

CLANDESTINE MARRIAGE.

1705. December 7.

The PROCURATOR FISCAL of the Stewart-court of Annandale, *against* GEORGE
CARRUTHERS of Holmains.

THE said George having married a gentlewoman of his own name, but irregularly, without proclamations, he is pursued by the procurator-fiscal of Annandale before Johnston of Girth-head, stewart-depute thereof, for payment of 1000 merks, as the fine imposed, by the 34th act, Parl. 1661, on a landed gentleman for a clandestine marriage; and this cause being advocate to the Lords, it was *alleged* for Holmains the defender, That though he was irregularly married, and so liable to the penalty, yet that, by the foresaid act of Parliament, does not belong to the fiscal, but only to the poor; for there are two clauses in the act, one relating to such marriages within the kingdom, and their fines are expressly applied to pious uses within the parish where they dwell; and the other clause is, when persons living in Scotland retire to England or Ireland, and marry there without proclamation of banns, these penalties are divided, the one-half to the King and fisk, and the other half to the poor; now, Holmains' marriage was of the first kind, and celebrated within the kingdom, and so the whole pertains to the poor of the parish of Dalton, within which he dwells, and his lands lie, and to whom he has given satisfaction, and obtained the minister's discharge for the same; whereby all pretence of the stewart-depute or his fiscal is cut off. *Answered*, The last clause of the act, dividing the fine betwixt the fisk and the poor, must have a retrospect to the whole act, and is explained by the 12th act 1695, committing the execution of these laws against disorderly marriages to the procurator-fiscal of the bounds and jurisdiction where the person guilty dwells; and if they had not the encouragement of the half of the fine, they would never pursue, so these delinquencies would go unpunished; and the payment made to the minister of the parish is but simulate and collusive, for some small composition; and the discharge is null, as wanting the concurrence of the elders, and being posterior to the citation at the fiscal's instance. THE

No 1.

The poor of the parish only, have right to the fine for clandestine marriage; but, in order to encourage to prosecute, the procurator-fiscal will be allowed his full expences out of the first of the fine.

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