

1631. July 28.

ROBERT NAPIER against JOHN ROLLOCK.

No 252.

ROBERT NAPIER being incarcerated upon a horning, got the same reduced against Mr Rollock, upon this reason, That his cedent Agnes Lyel, at whose instance the pursuer was denounced, was cloathed with a husband the time of the charge and denunciation used by her against the pursuer; so that although the debt was owing to her, yet she could not have used any execution against the debtor without her husband's consent and concurrence. And this was found, though the defender alledged it did not import much, seeing the husband was yet content to allow of them; for it was thought it being null *ab initio*, could not be helped by his posterior consent, especially the wife being at the time dead.

Fol. Dic. v. 1. p. 405. Spottiswood, p. 159.

* * Durie reports the same case :

ROBERT NAPIER pursuing a reduction of a horning executed against him, at the instance of a woman called Lyel, to whom the said Robert was bound in a sum contained in his bond given to her, and whereto the said Mr John was made assignee, upon this reason, because the letters of horning were raised and executed at her instance, she then having an husband, and the letters not raised at his instance, nor the charge used and executed at his instance. This reason was found relevant, and the exception repelled, bearing, that the wife might seek her own proper debt, justly pertaining to herself, without necessity to raise the letters at the husband's instance, seeing the husband did never oppone thereto, so long as they lived together; likeas now the wife being dead, and the husband being living, consented to the charger's letters, and denunciation following upon the same; which was not respected, but the horning reduced for the reason foresaid.

Durie, p. 602.

1702. January 29.

HEPBURN against BLAIR'S CHILDREN.

No 253.

I REPORTED the competition betwixt Patrick Hepburn, arvester of a sum due by the Laird of Lundie to Thomas Row, and the Children of Dean of Guild Blair, as donatars to the said Row's escheat; who *objected* against Hepburn's arrestment, that it was null, in so far as the ground of the debt being a bond granted by the said Thomas Row to Mary Jack for 400 merks, wherein she is designed spouse to Patrick Hepburn apothecary in Edinburgh, and so it was his *jure mariti*, yet she raises horning on it singly in her own name, and arrests in Lundie's hand likewise in her own name, without mentioning the course of her husband; *femme coverte* can do nothing validly in judicial acts without her husband, this arrestment was clearly null. *Answered,*

An arrestment was sustained, though it was objected, that the letters of arrestment being raised at the instance of a woman, on a bond due to herself, did.

No 253.
not mention
her husband,
for his inter-
est, though
the summons
of furthcom-
ing ran in the
names of
both.

The writer by mistake had raised the horning in her name only, which inadvertency gave rise to the messenger's falling into the same error of arresting in her name, without mentioning the husband for his interest; but this defect was fully and abundantly supplied by the summons of furthcoming raised in his name, as well as his wife's, which redintegrates the arrestment, and accordingly the decret goes forth in both their names. *Replied*, Nullities cannot be so made up; for *esto* a woman should inhibit in her own name, would the husband pursuing a reduction *ex capite inhibitionis* validate that null inhibition? For a married woman has neither *persona standi in judicio* for pursuing nor defending, except where she is authorised by her husband; and, if he refuse, on application, the Judge can nominate another as her curator; and so it is done in the Parliaments of Paris, and it has been so decided with us, 9th and 10th of January 1623, Marshall, No 245. p. 6036, recorded both by Haddington and Durie: And the husband's posterior concurrence was not found sufficient to validate letters raised by the wife, 27th July 1631, Rollock, No 252. p. 6047. THE LORDS thought a wife might be considered as a minor *qui potest meliorem suam conditionem facere sine auctoritate curatoris et tutoris*, and that his subsequent consent validated the act; and that her not being *integra persona in judicio* without her husband, was introduced in his favour, and so ought not to be detorted to his prejudice; and therefore repelled the nullity, and sustained the arrestment.

Fol. Dic. v. 1. p. 406. Fountainball, v. 2. p. 141.

S E C T. III.

A Wife may prosecute her Husband, with a Curator *ad litem*.

1625. January 11. HAMILTON against Her HUSBAND.

No 254.

AN inhibition being sought by a woman called ——— Hamilton, upon her contract of marriage against her husband, that he should not annailzie in prejudice of the provision, conditioned to her by him, by the said contract of marriage, this inhibition craved by her supplication was refused, because the LORDS thought that no such inhibitions, nor no action could be sustained bewixt man and wife while the marriage stands.

Fol. Dic. v. 1. p. 406. Durie, p. 155.