

No 1. LORDS found the steward and his fiscal had no right to this fine, being a clandestine marriage within the kingdom ; but considered, if there were no reward, there would be no pursuer, and therefore found he ought to have all his expenses allowed him out of the first end of the fine ; and repelled the defence founded on the payment made to the minister, and found Holmains liable in the fine. It may be doubted, whether the composition given the minister, when instructed, (the discharge not mentioning the particular sum received), should be deducted out of the first end of the fine, and imputed in part payment thereof *pro tanto* ; and if he be only liable for the remainder ; seeing the design was collusive and in defraud.

Reporter, Lord Pollock.

Fol. Dic. v. 1. p. 143. Fountainball, v. 2. p. 298.

1705. December 11. CARRUTHERS against JOHNSTON.

No 2.

It was found, that the act 1672, by which a woman clandestinely married loses her terce, was entirely abolished by the act rescissory in 1690.

JANET CARRUTHERS, relict of Johnston of Elschieshiells, and Maxwell of Barncleugh, her present husband, pursue Gavin Johnston of Elschieshiells, and his tutors, in a declarator of a terce due to her as relict, out of the lands acquired by her husband, and wherein he ought to have infest himself, but did not. *Alleged*, Her marriage with his father was clandestine, without consent of parents, or proclamation of banns ; and which, by the 34th act of Parliament 1661, though it subsist *quoad vinculum matrimonii*, yet are expressly prohibited, so that the contravener should have no legal benefit arising therefrom : *Qui contra legem committit, is eo facto juris privilegium amittere debet* : but farther, by the 9th act 1672, by such marriages both the *jus mariti* and *jus relictæ* is lost. *Answered*, That act is expressly rescinded by the 27th act 1690 ; and so the *jus relictæ* continues, and she is only liable to the certification and pecuniary penalties contained in the act 1661.—THE LORDS, after perusing the rescissory act 1690, found it was totally rescinded ; though it appears that no more was intended, but only the abolishing the act in so far as it was inconsistent with presbyterian government, and the present establishment, which that clause anent losing the *jus relictæ* was not ; and so repelled the first defence. Then, *2do, alleged*, There could be no terce sought but of lands wherein the husband died infest, which is not pretended in this case. *Answered*, It is true, a widow cannot be retoured to a terce of any lands by a brief, but allenarly where her husband died last vest and seised as of fee ; but our lawyers allow it to be done by way of declarator, where the husband has lain out for any space of time, and neglected to infest himself ; and here, as to one piece of land, he has been fifteen years in possession, and *quoad* another three years and a half, without infesting ; for though the lying out some time does not infer a sign of fraud, yet a long time presumes it, where there can be no impediment condescended on to

hinder him ; and though it cannot be positively proven, that he abstained from infefting himself merely on the account of defrauding his wife of her terce, that being *actus animi*, and not a positive subject of probation, yet it is a presumptive dōle, *et nemo debet ex suo dolo lucrari* ; and Craig says, *Si pater mariti filium suum investiri obligatus sit, licet maritus durante vita sua investitus non sit, relicta tamen actionem habebit pro tertia* ; and Stair, *lib. 2. tit. 6.* gives sundry cases where a terce is due when the husband dies not infeft, especially where a father disposes his lands to his eldest son in his contract of marriage, and the son for several years does not infeft himself, his omission will be presumed fraudulent, and will not prejudge the wife of her terce. *Answered*, There is no definite time betwixt and which a husband is obliged to infeft, that being an act of administration ; that the want of money, the superiors demanding too great an entry, and many other accidents, may delay without any design of fraud ; and the cases instanced by Craig and Stair are in contracts of marriage, where there is a virtual *jus quæsitum* to the wife, and where she is not otherwise provided, which is not the case here, she having a competent terce in lands wherein he died infeft.—THE LORDS thought the case deserved farther consideration, and ordained it to be heard in presence.

1706. *January 29.*—In the action mentioned 11th December 1705, between Carruthers and Johnston ; the LORDS having heard it in presence, and advised the debate, they, by plurality, found no terce due in lands wherein the husband was not infeft, and that it would be too arbitrary to go upon presumptions and designs, that he lay out of purpose to deprive her ; and it was much safer to hold by the rule, and would ascertain the lieges better what they had to expect ; especially, seeing if he had designed to exclude her from a terce, he had no more to do but to have given her a bond of provision effeiring to the 350 merks she now has, and which, by the act of Parliament in 1681, anent terces, would have been in satisfaction ; only it would have been in her option either to have accepted or repudiated it, and taken herself to her legal provision ; and jointures now have come to be so burdensome to estates, that they need rather diminution than encouragement. *See TERCE.*

*Reporter, Lord Tillicoultry.*

*Fol. Dic. v. 1. p. 143. Fountainball, v. 2. p. 298. & 320.*

1761. *November 14.* KIRK SESSION OF DUNDEE *against HACKNEY.*

No 3.

THE LORDS found, that the kirk-session had no title, on any acts of Parliament, to pursue for fines of a clandestine marriage, although, when regularly imposed by the Judge of the jurisdiction, the kirk-session is entitled to a share.

*Fol. Dic. v. 3. p. 123.*

*See POOR.*

*See APPENDIX.*