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*** Gosford reports the same case:

IN a pursuit at Agnes her instance, against Thomas Guthrie her brother for payment of 500 merks, *super hoc medio*, That the said Thomas, in the contract of marriage betwixt the pursuer and John Menzies, became obliged to pay in name of tocher to the said John the foresaid sum, for which the said Agnes and her future husband did accept the same, in full satisfaction of all portion-natural which might befall to her through her father's decease, and did discharge her brother thereof; and seeing the marriage was now dissolved by the death of the said Menzies within year and day, therefore her brother was obliged to pay her the foresaid sum. It was *alleged*, That the marriage being dissolved, no action could be founded upon that contract of marriage, bearing that the same was to be paid in name of tocher to the husband; and therefore, as to any portion-natural, or provision due by the father, the defender must be pursued *via ordinaria* upon these titles.

THE LORDS did sustain the action, notwithstanding of the defence, and found, that albeit as to the obligement for tocher payable to the husband and his heirs, the same was extinct by the dissolution of the marriage; yet *quoad* the pursuer, who had given a sufficient discharge of all portion-natural and provisions, against which she can never be reponed, albeit they did far exceed the sum of 500 merks, that the contract was still obligatory against the defender for payment of that sum which was due upon another just cause than for tocher.

Gosford, MS. No 516. *p.* 273.

No 382.
A marriage dissolved within a year by the wife's death. The infeftment by the father to the son, of his estate, in contemplation of the marriage, was found also to be void.

1678. *July* 16. The LORD BURLEIGH *against* ARNOT of FAIRNIE.

THE Laird of Fairnie, by contract of marriage, disponed his whole estate to his son Sir Robert Arnot, and his future spouse, Carnock's daughter, in conjunct fee, as to a part of the estate, and the rest to Sir Robert in fee, reserving his father's liferent, with a power to burden the estate with L. 10,000. The tocher being 16,000 merks, is payable to the father, whereof eight was paid, whereupon the marriage followed, but the Lady died within the year. Carnock renounces the 8000 merks paid, providing Fairnie secure the same for Sir Robert, or accept thereof as a part of the L. 10,000, or burden the estate with the L. 10,000. Shortly after, Sir Robert died also, and Fairnie did thereafter contract his second son, James Arnot, and disponed his whole estate to him, in contemplation of the marriage; and James contracts many debts, whereupon the estate was affected with diligences; and after his death, his son entered heir to Sir Robert, his uncle, passing by his father, supposing thereby to shun his father's debt, and bruik his estate, as heir to his uncle.

The creditors raised reduction of this Fairnie's right, as heir to him, on these reasons; 1*mo*, That by the law of this kingdom, marriage being dissolved within year and day without children, the contract of marriage becomes void, and all things return as they were before the marriage, and the tocher returns to the granters thereof; so the jointure ceases, and the husband's provision returns also to the granter thereof. 2*do*, That Sir Robert was infeft only by his father *propriis manibus*, relative to the contract of marriage bearing a clause of infeftment, *a se, et de se*; which sasine, if it relate to the infefment *a se*, is null, not being confirmed; nor can it be confirmed, by reason that the second son was publicly infeft, which is *medium impedimentum*; and if it be attributed to the obligement to infeft *de se*, it is base, not clad with possession, and latent for so many years, and the second son's infeftment being public, is preferable thereto. The defender *answered* to the first, That dissolutions of marriage within year and day, returning the tocher and jointure, are only introduced by custom, and peculiar to this kingdom, and so are to be extended no farther than as custom hath extended the same, which hath never been to return an estate settled upon an eldest son, though many such have been, when either party died within year and day, yet the son did never bruik thereby; and if it were supposed to return as tocher and jointure, it would be null *ipso jure*, without any deed of the father to call or annul; and though the son should have bruiked all his life, his succession behoved to enter to his father, and would evite all his debt, which was never pretended or practised. It is true, that when the tocher is payable to the father, it being a part of the mutual cause, if the marriage dissolve, the son must perform to the father, but his fee is never recalled; because, though the contract bears, that in contemplation of the marriage, and for the tocher, the father dispones, yet these are not the adequate causes of this disposition, but the father's affection and inclination to settle his estate upon his apparent heir, which is often done without a contract of marriage. To the *second*, The sasine produced being generally relative for fulfilling the contract, it must be interpreted as *actus validus*, and therefore to be *de se*, yet it is not latent and and base, being for implement of a contract of marriage, which is a most public and solemn deed; and though the father's possession, by reservation of the liferent, does not validate the son's infeftment *de se* ordinarily, yet it does it always when the liferent is reserved in a contract of marriage. The pursuers *replied*, That the reasons stood most relevant; for the law is evident, that the dissolution of marriage within year and day, without children, returns all parties as to their fortunes, as before the marriage, especially when dispositions of estates are expressly in contemplation of the marriage; which ceasing, either simply by no marriage following, or *quoad effectus civiles*, by dissolution within year and day, the estate returns to the father; and though fathers sometimes infeft their sons in their estates, without a contract of marriage, yet that is upon special con-

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siderations, as if the father were burdened with debt, and would ease himself, or be unfit to manage: But otherways, the father's intention is never to be presumed to state himself a naked liferenter; yea, many times, in contracts of marriage, fathers denude not themselves, but on special considerations, for the respect to that party, or the tocher which they cannot otherways obtain. It is true, infeftments in contemplation of marriages do not simply cease as personal rights or liferents; but if the father persist, and suffer the son to possess, and keep him to his liferent reserved, the infeftment will be good, both as to the son's heirs and creditors; but here the father persisted not, but on the contrary, infeft his second son in his whole estate, whose creditors, in his right, do now crave the eldest son's infeftment to be reduced and annulled; which would have been relevant, though it had been held of the superior upon resignation, much more when it is held of the father, and so conditional till the year and day run, or children be born; during which time, it is dubious, whether the infeftment will be counted a public or private right, which must be *secundum eventum*; and, therefore, who contract *medio tempore*, do it on their peril; but after the year, creditors may securely contract with the son, unless the father, by some public deed, come against the son's infeftment.

THE LORDS found the reasons of reduction relevant and proved, viz. That the marriage dissolved within year and day, without children, and that the father persisted not, but infeft the second son in the estate; and therefore reduced the eldest son's infeftment, but with the burden of the 8000 merks provided to him by his good-father, which they found to affect the estate, and reserving the same to all parties having interest, as accords, even though the eldest son's infeftment had been upon resignation, and so had not need to determine whether it was public or private.

Fol. Dic. v. 1. p. 414. Stair, v. 2. p. 633.

*** Fountainhall reports the same case.

July 16. 1678.—A new and very extraordinary point was decided between the Lord Burleigh and Arnot of Fairney. Arnot of Fairney, in his eldest son's contract of marriage, in contemplation thereof, dispones the fee of his lands and estate to his eldest son; the marriage dissolves within year and day by the death of the son; his next brother serves himself heir to him; notwithstanding whereof, Lord Burleigh being a creditor to Fairney, the father, in great and considerable sums of money, he apprizes the estate from the father, and raises a declarator, to hear and see it found and declared, that the marriage having dissolved within the year, by the dissolution *omnia restituuntur in priorem statum* into the same condition they were in before the marriage, as if it had never intervened, and consequently, that the father returned to the fee of his own estate, which *eo intuitu* he had disponed, and so was

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causa data ea non secuta. *Alleged*, This was a novelty, and though tochers returned in case of dissolution *intra annum*, yet it was *inauditum* that deeds in favours of the husband also returned; and that we had only custom for repeating tochers, and which being exorbitant *a jure communi*, it could not be extended, as laws may be, *ultra proprios limites, ad pares casus. Vid. Remarques du droit Francois, par Mercier, tit. de test, ord. p.* 184. 205. Yet the LORDS found "the father did return again to the fee of his estate in such a case." This would be more dubious and disputable, if the son had had creditors who had effected the estate, as the son's, either in his life, or after his decease, as he who stood last vest and seased therein, who would be preferred in a competition between them and the father's creditors; and this seems to alter the point much. This decision was wondered at by many.

Fountainhall, v. 1. *p.* 7.

1739. *November* 6. KATHARINE HOOD *against* JAMES JACK.

No 383.
A father in his son's contract of marriage became bound to pay him a sum. This sum not having been conveyed to the wife or the children of the marriage, was found due, although the marriage dissolved within year and day.

BY contract of marriage, dated in January 1736, betwixt Katharine Hood and George Jack, she and curators became bound to pay L.907 Scots, in name of tocher. 2*dly*, James Jack, father to George, therein obliged himself to pay to his son, the sum of 2000 merks against the Whitsunday thereafter. James the father, soon after the marriage, died, and before the term of payment of the 2000 merks; whereupon, George, his son, succeeded to him, and made a new settlement in favours of his wife, in which he assigns her, *inter alia*, to the two thousand merks due by his father. This marriage dissolved by the death of George, the husband, within year and day, without issue. Whereupon Katherine brought an action against the Representative of James, for payment of the 2000 merks. *Pleaded* for the defender, That the obligation assigned was granted by the husband's father to him, his only son, in contemplation of the marriage: That the marriage having dissolved within year and day, and without issue, the obligation was void in the same manner, as if the marriage had never been contracted; and as the assignation contained only warrandice from fact and deed, neither the husband nor his representatives were bound to make good the deed that so became void to the pursuer. In support of this defence, it was observed, 1*mo*, That all obligations entered into, in contemplation of a marriage, are properly conditional obligations, and have no effect, if the marriage never follow: That this takes place, not only in obligations entered into betwixt the persons to be married, but also in such as are granted by third parties to either of the married persons in a contract of marriage, *intuitu matrimonii*; such obligations are not simple, but conditional; they are granted with a view to the marriage, and in order to enable the parties to live more comfortably in that state: and if the marriage never follow,