

1704. *June 22 and November 15.* The DUCHESS of BUCCLEUGH *against* The EARLS of MELVIL and LEVEN, and Mr JAMES MELVILL of HALHILL.

*June 22.*—THE Duchess pursues a reduction of an assignation made by her and the Lord Cornwallis, then her husband, to Mr James Melvil, of the rents and debts owing to her in Scotland preceding its date in 1694.

ALLEGED,—No process at the Duchess's instance ; because these bygone rests assigned did, *jure mariti*, belong to the Lord Cornwallis, her husband ; and she produced no right nor title from him.

ANSWERED,—She had sufficient interest ; for he was fully denuded by a renunciation of all he could claim by the dissolution of the marriage ; and accepted L.1000 sterling *per annum* in full satisfaction thereof, and of his right of courtesy ; which reinstated her in her own right to her rents and arrears, *stante matrimonio*, as fully as if they had been *per expressum* assigned.

REPLIED, *Imo.* Renunciations transmitted no positive right, and were not equivalent to an assignation. Likeas, a husband cannot validly renounce his *jus mariti* no more than he can do the administration, or his being head of the family ; but, like water thrown upwards, it always recurs and falls back again. And it was so found in the case of the *Lady Carberry* and the *Creditors of Mr Andrew Hamilton*, her husband, that the husband could not discharge his *jus mariti* ; and *9th February 1667*, *Lord Collington and Ratho* against the *Lady Collington*. See *13th July 1678*, *Nicolson* against *Inglis* ; and *Mrs Anderson, the printer*, against *Patrick Telfer her husband's Creditors* in 1682, that the *jus mariti*, being *officium virile* and essential to the husband, could not be renounced.

DUPLIED,—That the *jus mariti* quite deborded from the civil law, and was unknown to the Romans, where the wife's goods remained fully her own, unless constituted in a tocher, and so disposed by her to her husband ; and this *jus mariti* was introduced by the Saxons, and assumed by the northern nations : and even Holland, who follows this custom, do wholly over-rule it by the *pacta nuptialia* : so that it is modified and restricted by the pactions and agreements of parties ; that maxim here taking place, *Provisio hominis tollit provisionem legis* ; and the notion of its being undischageable is now wholly laid aside. And the similitude of water recurring, borrowed from nature, does not quadrate to moral and civil cases depending on the free consent of parties, and not acting from a natural principle of necessity.

It was farther contended, That this renunciation was on the matter a donation *inter virum et uxorem*, revocable, and actually revoked by the assignation ; and which, containing warrandice, made his representatives liable. And that the onerous cause of the renunciation, for his courtesy, was a mistake ; for he being the Duchess's second husband, he could have no such claim, she having sons by her first husband ; as was decided, *1st December 1702*, *Darleith and Campbell*. And from all this it was concluded, That, unless she had a right from Cornwallis's executors, and that they and his creditors were called, she had no title to pursue ; neither could she validly discharge Mr James Melvil, who might be afterwards pursued by Cornwallis's heirs or creditors ; and it was more reasonable that she secure him by bringing them in the field, which would occasion but a short delay, than to expose him to a manifest hazard ; especially seeing the Lord Cornwallis renounced only what might befall to him by his *jus mariti* at the time of the dissolution of the mar-

riage, which could not extend to thir rests, being assigned to Mr James Melvil before.

The Lords, by plurality, found the Duchess had not a sufficient title to pursue, without the concurrence of my Lord Cornwallis's representatives. And, though the Duchess's daughter, by him, was his nearest of kin, yet this opens a door to his creditors to claim all these bygone rents, if Mr James's assignation fall.

On the 6th July 1704, the Duchess appealed, against this and the other interlocutors, to Parliament. *Vol. II. Page 232.*

*November 15.*—The Duchess of Buccleugh gives in a bill against the Earls of Melvil and Leven, reclaiming against an interlocutor, finding they are not obliged to depone anent, or exhibit the papers contained in, the 4th article of the condescendence; and though she had (as mentioned *supra*, 22d June 1704,) appealed from the Lords to the Parliament, yet her lawyers did now judicially declare they passed from it *quoad* this article.

It was *CONTENDED* for the two Earls,—That however appellants have been hitherto allowed to pass from their appeals *re integra*, while there was nothing done in it by the superior court appealed to, yet the Duchess had tabled and brought in her affair to the Parliament, and received interlocutors there, which made such a *litis pendentia* as there was no returning back again to the session; neither could the Lords now sustain themselves competent judges to the process now tabled and depending before the Parliament. Put the case that one should advocate a cause from the Sheriff to the Lords, and, after debate and interlocutor, being dissatisfied, should lift his process, and go back again to the Sheriff, would the Lords permit this? Even so, *a pari*, the Parliament is as far above the session as they are above the sheriff.

*ANSWERED* for the Duchess,—That there was no litiscontestation made, or relevancy discussed before the Parliament, but only a dilatory defence, rejecting the execution of citation against Mr James Melvil; and, before litiscontestation, any party may lift their process.

The Lords, finding the case new, resolved to proceed deliberately, and hear the parties; for, though Mr Higgins and others had passed from their appeals, yet that was where the Parliament had not yet dipped in the business; and, by the 2d Act, Parliament 1695, the exception of prejudiciality seems to commence when the citation is called and sustained by the Parliament: and this inconvenience of prolonging pleas was obvious, that though the Duchess passed from this appeal, yet, if her Grace thought herself lesed by any new interlocutor of the Lords, she might appeal *de novo*, and so *duretur progressus in infinitum*, unless she renounced all future appeals. Next, it deserves inspection, how far her passing from one article, and adhering to her protest for remedy of law *quoad* the rest, is receivable; and if it can be divided, so that a part of the process shall lie before the Parliament, and another part of it may, by the appellant, be brought back to the Session, without a special remit from the Parliament.

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1704. *November 25.* The TOWN of CULROSS *against* ERSKINE of BALGOWNY

THE Lords advised the probation led in the mutual declarators of property