

1708. July 28. ANNE BYERS against Her HUSBAND'S CREDITORS.

ANNE BYERS having a land-interest in St Cuthbert's parish, to the value of 10,000 merks, marries, about her age of 17, Alexander Reid, son to Mr James Reid of Northbrae, and in her contract of marriage disposes to him her whole heritage, and he provides her in a jointure of 600 merks. Shortly after this, it breaks out that what by his own debt, and as cautioner for his father, he is *obscurus*; and he flies first to the Abbey, and then out of the kingdom, and takes on to be a soldier in Flanders, and his creditors seize upon his wife's estate, and reduce her to beggary. Upon this she raises a reduction of her own contract-matrimonial, and revoked within 25 years, upon the plain reason of minority and lesion, that she disposed all away and got nothing, but her husband has deserted her, and his creditors have swallowed up her fortune, and left her and two children miserable; and though 600 merks be named in her contract for life jointure, yet there is not one sixpence left her to possess. *Answered* for the Creditors, That being married, she has not *personam standi in judicio* without her husband, who integrates her right, and much less to pursue him. *Replied*, It is true, a wife cannot pursue *regulariter* without her husband's concurrence and consent, but where the controversy is with himself, law cannot be without a remedy, and the Lords nominate her procurator or any other, to be her curator, and authorise her in the process. This is not only our practice, Marishall *contra Yule*, No 245. p. 6036, but also the custom of Sovereign Courts abroad, as particularly the Parliament of Paris. See Bertrand *Argentæus ad consuetud. Britannicæ Armericæ*, L. 30. C. De jure dot. and l. 7. § 4. C. De præscript. 30 vel 40 annor. THE LORDS allowed her procurator to concur in this process, and to authorise her therein. The next defence against the reduction was, that minors may lawfully enter into contracts of marriage, and dispose their heritage for a mutual onerous cause corresponding thereto; and here lesion cannot be pretended, for she is competently provided in a jointure, when the same exists by his death. *Answered*, This was but a mere sound, for she effectually denudes of an heritable estate worth ten thousand merks *causa data sed non secuta*, which is now absorbed by her husband's creditors; whereas his provision to her of a jointure is a mere *non ens* and a name, having nothing left him either for her life jointure, or her children's provisions; for a bankrupt's engagements never can prove effectual to take off lesion. THE LORDS repelled the defence, and found the minority and lesion proved, and reduced the contract in so far as concerned the disposition she had given of her own estate; but this does not take from the husband and his creditors the *jus mariti* to the rents of the lands during the standing of the marriage. On a process, the LORDS would probably modify an aliment to her out of her own lands, so long as her husband deserts her.—See MINOR.

No 249.

A wife, in a competition with her husband's creditors, raised a reduction of her contract of marriage, upon minority and lesion. It was objected, that she could not insist without her husband's consent. The Lords repelled the objection.

Fol. Dic. v. 1. p. 405. Fountainball, v. 2. p. 458.

No 249.

*** Forbes reports the same case :

IN a reduction at the instance of Anne Byers, against Alexander Reid her husband, for reducing their contract of marriage upon minority and lesion; the LORDS sustained this reason of reduction, that the pursuer had, in the 17th year of her age, disposed the property of her heritage to the defender, who was *obæratu*s, and not in a condition to secure any suitable provision to her effectually.

Forbes, p. 275.

 S E C T. II.

Whether a Wife may prosecute legal Diligence, and appear for her interest in a Process, without concourse of her Husband.

1541. *January 23.* LAIRD OF CRAIGIE *against* HEPBURN.

No 250.

THE Laird of Craigie warned Jean Hepburn spouse to Peter Oliphant, to flit and remove from certain lands. Compeared the said Jean, and *alleged* the lands to pertain to her in conjunct fee, as spouse to umquhile the Laird of Craigie. It was *answered*, That she ought not to be heard to make any defence, because Peter her husband was at the horn, *et vir est caput uxoris*, and he being in life, she had no power to stand in judgment. She *answered*, That she claimed not the right of these lands by Peter Oliphant her present husband, but by her first husband, *quia sunt donatio propter nuptias et fundus dotalis*, which in no ways could be taken away from her for his default. THE LORDS, notwithstanding, admitted her to stand in judgment, and propone her defences.

Fol. Dic. v. 1. p. 406. Sinclair, MS. (Pitmedden's Copy.) p. 159.

1620. *June 17.* HALIBURTON *against* —

No 251.

FOUND, that a woman pursued with her husband, may defend herself, albeit the husband be debared by horning.

Kerse, MS. fol. 65.