

bers of the house were under the protection of the Lords, in going about the exercise of their employment, he craved redress.

The Lords considering that injuries and indignities, done to any of the College of Justice in their employments, used to be summarily cognosced and vindicated, without a formal process, they ordained him to be cited to answer to the bill; but the question arose upon how many days, six being usual in such cases: But, in regard he lived in Aberdeenshire, they appointed the citation to proceed on fifteen days, as a more competent time to answer.

*Vol. II. Page 129.*

1701. *December 19.* MARGARET BOSWAL, and HAMILTON of GRANGE, *against* BOSWAL, her Father.

MARGARET Boswal, and Hamilton of Grange her husband, against Cornet George Boswal her father. The said George Boswal marries Margaret Bruce for his first wife, and by her has only one daughter, called likewise Margaret, who, by the decease of her mother's father, falls in to be apparent heir to some houses and acres about Kinghorn, and sundry sums of money, extending to upwards of 12,000 or 13,000 merks, as they were commonly valued; but Robert Bruce, her uncle, claiming the same by a disposition, Cornet Boswal raised reduction thereof, and, after a tedious and expensive plea, prevailed, and at last it ended in a transaction. In 1698, William Hamilton of Grange came in suit of the said Margaret Boswal, daughter of the said Cornet, and, after communing, he agreed to accept of 6000 merks of tocher, whereof 4000 in hand, and 2000 after the Cornet's decease, and to abide his liferent; and, of the date of the contract of marriage, there is a bond, subscribed by Grange and his future spouse, obliging them, for the tocher foresaid, to dispone all the estate befallen her from her grandfather, to the Cornet, and to discharge him of his tutory-accounts; and to grant an ample disposition thereupon, after the celebration of the marriage. About a month after the marriage being consummated, there is, the next morning, a disposition subscribed by the said two new-married persons, conveying all she had succeeded to, by her maternal line, in favour of her father. And, some time after that, Grange gives a discharge of the 4000 merks of tocher; but afterwards, thinking that he and his wife had renounced an opulent estate, and gotten nothing but a small part of that which was undoubtedly her own, and which her father could not withhold from her, he raises a reduction of the contract of marriage, and all the deeds and transactions depending thereon; and insisted on his wife's minority and lesion, on *metus reverentialis*, force, concussion, and fear; and that the deeds were in favour of her curator and administrator of law, without consent of a quorum of the rest of her curators.

The Lords, before answer, allowed a conjunct probation to either party, what was communed or treated betwixt the parties before the marriage, and if any threats or concussion was used; and what was the true value of the estate in controversy, which devolved to her by her grandfather, and how far it exceeded the tocher, and what expenses were bestowed on the process for defending or recovering it.

And accordingly probation was led ; and the parties being heard on the import thereof, it was ALLEGED for Grange the pursuer,—That his wife was plainly lesed, even *ultra dimidium*, which the common law makes sufficient to reduce venditions, *l. 2. C. de Rescind. Vendit.* ; for her fortune was better than 13,000 merks, and all she got was but 6000 merks, and 2000 of that liferented by her father, though he had right neither to fee nor liferent ; and her being then minor was acknowledged, and a quorum of her curators not consenting, but her father authorising her *in rem suam*, and taking the profit to himself. *2do*, It was a fraudulent advantage taken of the young folk, being *in æstro amoris*, and told the marriage would be stopt, if they did not yield to these conditions. And Pitblado, one of the witnesses, depones, That the gentlewoman hearing that of all her estate she was to get 6000 merks, she fell a-weeping, and complained. And the dole and circumvention evidently results from the whole *tractus negotii et ex re ipsa*, by eliciting such writs from them after their affections were engaged. And, if this were allowed, it laid down a plain foundation for parents, tutors, and curators, to prey upon their children and pupils, who have extrinsic adventitious estates, not descending from their father, but coming from the maternal line or collateral relations ; and to betray their trust, and make them a prey to any man that will make the cheapest bargain, and be easiest to please : and such paction the Lords had reprobated, as *illicitum et contra bonos mores*, by their decision, *23d June 1680, Hamilton of Balderston against Borthwick*, in the case of a step-father, except in so far as he instructed it to be onerous. *3tio*, As the wife must be reponed, so likewise must Grange her husband, though *major, sciens, et prudens* ; for if there be circumvention *in re*, it infects the whole transaction ; and a cautioner intervening in such a transaction will be restored as well as the principal : And thus the Emperor Dioclesian determines, *in l. 2. C. de Fidejussor. Minorum*, that though, *regulariter*, one who is cautioner for a minor has not the benefit of restitution yet if it be interposed and procured *ex dolo malo*, then both of them are to be reponed, *utrique personæ consulendum est*. And though much deference is to be given to parents, yet common honesty requires they be not permitted to rob their children of a first marriage, to give to those of a second ; and that parents or others, having estates in administration, under trust, do not, under colour of that sacred name, turn themselves, instead of administrators, into proprietors.

It was ANSWERED for Cornet Boswal, the defender,—That as to the wife, her succession was little more worth than the 6000 merks given her *nomine dotis*, seeing the evicting it from her uncle exhausted a part of it, besides her aliment for many years ; which ought to deduce, where she has a proper peculiar estate of her own. *2do*, It is *res transacta*, and so irreducible, her claims being dubious and illiquid, and here a neat sum is given her : and it is a principle, that *super re dubia transigere licet* ; as was argued *14th February 1677, the Duke and Duchess of Buccleuch against the Earl of Tweeddale*. *3tio*, The wife is not lesed ; for she is provided by her contract to a suitable and competent jointure ; so she is secured *in omnem eventum*. *4to*, The husband cannot be reponed, for he is major, and has homologated both before and after the marriage, and granted a discharge of the tocher ; so, *esto* his wife were reponed, he stands bound in the warrandice of the disposition. And if such pleas were sustained, then inevitable confusion would follow, and all fathers be exposed as fraudulent,

and many contracts brought in question, and parents called to a petty account, what they did with their children's means, and all be cast open.

The Lords having considered this debate, they thought it was not every lesion that could reponne minors entering into contracts of marriage; but it behoved to be *enormis et immodica*; as Spottiswood observes, *tit. Of Husbands, Fleming* against *Hog*,—that a wife, being minor, was not restored against her disposing her lands to her husband *nomine dotis*, though his fortune and means were unanswerable thereto; and that an exact equality was not necessary: *Vid. supra, Carmichael* against *the Lady Lee and John Sinclair*: And therefore the Lords, by a vote, found, That if enorm lesion were here proven, then the Lady Grange was to be reponed; but did not determine what lesion would be reputed such. Then, by a second vote, they found Grange the husband liable, notwithstanding his wife should be free. Some thought his homologations after the marriage not so valid, they being so recently taken as the next morning, and so still *in æstro amoris*; but that his deeds anterior did bind him, unless he could say that it was told him, If you do not accept of this tocher, the marriage shall be stopt; which was a plain concussion, and more than a *metus reverentialis*. Some asked, What did it signify to restore the wife upon immoderate lesion, if the husband stood bound, and was found to be excluded from quarrelling it? It was ANSWERED, —That though, during the standing of the marriage, it had little effect, yet, if she survived her husband, and became a widow, she might oblige her father to make up the defects of her contract, leaving him to recur for his relief upon her husband's heirs.

*Vol. II. Page 131.*

---

1701. *December 24.* MATTHEW CUMMING *against* MARGARET SCOT and JOHN MUIR.

I REPORTED the competition about the estate of Mr John Kincaid of Corsebasket, advocate, betwixt Matthew Cumming and Margaret Scot, his sister's children, and his nearest of kin. John Baillie of Park, heritor of the lands of Corsebasket, makes a tailyie of these lands in 1659, to himself and the heirs of his own body; whilk failing, to John Kincaid his nephew, and the heirs of his body; then to Francis Kincaid and his heirs; and, last of all, to Margaret Kincaid their sister, and the heirs of her body. After Baillie's decease, John Kincaid does not prosecute the tailyie, but charges Baillie's sisters, as heirs of line, to enter heir to him in the said lands of Corsebasket; which they accordingly did, and disposed to him these lands, but exactly in the terms of their brother's tailyie, whereupon John is infeft; but afterwards resolving to change the holding, he resigns in the hands of the Duchess of Hamilton, superior, and prevails with her Grace to get them changed from ward to feu; and in this charter the tailyie is neglected, and the lands taken to himself and the heirs of his own body; which failing, to his brother Francis, and the heirs of his body; and these also failing, the fee to return to himself, and his own heirs whatsoever; and on this he is also infeft. On John Kincaid's decease, in June 1700, Matthew Cumming, eldest son to Margaret Kincaid, the last branch and member of the tailyie made by John Baillie, serves himself heir of provision and tailyie to the said John Baillie, and thereon infefts himself as *hæres ex asse* in the whole lands: