1707. *February* 11.

REBECCA SIMPSON, and JOHNSTON her Husband, *against* ELIZABETH BROOMFIELD, Lady Nethermains.

No 171.
Found in conformity with Birch against Douglas, No 161. p. 5961.

THE said Elisabeth being married to Mr William Hog advocate, she was prevailed upon to grant bond together with her said husband to the said Rebecca for L. 700 Scots in 1698, and likewise in corroboration and further security to assign them to the rents of her lands of Nethermains, whereof she was heiress; and this bond she judicially ratified upon oath. Upon this bond caption having been raised, she was apprehended and incarcerated in the tolbooth of Edinburgh; whereupon she gives in a complaint to the Lords, that she was illegally and unwarrantably incarcerated on a bond granted by her when *vestita viro*, and so *ipso jure* null, and craved to be liberated without caution or consignation. *Alleged*, That though such a bond was reducible, yet it could not be taken away *hoc ordine* by a summary bill of complaint, without a formal suspension and charge to set at liberty, duly intimated, conform to the act of sederunt. 2*do*, *Esto regulariter* bonds by married women were null, yet this behoved to subsist; for, 1*mo*, it had both a moral and a natural obligation to support it, a married wife being as much endued with judgment, sense, and reason, as when unmarried, and *major sciens et prudens*, in both cases. 2*do*, It had likewise a sacred and religious tie to bind it, it being ratified and confirmed by her oath, which she cannot without infamy contravene and the 83d act, parl. 1481, declares all such oaths by wives valid and obligatory, and to break it is criminal *in foro poli et conscientiæ*, if not *in foro humano*; and this privilege of wives arises from the *Senatusconsultum Velleianum* in Roman law, which secured women against intercessions and cautionries; yet that law permitted them to quit and renounce this privilege if they pleased; and there could not be a more strong and explicit renunciation, than her swearing never to come in the contrary, not to quarrel it, either directly or indirectly, any manner of way. And though Stair has marked a decision, 18th February 1663, Birch *contra* Douglas, No 165. p. 5961. where a bond given by a wife, though ratified judicially, was found null, *quoad* personal execution against her; yet he tells it was won only by a vote or two, and sundry of the LORDS thought the oath obligatory. *Answered*, There was no need of a suspension in this case, the charge being unwarrantable, and the bond *ipso jure* null, without the necessity of a reduction; and though she was to blame to contradict her oath, yet human laws did not regard it, where it was used to confirm a null deed; for *non entis nullæ sunt qualitates*; and this has not only been the constant and uniform opinion of all our lawyers, but likewise of our Judges and Supreme Courts. And to begin with Craig, *lib* 2. *Dieg.* 22. § 18. he declares, Though wives may dispone their lands and liferents without their husband's consent, and bind themselves in warrandice of the

No 171. same, yet they cannot subject themselves to personal executiou; and Sir George Mackenzie, Instit. Tit. Marriage, page 55, says the same. Likeas, Lord Dirleton, in his decisions, 5th July 1676, observed, the LORDS found the oath not obligatory, No 168. p. 5965.; and President Gilmour, gives us that case of Birch and Douglas at great length, No 165. p. 5961., and concludes, That the LORDS found the bond null, notwithstanding of the oath. And this appears to be Stair's own opinion, Instit. B. 1. Tit. 17. Sec. 14.; and in his decisions, 8th Nov. 1677, Sinclair *contra* Richardson, No 29. p. 5647.; and although the *jus digestorum* allowed women to renounce the benefit of the *Senatusconsultum Velleianum*, yet the law of the novels altered that, *Novel.* 134. *cap.* 8. and we have now a special statute in 1681, declaring oaths of minors null. THE LORDS having pondered all the decisions, they found no reason to recede from so constant a tract, where there could not so much as one practique in the contrary be adduced; and therefore declared the bond null, notwithstanding of her oath, and ordained her to be set at liberty; and that it needed not abide the reading in the minute-book, not being in a process, but required only an act for the keeper of the prison's warrant; but refused to find it a riot, or to modify expenses, seeing the charger, who imprisoned her, wanted not a probable ground of doubting. And found the assignation to the tack-duty valid and obligatory, but repelled the homologation founded on, that she had proponed payment, and produced partial receipts for instructing thereof, that being less binding in law, than the oath from which human laws assoilzied her; though it had been both more honest and conscientious to have kept it.

Fol. Dic. v. 1. *p.* 398. *Fountainhall, v.* 2. *p.* 348.

*** The like judgment was pronounced in a case, Lithgow against Armstrong, July 1730, though in that case the creditor offered to restrict his bond to be the foundation of real diligence against the debtor's estate only. See APPENDIX.

1711. *July* 13.

WILLIAM and JEAN PRINGLES, Children of the deceased David Pringle, Chirurgeon Apothecary in Edinburgh, *against* THOMAS IRVINE of Gribton.

No 172.
A wife having granted a bond for borrowed money without consent of her husband, and pledged her paraphernalia in security thereof, it was found that the nullity of the

IN a process at the instance of William and Jean Pringles, against Thomas Irvine, for exhibiting to the pursuers five rings belonging to them, which —— —— Maxwell Lady Kirkhouse had pawned to the defender for L. 16 Sterling, owing by her to him by bond, granted while she was *vestita viro*,

Alleged for the pursuers; 1*mo*, The bond granted by the Lady for borrowed money *stante matrimonio* being null, the pledge is null in consequence; for a pledge being *res creditori data in securitatem debiti*, where there is no debt, there can be no effectual impignoration in security thereof, *accessorium sequitur*