

1772. Dec. 10.

JAMES WATSON, Advocate in Aberdeen, *against* JOHN ROBERTSON, eldest Son procreated between John Robertson and the deceased Violet Gray his Wife; and the said John Robertson senior, Administrator-in-Law to his Son.

No 175.

A married woman's personal obligation in an heritable bond, subjoined to which, as a corroborative security, she came under an obligation likewise to infeft the creditor in a subject properly belonging to herself, not effectual to be the foundation of a process of adjudication against her heir.

VIOLET and JANET GRAYS, two sisters, and joint proprietors of a tenement in Aberdeen, and John Robertson, husband to Violet, having borrowed L. 150 from Patrick Wilson, did, by heritable bond, dated June 19. 1755, and ratified by Violet the 26th of same month, with one consent, bind and oblige themselves, their heirs, &c. to pay to the said Patrick Wilson, his heirs or assignees, the sum of L. 150 Sterling, at the term of Whitsunday 1756; with interest and penalty; and, for Wilson's further security, and more sure payment, without derogation to the personal security, or innovation thereof, but in further corroboration of the same, *accumulando jura jurebus*, Violet Gray, with consent of her said husband, and the said Janet Gray for herself, bound themselves to infeft him and his foresaids, heritably, but under reversion, in the foresaid tenement of land and pertinents, declaring the same to be redeemable, upon payment of the principal sum, annualrent, and liquidate expenses.

Violet and Janet Grays, and John Robertson, granted another heritable bond over said subjects to George Turner, for L. 60 Sterling; and, for security, granted an obligation to infeft in the same terms with that in the former one. This bond was also duly ratified by Violet Gray; and having been thereafter assigned by George Turner, to Patrick Wilson, creditor in the first bond, he was infeft upon both.

Violet Gray having died, and Janet having disposed her half of the said tenement, under the burden of the half of the said heritable debts, to George Bean, to which half, under the like burden, William Swinton acquired right, and entered into possession, Patrick Wilson, creditor in both bonds, brought an action at his instance before the Sheriff of Aberdeen, upon the personal obligations contained in these bonds, against the said William Swinton and John Robertson senior, and also against John Robertson junior, as lawfully charged to enter heir to Violet Gray, his mother, and his tutors and curators, for payment of the two principal sums before-mentioned, and annualrents thereof, and liquidate expenses; and obtained decree in absence against them.

James Watson, as deriving right from Wilson to the foresaid two bonds and decree, executed letters of special charge, at his instance, against John Robertson junior, charging him to enter heir in special to his said mother, Violet Gray, in the said subjects; and then brought an action of adjudication against him before this Court, founding upon the two heritable bonds and decree of constitution above-mentioned; and subsuming, that the several sums of money

contained in the foresaid decree of constitution and assignation thereof, in his favour, are yet unpaid; and therefore concluding, that, in terms of the act of parliament, the lands should be adjudged to him in payment and satisfaction of the said sums, principal, annualrents, and penalties, as the same shall extend at the date of the decree.

The defenders objected, That though the obligation to infest might be valid, and accordingly has been carried into execution, and the creditor put in possession of the rents, which are more than sufficient to pay the annualrents, yet the personal obligation upon Violet Gray, in these bonds, was void and null, being granted by a wife *stante matrimonio*; and that, therefore, the process of adjudication, which was founded upon these personal obligations, is inept, and fell to be dismissed. But the Lord Ordinary proceeded to adjudge, decree, and declare, in terms of the libel:

And, upon advising a representation and answers, pronounced the following interlocutor: "FINDS, That an heritable bond granted by a wife, *stante matrimonio*, with consent of her husband, can be made effectual against her lands by adjudication, if the money is not paid; therefore, refuses the desire of the representation, and adheres to the former interlocutor."

Pleaded in a reclaiming petition for Robertson: His defence is founded in the law of Scotland, and has been established by a variety of decisions in the Dictionary, under the title HUSBAND and WIFE, Div. 5.

These decisions are approved of by Stair, in his Institute, Tit. CONJUGAL OBLIGATIONS, § 16.; and by Bankton, vol. I. p. 126. who says of such obligations, 'that they are intrinsically null, and the judges will *ex officio* reject them, so that they cannot be the ground of diligence against her person or estate, personal or real.'

The single decision referred to by Watson, in support of his adjudication, is thus abridged in the Dictionary: 'A bond granted by a wife, *stante matrimonio*, with consent of her husband, was sustained, because the creditor had granted back-bond, that he was only to make use of the same to lead an adjudication, whereby it only had the effect of a disposition.' Stair, 23d Jan. 1678, Bruce *contra* Paterson, No 169. p. 5965. See SYNOPSIS.

But to this the defenders answer, in the *first* place, that, supposing the decision did apply, yet, as it is single, it cannot be put into the balance against the series of decisions, ancient and modern, on their side. And *secondly*, it does not apply; for it appears, upon looking into the case, as collected by Stair, that the bond was a trust-bond granted for the purpose of leading an adjudication against certain lands, to which the wife was heir apparent.

Answered: It is *triti juris*, that a wife can, with consent of her husband, dispose of her lands at pleasure. She can dispoise annualrent-rights out of her lands; she can grant her lands in wadset; and, in both cases, it will follow, from the nature of the thing, that she can grant clauses of requisition in these

No 175. rights, to enable the creditor to call for his money, which, in default of payment, will entitle him to adjudge the estate.

And, therefore, though a wife cannot grant any obligation to be the ground of an action against her person, yet it does not occur what objection can lie, why her obligations should not be effectual to produce action against her estate; and, indeed, it would be incongruous to say, that a wife can grant an heritable bond over her estate, in security of a sum of money, and that the creditor should not have it in his power, upon a refusal to pay, to adjudge her estate therefor; and, accordingly, the Court has frequently decided, that a bond granted by a wife, *stante matrimonio*, is a good ground of diligence against her estate; Marshall against Ferguson, No 192. p. 5990.; Stair, 23d Jan. 1678, Bruce *contra* Paterson, No 169. p. 5965. and Stair, 15th Dec. 1665; Ellis *contra* Keith, No 191. p. 5987.

It is therefore a most erroneous supposition, that every obligation granted by a married woman, is intrinsically void and null. There is only competent to her an exception against the debt, which will protect her from being personally liable; but still it is the foundation of an action, and which will have the effect of attaching her estate, as appears from the decisions above-mentioned, and many others which might be quoted: Thus, 'an heretrix, with consent of her husband, disposed her lands, and became bound for warrandice and delivery of a progress. These obligations were not found null, though granted by a wife, *stante matrimonio*; for, if a wife can sell her heritage, it must follow that she can involve herself in rational obligations relative thereto; Stair, 21st Jan. 1674; Ridpath *contra* Yair, No 189. p. 5996. As an heiress may wadset her lands, with her husband's consent, though the wadset-sum go to the husband, so she may bind herself to pay back the money upon requisition, as a part of the contract of wadset.' Hope (HUSBAND) 3d Feb. 1617, Gordon *contra* Gordon, No 196. p. 5994.

These decisions appear very much in point; nor are the principles thereby established struck at by the decisions cited on the other side from the Dictionary.

Thus, in the case of Mitchelson *contra* Moubray, 30th Jan. 1635, No 164. p. 5960. when the decision comes to be looked into, as collected by Durie, it appears, that in that case the heritage did not belong to the wife, but to the husband, the wife having only been infeft therein by him in a conjunct fee, for her liferent right; and the heritage having been appraised for the husband's debt, the wife had been prevailed on to declare before a judge that she renounced her terce, liferent-right, &c. and ratified the appraising. She afterwards challenged the right of the appriser, on her prior liferent-infeftment; and concluded, that she could not be bound by the ratification, as she had never signed it. The principal point in dispute was, Whether the ratification was good, though not signed by her? And it is no wonder that the Court should in that case find, that the appriser could not compete with her.

Again, in the case of Shearer against Kerr, No 194. p. 5991. there likewise the heritage belonged to the husband, not to the wife; and all that the wife craved was, that she should be preferred for her liferent on the surplus mails and duties; for she admitted, that the real right of annualrent was a burden on the subject; and accordingly, the Lords, in the decision, burdened her with the annualrents bygone, and in time coming. And, in both these cases, the question occurred with the wives themselves, not with their heirs or successors.

Neither of these decisions, therefore, meets the present case; nor does there appear any thing in our law that denies the proper effect of legal diligence against a married woman's estate, deduced upon any obligation of hers relating thereto; and so, where she hath granted an infeftment of annualrent, with a clause of requisition in favour of the creditor, he may thereupon, in default of payment, lead an adjudication against the estate, which seems to be the natural result of the power which the law gives a wife to grant infeftments of annualrent over her estate.

It will not be doubted, that a wife, who is an apparent heir in an estate, can grant a trust-bond to be the foundation of making up titles to that estate by an adjudication; or that, when, with consent of her husband, she grants a disposition of her lands, with an obligation to infeft, but without procuratory or precept, this obligation of hers may be made the foundation of an adjudication in implement; for, it seems inconsistent to say, that a wife can dispoise her lands, and not be obliged to make the deeds she has granted for that purpose effectual; and if, in these cases, a wife's obligation can lay the foundation for an adjudication, there seems to be no reason why a creditor, to whom she has granted an infeftment of annualrent, with a clause of requisition should not have the same power of making such obligation effectual against her estate.

In a word, it would appear that a wife's obligation, in so far as it relates to her heritage, is valid *ad hunc effectum*, to entitle the creditor, in such obligation, to carry the same into execution against the estate.

Replied: This argument was urged in all the cases above quoted, for proof of which the defenders appeal to the case of Shearers in 1715, which is shortly, but distinctly, collected by President Dalrymple, No 194, p. 5991. There the Lords 'found the obligation (it should be the adjudication) upon the personal 'obligement null as to the wife's liferent.'

This decision is directly in point to the present case; for it makes no difference that the question there was with the wife herself, not with the heir. A donation made by a wife to her husband is not null, but only revocable by her, if she chuses to use the privilege the law gives her; but, if she does not use it, as the deed was valid from the beginning, it must be good against her heir: But a personal obligation, granted by a wife, *stante matrimonio*, is annulled by the law from the beginning; and though, perhaps, by ratification

No 175. or homologation, after her husband's death, she may validate such obligation; yet, if she dies without taking any steps to remove the nullity, it must continue and be pleadable by her heir after her death, equally as it would have been by herself during her life.

"THE LORDS find, That an adjudication cannot proceed on the personal obligation of a wife *stante matrimonio*; therefore, sustain the defences, assolzie, and decern."

Act. J. Douglas.

Alt. M. Laurin.

Clerk, Tait.

Fol. Dic. v. 3. p. 284. Fac. Col. No 40. p. 107.

No 176.

1791. Feb. 21. HARVEY and FAWEL *against* TRUSTEES of CHESSELS.

HELEN CHESSELS, wife of James Scot, inherited from her father a considerable heritable property, on which the *jus mariti* of her husband had been excluded in the event of his bankruptcy, an event which actually happened. Afterwards Helen Chessels bound herself, with consent of her husband, in a cautionary obligation for their son. In an action brought on this obligation, the Lords found that it was ineffectual. The only way in which a wife's personal obligation can be made good, is by shewing that the money has been *in rem versum* of the wife. — See APPENDIX.

Fol. Dic. v. 3. p. 284.

S E C T. V.

Bonds of Provision by Wives.

No 177.

A married woman became bound to provide a wife in a tocher, in consequence of which the husband granted her a suitable life-rent. The obligation was

1579. December 20. PRIMROSE *against* LADY ROSSYTH.

There was ane HENRY PRIMROSE in Culross that pursued the Lady Rossyth, now spouse to the Abbot of Dunfermline, to hear and see a contract betwixt the said Henry and the said Lady registered, into the whilk the Lady was bound to pay certain sums of money for tocher good, *et nomine dotis* of Redheugh maiden to the said Lady and spouse to the said Henry. The Lady *alleged*, that the contract ought not to be registered, and also the Commendator of Dunfermline spouse to the said Lady *alleged*, the contract ought not to be registered, because the same was done without the consent of the husband, then, at the making thereof, in life. To this was *answered*, that her hus-