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nor execution against the effects falling under the husband's *jus mariti*, pass upon it during the marriage."

*Fol. Dic. v. 1. p. 403. Kilkerran, (HUSBAND and WIFE.) No 1. p. 256.*

\* \* \* C. Home reports the same case :

IN the process of scandal, at Gordon's instance, against Jean Pain, for having called him a base deceitful villain, and scoundrel, &c. ; the Commissary of Dumfries, upon a proof of the fact, fined her in L. 30 Scots, and assolizied her husband. She suspended on these grounds, *imo*, That the pursuer had laid a base contrivance for keeping her husband away from a Michaelmas election of the magistrates for the burgh of Annan, by sending to acquaint him, that a friend of his was dying, whom he immediately set out to see, four armed men gripped and kept him till the election was over, which she offered to prove, as a sufficient excuse for any opprobrious language she had given him. *2do*, The decret was inept, being against a wife, *stante matrimonio*, for a sum of money, who, having nothing of her own, cannot have a fine imposed on her for her delict ; and that it would be an inconsistency in law to allow execution to pass for levying such fines during the marriage.

THE LORDS found, that personal execution could not go against the wife *stante matrimonio* ; and that the goods in communion, or what fell under the *jus mariti*, were not affectable for the fine ; and allowed a proof before answer of the husband's being carried off.

*C. Home, No 105. p. 169.*

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1739. February 9. SPENCE against THOMSON and Others.

THE process for the pecuniary penalty upon the statute discharging play-houses, against the wife of Henry Thomson comedian, was cast on this ground, that her husband had not been called.

*Fol. Dic. v. 3. p. 285. Kilkerran, (HUSBAND and WIFE.) No 2. p. 256.*

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Where a wife is pursued for a delict, she cannot waive the defence that the husband was not called.

1749. December 8.

ISABEL FREEBAIRN and MUIR her Husband against HELEN GRANT.

A DECREE of the Commissary of Glasgow, obtained at the instance of Isabel Freebairn against Helen Grant, decerning her ' To stand at the court-door for half an hour, with a label above her head acknowledging her crime, in uttering certain injurious expressions against the said Isabel, and to subscribe a

‘ recantation, all under the penalty of L. 10 Sterling; and afterwards decern-  
 ‘ ing in the penalty as incurred;’ was suspended on this ground, that though  
 James Howie, husband of the said Helen Grant, had, on the day on which she  
 was appointed to give obedience, presented a petition, setting furth, That a-  
 bout the commencement of this process, he had been married to the defender,  
 and that the process could not proceed till he was called; the Commissary,  
 without enquiring into the truth of the allegiance, disregarded this objection,  
 and ‘ found the penalty incurred.’

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When the suspension came to be discussed, rather than be at more trouble  
 about the matter, Helen, the suspender, submitted to make an acknowledg-  
 ment of the injury in the commissary-court, in presence of the chargers, in  
 which the chargers acquiesced; and it being appointed by interlocutor of the  
 Ordinary to be done, it was done accordingly.

Thereafter the chargers enrolled the cause, and insisted for expenses, which  
 the Ordinary found due to take effect at the dissolution of the marriage. A-  
 gainst which the chargers reclaimed, and insisted that the husband should also  
 be found liable; but upon advising the same, with the answers, the marriage  
 being instructed by a decree of the Sheriff of Lanark, fining the parties for a  
 clandestine marriage, the LORDS, without entering upon the question, whether  
 or not the husband should be liable for the expenses, supposing the injury  
 to have been committed before the marriage, found, ‘ that the process could  
 not proceed, the husband not being called, which objection the wife could not  
 wave.’

*Kirkerran, (HUSBAND and WIFE.) No 15. p. 267.*

1775. July 27. JOHN ANDERSON *against* MARGARET BUCHANAN.

MARGARET BUCHANAN, wife of Andrew Harvie, in the course of her busi-  
 ness of retailing ale and spirits, had contracted a debt to John Anderson malt-  
 man, to the amount of L. 19; and, being distressed for some other small debts  
 which she was owing, Anderson was induced to lend her L. 6 to pay them off,  
 upon her granting an heritable security to him upon certain subjects to which  
 she had succeeded, as heir to her brother; and, accordingly, an heritable bond  
 for L. 25 was executed by the said Margaret Buchanan and her husband,  
 whereby the principal sum was not to be demanded till the term of Martinmas  
 1770, three years and nine months after the date of the bond; and it is there-  
 by declared, that, in default of redemption of the said lands upon the foresaid  
 term, full power is given to the said John Anderson to sell and dispose upon  
 the foresaid lands, and to retain out of the price the foresaid sum lent, interest,  
 and expenses. And as neither the principal, nor even the interest, was paid at  
 that term, Anderson applied to Margaret Buchanan and her husband to con-

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Execution  
 may be used  
 against a  
 wife's person,  
 upon her obli-  
 gation *ad fac-  
 tum prastan-  
 dum.*