's own gear, and that she had made her husband's brother assignee thereto, to the behoof of her husband. THE LORDS ordain to pay back the tocher-good again to the mother contractor, and ordain the mother to find caution to make the sums forthcoming to all parties having interest.

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Auchinleck, MS. p. 125.

1672. November 9.

GUTHRIE against GUTHRIE.

By contract of marriage betwixt John Menzies and Agnes Guthrie, Thomas Guthrie her brother is obliged to pay to the said John 500 merks of tocher, and that in satisfaction of her portion-natural, and all provisions made to her, whereof she discharges her brother. The marriage having dissolved within year and day, by the death of the husband without children, the said Agnes pursues her brother for payment to her of the tocher; who *alleged* absolvitor, because his obligation being in contemplation of the marriage, the same being dissolved, the obligation ceaseth, even though he had been obliged to pay, and employ for his sister the said sum; whereas he is only obliged to pay it to the husband, who was to ware and bestow a sum for his wife; and if a voluntary concession of a tocher, upon the account of a marriage, should be obligatory, though that marriage dissolved without effect, it would be of very evil consequence to parents and others. It was *answered*, That if the brother's obligation had been, or borne to be, for love and favour, this ground might have been with some probability *alleged*; but here the sister discharges her portion-natural, and all provision; for which if she were now pursuing, this contract would exclude her from any further than this 500 merks, whatever the value of her interest were, notwithstanding the dissolution of the marriage. It was *replied*, That the contract did not bear, that there was any thing due to the sister; and the clause 'in satisfaction, &c.' is of mere style, and the dissolution of the marriage puts both brother and sister in the case they were in before the contract.

THE LORDS would not sustain this action, but found the contract dissolved, even as to the brother and sister, unless there had been a portion or provision due to the sister, and that the clause 'in satisfaction' had not been adjected in course of form, without communing or consideration.

Fol. Dic. v. 1. p. 414. Stair, v. 2. p. 116.

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A marriage having been dissolved within year and day, a tocher provided by a brother to his sister, payable to her husband, who was to employ it for her use, was found void.

Gosford's report of this case, next page, is different.