

Case 78. William Hamilton, of Grange, Esq; - Appellant;
 Fountain- George Boswell Esq; - - - Respondent.
 hall,
 19 Dec.
 1701.

Forbes,
 25 July and
 22 Nov.
 1705.

3d Feb. 1720-21.

Minority and Lesion.—Jus Mariti.—Courtesy—A minor wife, whose husband was major, is reponed on the head of Minority and Lesion, against certain deeds executed by her, with consent of her husband: but such consent of the major husband excluded his jus mariti and courtesy, though it did not extend to enforce a warrantice of the deeds executed by the wife, to which he was specially bound.

AFTER the determination of the former appeal, (No. 44 of this Collection,) whereby it was found, that the infestments of the appellant's wife not being quarrelled in her lifetime, were sufficient to support the courtesy of the husband; the appellant brought a fresh appeal against sundry of the early interlocutors pronounced in the cause by him and his wife, in her life-time, against the respondent. On the 19th of December 1701, the Court "found that Margaret Boswell, the appellant's wife, being
 " minor when she subscribed her contract of marriage and other
 " writs craved to be reduced, she ought to be reponed against
 " the same upon enorm lesion; and ordained parties procurators
 " to be further heard if the said Margaret Boswell was enormly
 " lesed by subscribing the writs aforesaid; but found that the
 " appellant being major, and not having proved concussion, that
 " the qualities alleged by him were not relevant to infer
 " contravention to repon him against the deeds subscribed by him
 " before and after the marriage, and therefore assoilzied the respon-
 " dent from the reduction at the appellant's instance:" And to this interlocutor the Court adhered on the 23d of February and 22d of June 1703: And on the 1st of July 1703, the Court
 " repelled the nullity, that the father being curator to his daugh-
 " ter could not take a discharge to himself from his daughter, in
 " her contract of marriage of her curator's accounts; but re-
 " mitted to the Lord Ordinary to take inspection of the accounts
 " produced, and instructions thereof, for inferring or liberating
 " from enorm lesion, and to hear parties procurators there-
 " upon."

Counsel being heard on the said accounts, and a report made to the Court, their lordships, on the 27th of the said month of July, "found sufficient instruction of enorm lesion to repon
 " the appellant's wife against the contract of marriage, and
 " deeds following thereupon, and to oblige the respondent to
 " count and reckon:" to which the Court adhered on the 26th of November thereafter. After an account taken, the Court, on the 25th of July 1705, "found that the annual rents of the
 " principal fums, and the rents of the acres and others belonging
 " to the appellant's wife, must enter into compute for determin-
 " ing

“ ing whether she was enormly lesed by her contract of marriage; and found that she was enormly lesed; and that the respondent was not liable to account for the said annual rents and rents, in respect they were discharged by the appellant, the husband, who was major.”

After further proceedings in the count and reckoning, and the respondent having got credit for the sum of 6000 merks, given as a marriage portion to his daughter, the Court, on the 16th of January 1708, “ found that the respondent had in his hands, at the time of the marriage, of by-gone rents and annual rents, the sum of 509*l.* 10*s.* Scots, over and above all his disbursements, for aliment, expences of plea, and other expences, and annual rent thereof, expences of the wedding and wedding cloaths, public burdens, reparations, and others, depursed by him for his daughter preceding the marriage.”

The appellant and his wife afterwards applied by petition to the Court, stating, that as it appeared, that instead of the daughter's being indebted to the father at the time of the marriage, as was pretended, he was in her debt 509*l.* 10*s.* Scots, so he had this sum as a reward to engage him to take her estate; and they therefore prayed, that they might be relieved against this transaction as being so much imposed upon: But the Court, on the 4th of July 1706, “ assilzied the respondent from the reduction at the appellant's instance, in so far as concerned his *jus mariti* or courtesy, but declared the obligation or burden taken by the appellant to cause his wife to make good the disposition under a certain penalty, to be void as to the appellant's wife and her heirs, and reduced in so far.” And on the 31st of the said month their lordships “ reponed and restored the appellant's wife against the several deeds executed by her at the time of her marriage, and reduced the same as to her interest.” And on the 22d of July 1707, the Court “ refused to restore the appellant, or reduce the deeds as to him.”

The appeal was brought from “ part of two interlocutory sentences or decrees of the Lords of Session of the 19th of December 1701, and 25th July 1705, and the several affirmances thereof.”

Entered,
26 Nov.
1719.

Heads of the Appellants' Argument.

The said Margaret, the wife, was a minor, when she executed these deeds; she had at that time guardians or curators, and these deeds being executed without their consent, were void. They were not only deeds without their consent, but really deeds in their own favour, since they discharged the curators of all their receipts, upon the recital of an account stated, when there was no such thing. If these deeds were null upon this account, then the joint obligation of the appellant must fall; for a null obligation can have no accession, and the appellant's obligation was only accessory to the wife's.

It is certain there was very gross fraud, for the respondent, instead of letting his daughter know the true state of her affairs,
wholly

wholly misrepresented them. Though the estate which descended to her from her mother was said to be encumbered, yet it appears it was quite otherwise; and though the respondent alleged that his daughter was in his debt, it was proved that he was indebted to her. And the time when these representations were used adds considerably to the fraud; after he had proposed the appellant as a proper husband for her, after their affections were mutually engaged, then, and not till then, did he trump up the false account of her circumstances. To tell them then that there should be no marriage without giving in to the terms proposed by him, shews, to a demonstration, the intention of a fraud. That is even still made more plain from the inducement he made use of to persuade the appellant and his daughter to agree to these measures, which was the promise of a fortune of 6000 merks, which, as he said, was altogether voluntary, when in fact the 6000 merks were her own money, and instead of giving her any thing, he retained the interest of 2000 merks of her own money during life.

If the transaction in regard to the wife was fraudulent, as the Lords have determined it to be, it must be so in relation to the husband, he being imposed upon and drawn in by the same misrepresentations; and the reason given for the distinction, viz. that the husband was major, seems to be of the most dangerous consequence: Upon that way of reasoning, no man of full age is to be relieved against fraud. A minor is to be relieved on account of nonage, even though the bargain be not fraudulent; but wherever fraud is an ingredient, whoever is thus fraudulently circumvented, without regard to his age, is to be relieved. This is the proper business of a Court of Equity, as the Court of Session certainly is.

If the appellant was not to be relieved because of age, how could he be relieved against his obligation, that his wife should ratify these deeds when of age, under a penalty equal to the value of the estate? Was not he as much of age, when this obligation was entered into, as when the conveyance was executed? And as they were in the same deed, why should he be relieved against one and not against the other, since the reason is the same in both.

Heads of the Respondent's Argument.

The respondent claimed the appellant's life-rent estate upon the same title and conveyance which is now quarrelled; and the Court of Session absolved him from the appellant's action brought in order to remove him from the possession of that life-rent estate; which was directly and plainly decreeing the estate to belong to the respondent in virtue of this conveyance. That decree was affirmed by the House of Lords; and if the appellant did not think fit to insist upon the objection he now makes against the conveyance, he has himself to blame; but the truth is, he was conscious to himself, and was advised, that the objection was of no force.

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There is no evidence of the least unfair dealing in the whole transaction; the respondent represented the circumstances of the estate according to the best of his knowledge and belief: if the appellant was not satisfied with these accounts, he was at freedom to have inquired more narrowly, which if he neglected, he has himself to blame, but that can be no ground for avoiding the transaction.

It was optional to the respondent to consent to his daughter's marriage with the appellant or not, as he thought fit, and upon such terms as he judged reasonable, considering his own circumstances; and if it was true that the appellant would not consent to the marriage, and give the tocher with his daughter, that he actually gave her, without the appellant's quitting and making over any claim he might have had to the life-rent of the daughter's estate, there was no fraud in this, but a fair transaction. The appellant himself, in a petition given in to the Court in the name of his wife, does acknowledge in so many words, that he neither did allege nor prove any concussion or force used against him, though he had alleged and proved concussion used against his wife.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that such part of the interlocutory sentences or decrees, and the affirmances thereof as are therein complained of, be affirmed.*

Judgment,
3 Feb. '
1720-21.

For Appellants, *Rob. Raymond. Will. Hamilton.*
For Respondent, *Ro. Dundas. Tho' Bostle.*

The actions between these parties appear to have lasted upwards of 20 years.

John Paterson, eldest Son and Executor of
John Archbishop of Glasgow, deceased, *Appellant*;
The Commissioners and Trustees of the
Forfeited Estates, - - - *Respondents.*

Case 79.

20th March 1720-1.

*Forfeiture for Treason.—1 Geo. I. c. 20.—Personal debt claimed on a forfeited Estate.—*The acts relative to forfeiture for treason having saved the rights of creditors innocent, dutiful, and loyal; a claim on a forfeited estate, by virtue of a personal bond, (which had been given up in the inventory by the claimant when confirmed to his father) is made by a person who had been confined in prison upon suspicion, but liberated without trial; this claim is rejected by the trustees and Court of Delegates, but their judgment is reversed.

IN February 1681 Charles Earl of Marr, deceased, as a principal, and George Earl of Panmure deceased, as cautioner, granted a bond to the appellant's father for 2000 merks Scots.

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