

1724. July 21.

ELIZABETH BORTHWICK, widow of Thomas Scot, *against* JOHN SCOT, son to the said Thomas.

THE pursuer, with consent of Thomas Scot her husband, granted a disposition of certain tenements in Edinburgh which belonged to her, in favours of Pringle of Torsonce, brother-in-law to the husband, who thereupon disposed the same to the said Thomas Scot. She having survived her husband, raised reduction of these two dispositions, as being in the same case as if she had disposed the tenements directly to her husband, which she could have revoked, as a donation *inter virum et uxorem*.

The defences were, *imo*, That she had judicially ratified the disposition *extra presentiam mariti*, and sworn, 'that she should never quarrel, impugn, nor reduce the same, nor come in the contrary thereof, directly or indirectly, in judgment, nor without the same, any manner of way, in time coming;' and this, according to Sir James Stewart's opinion, in his Answers to Dirleton's Doubts, tit. *Don. inter vir. et ux.* excludes revocation. *2do*, That she had homologated the disposition, in so far as, a liferent of the subjects being reserved to her, she had, after her husband's death, uplifted and discharged the rents, and set tacks, &c. as liferentrix.

Answered to the *1st*, That the judicial ratification does only exclude a reduction *ex capite vis et metus*, but does not hinder a wife to revoke a donation made by her to her husband *stante matrimonio*, as was found February 15. 1678, Gordon against Maxwell, No 353. p. 6144.; which authority must be of greater weight than the opinion of any private lawyer. To the *2d*, That her uplifting rents, to which she was entitled, could not be construed an homologation of the disposition; for, till that deed was reduced, she could do no more than levy the rents as liferentrix.

THE LORDS found, that the judicial ratification did not exclude the revocation; and that the setting tacks as liferentrix was not a sufficient homologation of the dispositions.

Reporter, Lord Grange.

A.G. Arch. Hamilton, sen.
Clerk, Mackenzie.

Alt. Ch. Binning.

Fol. Dic. v. 3. p. 288. Edgar, p. 97.

1793. December 4.

ANDREW BULLIONS *against* JAMES BAYNE and JOHN HEPBURN.

JOHN GUERNSEY, a soldier, husband of Margaret Bullions, went with his regiment upon foreign service.

No 355.

A wife, with consent of her husband, disposed certain houses to her brother-in-law, who redispensed them to her husband.

She afterwards raised a reduction of the disposition, on the ground, that it was *donatio inter virum et uxorem*.

Answered, She had ratified it *extra presentiam mariti*, and had homologated it by letting tacks as liferentrix (the liferent being reserved to her.)

The Lords repelled the defence.

No 356.

A deed executed by a married wo-

No 356.
man, which
is null for
want of her
husband's
consent, does
not become
valid on be-
ing ratified
by him after
her death.

After he had been absent about five years, she gave out that he was dead, and married James Bayne, to whom she disposed gratuitously, or at least only under burden of paying the debts affecting them, which were not equal to their value, certain heritable subjects belonging to her.

The subjects were sold by Bayne to John Hepburn.

After the death of Margaret Bullions, John Guernsey returned, and ratified her disposition in favour of Bayne.

In a reduction of this ratification, and of the dispositions in favour of Bayne and Hepburn, Andrew Bullions, the heir at law,

Pleaded; The husband is the curator of his wife, and in that character his consent is essential to all her deeds, even to those by which his interest is not affected; Ersk. b. 1. tit. 6. § 27.; Reg. Maj. b. 1. c. 30.; b. 2. c. 36.; Balf. Pract. p. 95.; Craig, b. 1. d. 12. § 28.; Stair, b. 1. tit. 4. § 15.; Sir George Mackenzie, b. 1. tit. 6. § 11.; Bankt. B. 1. Tit. 4 § 4. Parl. 67.; Dict. *voce* HUSBAND AND WIFE. The want of it cannot be supplied by a ratification afterwards granted by him; 12th February 1556, Melville, No 195. p. 5993. and No 206. p. 6001.; Matthew against Sibbald, No 163. p. 5959. and No 207. p. 6001.; Fount. 23d February 1698, Lady Cochran against the Dutchess of Hamilton, No 208. p. 6001.; Bankt. b. 4. tit. 45, § 40. And, at all events, such ratification, after his office of curator and his interest in her estate are dissolved by her death, can have no effect.

Answered; The consent of a husband to his wife's deeds is not required, from the idea that she, like a pupil, is incapable of acting for herself, but solely on his account; Ersk. b. 1. tit. 6. § 27.; Fount. 17th July 1711, Pringles, No 172. p. 5970.; Cockburn against Burn, No 29. p. 5793. and No 32. p. 5794. Although, therefore, his consent be not adhibited, they are not *ipso jure* null, but liable to exception at his instance; Ersk. ib. § 23. which the ratification bars the husband in the present case from pleading, all imperfect deeds which create a natural obligation being capable of homologation; Ersk. b. 3. tit. 3. § 47.

Besides, the necessity of the case was sufficient to give validity to the disposition granted by Margaret Bullions; Ersk. b. 1. tit. 6. § 27.; Bankt. b. 1. tit. 5. § 4. Parl. 67.

THE LORD ORDINARY reported the case on informations.

Observed on the Bench; A married woman is *sub cura mariti*, and on that account her deeds are null without his consent. If she survive her husband, she may either ratify them, or bring them under reduction. But the consent of the husband, after his office of curator is at an end, can have no effect; his marital power has then ceased, and a *jus quesitum* arisen to her heirs.

THE LORDS unanimously reduced in terms of the libel.

Lord Ordinary, *Henderland*. Act. *Cullen*. Alt. *Geo Fergusson*. Clerk, *Colquhoun*.
D. D. *Fol. Dic. v. 3. p. 288. Fac. Col. No 82. p. 179.*