

pay the tocher till his daughter was secured in her jointure ; and, *separatim*, that seeing the husband was now bankrupt, and utterly unable to perform, the defender should be declared free of his engagement, as if the contract had not been entered into, even although his daughter should die before her husband.

Upon which last point, it being answered for the creditors, That contracts of marriage, where marriage follows, cannot be voided by non-performance of any article, as they do not, as other contracts, admit of the restoring of each party to their original state, the LORDS gave no judgment, but ' found, by interlocutor July 4. 1732, the defence, that the mutual cause of the tocher was not performed, relevant to *assolzie hoc statu*.'

But thereafter, and after the defender's death, the creditors having wakened and transferred the cause, insisted on this new topic, that although the defender could not *hoc statu* be obliged to pay, yet they were entitled to oblige him to stock out the bygone annualrents of the tocher, in order that thereby, together with the principal sum of the tocher, the capital might be made up which the husband was obliged to secure, and to the annualrents whereof, when made up, the creditors would be entitled, and to the capital itself, how soon the obligation upon the husband came to be purified by the death of the wife.

And so the LORDS at first found, by interlocutor June 10. 1738, but thereafter, by interlocutor December 5. 1738, this was altered, and it was found by a narrow majority, ' That the creditors of the husband had no right to pursue for implement and performance, either by payment or stocking out of the annualrents.'

*Kilkerran*, (MUTUAL CONTRACTS.) No 2. p. 356.

1743. June 22. - CRAWFORD against MITCHELL.

A PERSON, in his contract of marriage, bound himself to employ the sum of L. 166 Sterling, together with the sum of L. 186 of tocher, after assigned, on sufficient security to himself and wife, in conjunct fee and liferent, for her liferent use, and to the children in fee. The wife, on the other hand, assigned to her husband a bond due her of L. 186 Sterling, and execution was appointed to pass, at the instance of the debtor, on said bond. A creditor of the husband having arrested this bond in the hands of the debtor, and pursued a furthcoming, the LORDS found, that the said sum being assigned by the wife in her marriage-contract, to herself in liferent, the debtor in the bond, who was trustee for executing the contract, could not be obliged to make furthcoming to the pursuer any part of the principal sum, unless the pursuer should find caution for the whole liferent provided to the wife in case of her survivance.

*Fol. Dic. v. 4. p 16. Kilkerran. C. Home.*

\* \* \* This case is No 31. p. 8266. *voce* LIFERENTER.