

\* \* \* 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.

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*, 1mo, She had ratified judicially ; 2do, That her husband having obliged himself and his successors to pay, the mother had disposed 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.

Found in conformity with the above.

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

\* \* Gilmour reports the same case :

No 166.

ALEXANDER HALIBURTON of Coldingknows and Margaret Ker his spouse, were obliged by their bond to pay to Isobel Lithgow the sum of 1200 merks; which she having assigned to Mr Michael Fisher her eldest son, he charges the said Margaret after her husband's death; who suspends upon this reason, that the bond is null, being made by her *stante matrimonio*, at which time she could not oblige herself effectually. It was *answered*, That she did ratify the same judicially with an oath not to quarrel. *Replied*, A ratification and an oath cannot make a null bond valid, both being done *eadem facilitate*; as was found January 1663, betwixt Douglas and Birch, No 165. p. 5961. *Duplied*, The suspender was in effect *præposita negotiis mariti*, and had had the management of all, being but a simple man, to whom no neighbour nor other would trust any thing without her: Likeas, her power was such with him, that she caused him dispoise his whole estate to her brother, Sir Andrew Ker younger of Cavers, reserving her liferent, and upon condition that the fee should also come to her in some cases mentioned in the disposition; so that she having bound herself and sworn, and got in effect his estate to her and her's, she ought to be liable notwithstanding of the practise which meets not.

*Gilmour, No 128. p. 93.*

1672. July 18.

WATSON against BRUCE.

No 167.

ONE having granted an assignation bearing to be for relief of a debt, wherein the assignee stood cautioner for him, and also for relief to his wife of another debt wherein she was cautioner; against the wife pursuing the assignee for her relief, it was *objected*, that her cautionry obligation was null, and therefore, *quoad* her, there was no debt to demand relief of. *Answered*, A wife's personal bond, as it is a valid natural obligation, so it is sufficient by our law to found an action, only the law gives the debtor a perpetual exception to protect her from payment; this exception is a privilege she may use or not at her pleasure, and if she is willing to wave her privilege, she must be entitled to relief equally with any other cautioner. THE LORDS found, that the pursuer might forbear to make use of her privilege as a wife, and insist for her relief as a cautioner.

*Fol. Dic. v. 1. p. 399. Stair.*

\* \* See this case No 70. p. 3537.