actus geminati, and all conjoined together, are of that same strength as if her husband and she had disponed the lands, and that she had judicially ratified the disposition;——THE LORDS found the exception relevant, notwithstanding of the ratification produced; for the LORDS found that the bonds, albeit subscribed also by the woman, yet being of borrowed money, and done by her with her husband *stante matrimonio*, could not be obligatory against her, nor produce caution against her; and also found, That a ratification, being done by an act extracted out of the town books, as said is, under the clerk's subscription, did not derogate to the defender's right of conjunct-fee, seeing it was done by her in the time of marriage standing, her husband then being in life, and that the same was not warranted by her subscription, nor was there any other writ made before this judicial act, whereby she had given her consent, and subscribed the like ratification, without which her subscription of some preceding writ of this tenor, and the said ratification judicially made of the comprising, and renunciation of her foresaid right, under the clerk's hands only, and not subscribed by herself, with her own hand, or by notaries for her, if she could not write, could not prejudge her right. See PROOF. No 164.

Act. *Cunningham* et *Johnston*. Alt. *Mowat* et *Deans*. Clerk, *Scot*.
Fol. Dic. v. 1. *p.* 398. *Durie, p.* 747.

*** See Spottiswood's report of this case, Div. 9. *h. t.*

*** In conformity with the above was decided a case, July 1725, Irvine against Representatives of Dougal. See APPENDIX.

1663. *January* 14. BIRCH *against* DOUGLAS.

No 165.
A personal bond granted by a woman *stante matrimonio*, found to be ineffectual against her, though her husband had subscribed it and she had ratified it upon oath.

SARAH BIRCH widow in London, charges Catharine Douglas relict of John Muir merchant, for payment of a sum of money contained in a bond granted by him and her to the charger. She suspends upon this reason, that the bond is not obligatory but null, as being granted by her *stante matrimonio*, during which time, no wife can validly bind herself, (though she may dispone with consent of her husband) and if she do, the bond is *ipso jure* null, whether it be judicially ratified by oath or not. This matter having never been decided before, was ordained to be heard *in præsentia*, where it was fully debated among the advocates and among the Lords themselves, from the civil law, our law and practiques, and from the consequences: From the civil law it was *alleged*, That a woman might *renunciare beneficio senatus consulti velleiani* made *contra intercessiones mulierum*, and oblige herself notwithstanding thereof, *multo magis* in this case, where an oath is interposed not to come in the contrary of the bond. From our law and practique K. James III.'s 11th Parliament, cap. 83,. it is declared, that a woman may not come in the contrary of her oath; and hence it is, that

No 165.

in our practique, liferenters or heritors disponing and ratifying judicially upon oath, cannot question their deed done *stante matrimonio* with consent of their husbands; nor can minors by the civil law, nor by our law and practique, question their deed, being ratified judicially with an oath, 'That they shall not 'quarrel;' and the consequence of perjury is dangerous, seeing oaths ought to be kept *quæ sine dispendio salutis æternæ servari possunt*. It was *answered*, That *senatusconsultum velleianum* has not place among us, and it is general for all women; this by our law is only in favours of wives binding in their husbands's time, who may be presumed, *ex metu reverentiali*, to set their hands to bonds, not only to exhaust any fortune of their own, but to involve themselves in such burdens as they are never able to pay, and so should be rendered miserable, either for fear, or for respect to their husbands: Nor is the case of an obligement, and of a disposition by a wife, alike; because a woman *facilius inducitur se obligare quam dare aut disponere*, and when she gives and dispones, it is no more than she hath, but she may bind for more than she hath, *in infinitum*; hence it is, that if a heritrix wife should dispone with absolute warrandice, with consent of her husband, though the dispostion be valid, yet the obligation of warrandice will be null. And further, an oath adhibited to such dispositions, renders not the same valid, as being invalid by our law without an oath; for dispositions made by wives with consent of their husbands are *regulariter* valid, unless they be quarrelled *super vi et metu*, which is a legal ground to quarrel all dispositions whatsoever, made by men as well as women; but because women are more easily to be induced to dispone than men, *et levior vis et metus* is relevant in women than in men; therefore, to eschew all questions, the judicial oath of the wife is taken, that she was not co-acted, to cut off all ground of question whatsoever; and though a minor when he binds with consent of curators, judicially swearing not to revoke, should not be restored, the reason is, because the bond of a minor, with consent of his curators, is not *ipso jure* null, but *eget semper restitutione in integrum super capite minoris ætatis et lesionis*, and must be intented *intra annos utiles;* but by our law, the wife's bond is *ipso jure* null, without necessity of revocation or restitution, and she is in the case of a minor binding, having curators, without their consent, or of pupil-binding, whose bonds are *ipso jure* null, and cannot be made valid by any such oath. Likeas, there be many cases, expressly in the civil law, wherein, without question, the adhibition of an oath renders not the deed valid, and many other cases disputed among the Doctors; and oaths indeed ought to be kept, and it will be so judged *in foro cæli;* but some oaths are not to be authorised by civil judicatories, who are to look to the advantage of civil societies, and the public civil interest, such as this, in the case of married wives in general; and therefore, all that the civil Judge can do, is to leave the swearer to God and his own conscience.

THE LORDS repelled the allegeance, and found the bond null, notwithstanding of the oath. *In præsentia.*

Fol. Dic. v. 1. *p.* 398. *Gilmour, No* 61. *p.* 45

*** Stair reports the same case:

No 165.

1663. *February* 18.—BIRCH, an English woman, pursues Catharine Douglas to pay a bond, wherein she and her umquhile husband were obliged. The defender *alleged* absolvitor, because it was a bond *stante matrimonio* given by a wife, which is null in law. It was *replied*, It is ratified judicially, and the defender obliged never to come in the contrary upon oath judicially, which is the strongest renunciation of that privilege of wives, and it hath been frequently found, that minors making faith, cannot be restored *lesionem conscientia ex juramento violato.*

THE LORDS having debated the case at large amongst themselves, found the bond null notwithstanding of the oath; for they thought, that where the deed needed no restitution, as in the case of minors, these deeds are valid, but the the minor may be restored; but in deeds *ipso jure* null, where there need no restitution, an oath cannot make that a legal deed which is none: It was won by a vote or two, many thinking that such privileges introduced by custom or statute might be renounced, and much more swore against; but that it were fit for the future, that all magistrates were prohibited to take such oaths of wives or minors, who are as easily induced to swear, as to oblige, and if they did, that they should be liable to pay the debt themselves.

Stair, v. 1. *p.* 181.

1665. *January* 27. FISHER *against* KER.

No 166.
Found in conformity with the above.

UMQUHILE Alexander Haliburton of Coldingknows and Margaret Ker his spouse, by their bond dated the 5th May 1651, are obliged conjunctly and severally to make payment to Isobel Lithgow, of the sum of 1200 merks principal, with annualrents and expenses, who having assigned the debt to Mr Michael Fisher, after the decease of Alexander Haliburton, he charged Margaret Ker for payment, who suspends upon this reason, That the bond was subscribed by her *stante matrimonio*, and so not obligatory against her. To which it was *answered*, 1*mo*, She had ratified judicially; 2*do*, That her husband having obliged himself and his successors to pay, the mother had disponed to his wife his whole lands and heritages, and so being successor to him, must be liable; likeas, the charger has intented action of reduction of the disposition. THE LORDS found the wife's subscription null, and therefore suspended the letters simpliciter, notwithstanding of the judicial oath and ratification, without prejudice to the charger to pursue for reduction as accords of the disposition, which was not made to the relict, but to Sir Andrew Ker of Cavers.

Fol. Dic. v. 1. *p.* 398. *Newbyth, MS. p.* 21.