

No 29. find the first creditor fiar. THE LORDS found the creditor had the power of up-lifting, because if he were *vergens ad inopiam* they had interest to see it better secured for their annualrents; but withal thought they could not frustrate and evacuate the substitution, but behoved to re-employ it again in the same terms as it stands in the first bond.

Fol. Dic. v. 1. p. 549. Fountainball, v. 2. p. 668.

No 30. 1731. July 13. MALCOLM against NEILSON.

A SUM was lent out to three debtors, payable to a woman in liferent and her son in fee. Two of the debtors died insolvent. The liferentrix found means to get payment from the third without a process when her son was out of the country, and lent it out again in terms of the former bond to a person in reputed good circumstances, who thereafter proved insolvent. The liferentrix was not found liable to make up the sum to the fiar, having an interest to see the money well secured, and having acted for the best. See APPENDIX.

Fol. Dic. v. 1. p. 549.

1743. June 22. CRAWFORD against MITCHELL.

No 31.

A sum provided for the wife's liferent in a contract of marriage, is not attachable by the husband's creditors, unless they offer security to make the liferent effectual.

By contract of marriage betwixt James Hog and Elizabeth Mitchell, dated the 18th of March 1741, he became ' bound to lay out the sum of ' L. 166 : 13 : 4 Sterling, with the sum of L. 186 his wife's tocher, upon land, ' bond, or other sufficient security, and to take the rights in favour of himself ' and Elizabeth Mitchell in conjunct fee and liferent, for the said Elizabeth ' Mitchell her liferent use allenary, and of the children to be procreated of the ' marriage in fee; and, failing children, the foresaid sum of L. 166 : 13 : 4 to ' James Hog, his heirs and assignees; and the other sum of L. 186 Sterling to ' the said Elizabeth Mitchell, her heirs and assignees.' And, on the other part, ' the said Elizabeth Mitchell, in name of dote and tocher, assigned and ' made over in favour of the said James Hog and herself in conjunct fee and ' liferent, for her liferent use allenary, and to the children of the marriage in ' fee, the said sum of L. 186 Sterling, contained in a bond granted to her by ' her brother William. And lastly, execution is appointed to pass upon the ' contract for implementing the conditions in favour of the wife and children, ' at the instance of Alexander Coupar minister at Traquair, and the said Wil- ' liam Mitchell.'

The sum in this bond being arrested by a creditor of the husband's for payment of L. 35 Sterling, the defence made in the forthcoming for William Mitchell, who was both debtor and trustee, was, that the sum in this bond being

liferented by the wife, he could not be bound to pay any part of it without her consent, unless the husband were ready instantly to lay it out with his own money upon sufficient security to himself and his spouse in conjunct fee and liferent, in terms of the contract of marriage; that he was however willing to pay to the husband's creditor what fell under the arrestment, provided caution was found for the wife's total liferent. THE COURT found, " that the sum of L. 186 due by William Mitchell being assigned by Elizabeth Mitchell, in her contract of marriage with James Hog, to herself in liferent, the said William Mitchell her brother, and trustee for execution of the contract, cannot be obliged to make forthcoming to the pursuer any part of the principal sum due by him, unless the pursuer shall find caution for the whole liferent provided to the said Elizabeth, in case of her survivance."

The creditors reclaimed, insiting, that the assignment of the tocher made the husband fiar; that when a tocher is absolutely disponed, the husband or his creditors may uplift the same, leaving the wife to claim performance from her husband of what is covenanted on his part; that when it is disponed to him, with the burden of the wife's liferent, he and his creditors may uplift the same, as in the former case; with this difference only, that they must find caution to make the sum uplifted forthcoming to the wife for her liferent, in case of her survivance; and that at any rate it is unreasonable to oblige a creditor who claims only L. 35 to give security for the total liferent.

At advising this petition, Elchies thought the interlocutor wrong in two respects; 1st, That the wife having made over her bond to her husband and herself in conjunct fee and liferent, it was no more in the power of the husband or his creditors to change her security, by substituting caution in place of it, than it is in a man's power, when his wife's liferent is secured upon land, to make her give up her real right, upon offering to give her other lands for her security; and therefore that Mitchell's bond must remain as it is, till the husband be ready to lay out both it and his own money in terms of the contract. He thought it wrong for another reason, that if caution were at all to be accepted, it ought to go no farther than to answer for the sum which was claimed to be made forthcoming upon the arrestment. It was the President's opinion, that the sum could not at all be uplifted even upon offer of caution, unless it could be qualified, that the debtor was *vergens ad inopiam*, in which case the Court might interpose *ex nobili officio*. But he observed, that the interlocutor was framed upon a concession made by the defender of allowing the sum to be uplifted upon caution for the wife's total liferent. Upon which the vote being put, it carried, by a narrow plurality, to refuse the petition. See MUTUAL CONTRACT.

No 31.

* * Kilkerran reports this case :

MR JAMES HOG in his contract of marriage with Elizabeth Mitchel, having become bound to employ the sum of L. 166 Sterling, together with the sum of L. 186 said money of tocher after assigned, on sufficient security to himself and her in conjunct fee and liferent, for her liferent-use, and to the children in fee; she on the other hand assigned to her future husband and herself in conjunct fee and liferent, &c. a bond of L. 186 Sterling due to her by Mr William Mitchel; and execution was appointed to pass at the instance of the same Mr William Mitchel.

John Crawford, clerk to the customs at Borrowstounness, who was creditor to Hog the husband in L. 35 Sterling, having arrested in the hands of Mr William Mitchel, and pursued a furthcoming, the LORDS found, " That the sum of L. 186 due by Mr William Mitchel being assigned by Elizabeth Mitchel in her contract of marriage with Mr James Hog to herself in liferent, the said Mr William Mitchel, trustee for executing the contract, could not be obliged to make furthcoming to the pursuer any part of the principal sum due by him, unless the pursuer should find caution for the whole liferent provided to the said Elizabeth in case of her survivance."

As where the husband's right to the tocher stands *in nudis finibus contractus*, the wife may, by the rules of mutual contracts, retain till the husband perform on his part, so where the tocher is singly conveyed *nomine dotis*, there are no longer habile terms of retention after implement; for, though the husband should be taken bound to employ, yet, as he is become proprietor by the conveyance, his personal obligation to employ does not limit his property. But here was a different case from either: The assignation was to the husband not absolute, but also to the wife in liferent; and all the question was, whether or not the creditor should have access to the extent of his debt, upon his finding caution for the wife's liferent, to the extent of the sum craved to be made furthcoming, in case of her survivance, and which he offered to find. But the LORDS found as above, that he could have access to no part of the sum, unless he should find caution for the whole. It was thought she was not obliged to allow her security to be divided, whereby she may have it split among as many hands as there were pounds in the sum assigned.

Kilkerran, (MUTUAL CONTRACT.) No 3. p. 357.

* * Clerk Home also reports this case :

• By contract of marriage betwixt James Hog and Elizabeth Mitchel, he
• became bound to provide L. 166 Sterling, and to lay out the same, with the
• sum of L. 186 of tocher, (after assigned,) upon land, bond, or other sufficient
• security, and to take the right in favours of himself and her, in conjunct fee

* and liferent, for her liferent use allenary, and to the children of the marriage
 * in fee, &c. And, on the other part, she, in name of tocher, assigned to him
 * and herself, in conjunct fee and liferent, for her liferent use allenary, and to
 * the children of the marriage in fee, L. 186 Sterling, contained in a bond
 * granted to her by William Mitchel her brother.'

Mr Crawford being creditor to Hog for L. 35 Sterling, arrested in William Mitchel's hands the sum due by him to his sister Elizabeth.

The defences *pleaded* against the furthcoming were, That the arrester, claiming in the right of Hog, whose only title to this money was the assignation in the marriage contract, could be in no better case than his debtor; and, of consequence, he behoved to claim his interest to be made furthcoming *tantum et tale* as it stood in Hog, subject to all exceptions and defences arising from the marriage-contract; from which it appears, that the wife's portion was assigned upon the faith that Hog was in condition to join the sum stipulated by him to the tocher, for the purposes of the marriage; which appear now not to have been true, as he was worse than nothing, which behoved to stop all diligence for recovering the tocher until the mutual cause upon the husband's side be *simul et semel* performed. And as the defender was, by the contract, intrusted with the execution thereof, he could not be bound to pay the tocher until the husband should be ready to lay out the same, together with the additional sum mentioned as his own, in terms of the contract.

Answered for the pursuer; That, as the tocher was assigned to the husband and wife, for her liferent use allenary, &c. he admitted that he could not crave to have this sum made forthcoming to him, but with the burden of the wife's liferent; therefore he was willing to find caution to pay her the liferent of the said sum in case she should survive her husband. In support whereof, it was observed, that the mutual prestation betwixt husband and wife did not stand *in nudis finibus contractis* to entitle the wife or her friends to withhold performance on their part till the husband should perform his part; but that the wife had, *de facto*, implemented her part, by assigning her tocher, whereby he became fiar of the sum; after which there was nothing to bar the husband's creditors from attaching this sum, as well as any other subject belonging to him. It is true, where a bride or her relations become bound to pay a certain tocher, neither the husband nor his creditors can insist for payment until the husband perform the prestations incumbent on him; but it is quite a different case, where, as in the present, the tocher is *de presenti* made over to the husband *nomine dotis*; for then the husband becomes fiar, and the bride takes herself to the husband's personal obligation for securing her in a liferent. And this doctrine is agreeable to our law in similar cases; *e. g.* If a man make a bargain about any subject, and deliver it, he thereby transfers the property, and has no other security for the price than the purchaser's personal obligation. See 22d November 1692, Hall, No. 48. p. 4387; 27th January 1698, Kennedy, No. 49. p. 4388.

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Replied for William Mitchel; That the pursuer's offer to find caution for so much of the tocher as should be made furthcoming to him, fell far short of answering either the wife's interest, or that of her issue, stipulated by the contract. That the pursuer's title was no better than Mr Hog's; and if he were insisting to uplift the tocher, or a part of it, surely it would be a good answer, to desire him to implement the prestations incumbent on him, in terms of the contract; seeing that was the consideration and mutual cause of assigning the portion to him, that she was not only to have the liferent of her own money secured to her, but likewise that of his, and the whole joint stock provided to the issue of the marriage; so that it is by no means sufficient to offer a partial performance, in so far as he was enabled by her own money; seeing that would be to proceed as if there had been no mutual contract at all, or any provision made on his part. See 4th July 1732, Creditors of David Watson, *voce* MUTUAL CONTRACT; Dec. 1721, Selkrig, *IBIDEM*; July 1724, Martin. See *IBIDEM*.

THE LORDS found, that the sum of L. 186 due by William Mitchel, being assigned by Elizabeth Mitchel, in her contract of marriage with James Hog, to herself in liferent; that the said William Mitchel, brother and trustee for execution of the contract, cannot be obliged to make furthcoming to the pursuer any part of the principal sum due by him, unless the pursuer shall find caution for the whole liferent provided to the said Elizabeth, in case of her survivance.

C. Home, No 240. p. 389.

S E C T. IV.

What incumbent on the liferenter and fiar as to repairs of the subjects.--Liferent of Furniture.--*Bnuos* on bank stock.

No 32.

1612. *June 23.*BRUCE *against* SINCLAIR.

A LIFERENTER, outwith burgh, may be charged to find caution to the heritor to uphold the houses of her conjunct-fee lands without recognition, and with certification that she shall tyne her liferent of the said houses.

Fol. Dic. v. 1. p. 550. Haddington, MS. No 2467.

No 33.
The act 25th,
Parl. 1491,
appointing

1626. *March 23.*FOULIS *against* ALLAN.

GEORGE FOULIS, heritor of a tenement of land in Edinburgh, raises letters, and charges upon the act of Parliament Ja. IV. *anno* 1491, and another act Ja.