

alleged, for entertaining for by-gones, holds also for time to come, which, if it should be admitted, would elide the act of Parliament. But I think the reason holds not, for in by-gones they are spent, and not so in years to come, whereby they are extant. And, upon the 11th December 1629, betwixt the same parties, the excommunicants and their tenants being both convened, each one of them *in solidum*, to pay the farms of their lands, being both holden as confessed, decret was given against them, and each one of them, *in solidum*, but once payment was declared, should only be taken from one of them to liberate both.

No 23.

Act. *Advocatus.*Act. *Aiton, M'Gill, & Hope.*Clerk, *Hay.**Fol. Dic. v. 1. p. 108. Durie, p. 451.*

1633. November 16.

GRANT against GRANT.

ONE Grant, by his contract of marriage with ——— his future spouse, being obliged to infeft her in lands which he had in wadset from the Laird of Grant, and the contract bearing, that he should take a new security of the lands from the L. of Grant, to himself and to her, and the longest liver of them, and the heirs to be procreate betwixt them, which failing, to his heirs; and, after the perfecting of the marriage, he having, within three or four months thereafter, obtained infeftment thereof to him and her in liferent, and to his heirs, failing of heirs betwixt them; which infeftment had no relation to the said contract, nor made mention thereof: Thereafter the husband dying within the year after the said marriage, and another Grant being infeft by the superior in that land, as heir to that husband deceased, being his brother, or uncle, there being no bairns of the marriage; which infeftment was granted upon the superior's precept of *clare constat*, and not upon retour; and this heir, diverse years thereafter, pursuing the relief for the mails and duties of the lands foresaid, of all the years after her husband's decease, and which were intromitted with by her, and which she had good right to uplift, as she alleged, by virtue of the said sasine, both for by-gones, and also in time coming: And the pursuer *replying*, that her sasine was become invalid and extinct by the husband's decease within the year, as said is, which put both parties in that case for conjunct fee and tocher, as if no marriage had ever been contracted, and restored them to their own rights thereof *hinc inde*: And she *duplicing*, that her sasine had no relation to that marriage, nor depended thereon, and albeit it should depend upon that contract, yet it was sufficient for all by-gone years before this pursuit, which she had uplifted and consumed, and must of reason be reputed to have been uplifted *bona fide*, by virtue of her right foresaid standing unquarrelled, and she never being interrupted in her possession before this pursuit.—THE LORDS repelled the exception and duply, and found the reply, upon the husband's decease within the year, relevant; which reply was

No 24.

A wife's right in lands by infeftment, in terms of her contract of marriage, extinguished by her husband's death within year and day, found not to afford such a colourable title as to infer *bona fide* consumption of the fruits.

No 24.

not only sustained for the years to come, but also for all by-gones, for which the Lords found the relicf had no right, and that she could not meddle with the same *bona fide*, in respect of her husband's decease within the year; and, therefore, that she ought to refund the same, albeit her possession was never interrupted before this pursuit, and albeit also that she alleged, that the pursuer, by virtue of his saine only upon a precept of *clare constat*, not being retoured, ought not in reason to claim the by-gones before the precept, since her husband's decease, but that her intromission therewith was favourable, for these years before his right; which allegiance was repelled, and the saids years since the husband's decease were all found due to the heir, albeit only received by the superior's precept, seeing the superior nor none other claimed these by-gones by non-entry; and also this saine, albeit making no mention to be given to the wife *intuitu matrimonii*, nor having any reference to the contract, yet expressing no other cause, and no other cause thereof being qualified by the party, and being the same deed, whereto the husband was obliged in the contract, the same was found to be done for implement thereof, and to depend thereon.

A.G. Gibson.

Alt. Baird.

Clerk, Gibson.

Fol. Dic. v. 1. p. 109. Durie, p. 692.

1708. July 7.

MR ANDREW REID, Minister of Kirkbean, *against* GEORGE MAXWELL of Munches, and JOHN LANERICK of Torrorie.

No 25.

A minister held a decree of modification and locality. Some years after, an heritor obtained a decree of valuation, by which his proportion would have been less. In a subsequent prosecution by the minister, he was not allowed to plead *bona fide* possession.

GEORGE MAXWELL of Munches having raised a valuation of the teinds of his lands of Torrorie, lying within the parish of Kirkbean, during a vacancy of the cure, wherein the patron, titular, and moderator of the presbytery were called, as the proper contradictors. He, in February 1699, thirteen days after Mr Andrew Reid's admission to that church, obtained decret, valuing his teinds to a less duty than the proportion of stipend imposed on his lands by a decret of modification and locality in the year 1650: Which decret of valuation being reduced by the commission upon this ground, That the minister was not called to the pronouncing thereof: Mr Andrew Reid pursued the said George Maxwell, and John Lanerick, present heritor of Torrorie, for several years stipend due to him out of these lands, conform to the decret of modification.

Alleged for the defenders: They were *bona fide* possessors, by virtue of the decret of valuation, till the same was reduced; and could be liable in no greater quantity of stipend than their valued teind-duty; especially, considering that their teinds are truly worth no more, and the highest flown divines never claim more than the teind: For even null decreets and other deeds have been found *tituli colorati*, affording the benefit of *bona fide* possession till they were reduced, Guthrie *contra* Laird of Sornbeg, No 65, p. 861.; Earl of Wintoun *contra* the