

1705. *November 22.* MARGARET BOSWAL and WILLIAM HAMILTON of Grange, her Husband, *against* Cornet GEORGE BOSWAL.

[*See the preceding Case.*]

IN the count and reckoning, at the instance of William Hamilton of Grange, and his spouse, against Cornet Boswal,—the Lords, by their interlocutor, 25th July last bypast, having absolved the defender from counting for annual-rents of sums, and rents of lands, preceding the marriage, as falling under the *jus mariti* of William Hamilton, who discharged the same, and is not restored against the discharge;

The pursuers RECLAIMED by bill, alleging, That rents of lands or annual-rents, could not fall under the *jus mariti* in this case; because the Cornet, as curator to his daughter, was bound, at the ceasing of his administration by her marriage, to accumulate rents and annual-rents then due, into a principal sum, bearing annual-rent. And sums bearing annual-rent, whether by paction or law, fall not under the *jus mariti*. 2. If the discharge be effectual as to rents and annual-rents, it can only be extended to cut off such as were resting, after deduction of the expences of aliment, wedding, and public burdens, for which the pursuers were then liable to the defender; it being against sense to take these deductions out of the fee. 3. Since fraud and guile ought to help no man, Act 54. Parl. 3. James VI. the defender having imposed upon his daughter, under his trust, in the double capacity of a father and curator, he ought to reap no benefit by that deed which was the subject of the lesion and dole. And if the *jus mariti* shall hinder Margaret Boswal to be effectually restored, by depriving her of the benefit of these rents and annual-rents, that law assigns to the husband as a legal tocher, *ad sustinenda onera matrimonii*, wherein she has a joint concern; then the benefit of her restitution, as falling under the *jus mariti*, should accresce to him, by the like reciprocal. Therefore, the Lords must either refuse the common benefit of restitution to a minor lesed, or grant it *cum effectu*, so as both husband and wife might have benefit by it: it being impossible, in this individual state of life, to restore the one, and not the other; especially in Scotland, where the wife has a joint interest with the husband in the moveables, during the marriage.

ANSWERED,—1. It is admired, how it can be asserted, that rents and annual-rents, due to a woman at her marriage, fall not under the *jus mariti*. 2. If the discharge granted by the husband should only reach what was due, over and above the Cornet's articles of discharge, it would have no effect; for the rents and annual-rents would not balance the Cornet's claim. And if any such thing had been intended, the husband, at the granting of the discharge, would have obliged the Cornet to discharge also his daughter. For had the daughter assigned these rents and annual-rents to a stranger, the Cornet would have been liable to pay to the assignee, and left to recur against his daughter upon other funds in his hands; and he is in the same case with the husband, a legal assignee. 3. It is strange for the husband to allege, that he must have the benefit of his wife's restitution, as falling under his *jus mariti*; for then, what must be the fate of most of contracts of marriage within the nation, where the husband, being major, takes bur-

den upon him for his wife that is minor ; against which he can never be reponed, be his lesion never so great, seeing he was *major, sciens et prudens*.

The Lords adhered to their former interlocutor, in finding the rents and annual-rents discharged ; but that they must compensate *pro tanto* the articles of the Cornet's discharge.

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1705. *December 7.* The PROCURATOR-FISCAL OF ANNANDALE *against* GEORGE CARRUTHERS of Holmains.

THE Procurator-fiscal of Annandale, having pursued George Carruthers for 1000 merks, as the fine imposed by the Act 34. Parl. 1. Charles II. for an irregular marriage ; which act was ordained by the Act 12. Sess. 5. Parl. King William, to be put to execution at the instance of the procurator-fiscal of the jurisdiction where the parties guilty should be questioned : and the said defender (whose estate and residence is in the parish of Daltoun, and stewartry of Annandale,) having procured a discharge from the minister of Daltoun, acknowledging his having given satisfaction to the parish ; and a testificate from the kirk-treasurer of Edinburgh, where the marriage was celebrated, bearing receipt of the poors' dues, and a discharge of the pecuniary mulct, for not marrying at the ordinary time in the church :—

The Lords found the fine should be applied to pious uses within the parish, with the burden of the pursuer's expences, to be modified by the Lords ; and found the minister could not discharge ; and therefore repelled the defence, upon payment made to him.

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1706. *January 3.* SIR ANDREW KENNEDY of Cloburn, *against* SIR ALEXANDER CUMING of Culter.

SIR ANDREW, thinking his liferent right to be conservator of the Scots privileges in the Netherlands unjustly invaded, by Sir Alexander Cuming's procuring a gift and commission of the office from the Queen ; raised a reduction of the said commission before it past the Seals, and a declarator of his own right and possession. Sir Alexander's gift being afterwards expedite under the Great Seal, he presented it to the States-General, and the town of Camphire, who received him, and recorded his commission.

At the calling of Sir Andrew's summons before the Lords, he first insisted for declaring his possession ; and decerning Sir Alexander to desist from troubling him in the exercise of the office, so long as his commission stood unreduced.