

[19th *June* 1832.]

No. 4. *Ex parte* Earl and Countess of STRATHMORE, Appellants.
Dr. Lushington.

WILLIAM EWING, Respondent.

Bill of Exchange—Husband and Wife.—Held, (affirming the judgment of the Court of Session,) that a party sued for payment of acceptances found in his deceased agent's repositories is not entitled to enter into an accounting on vague allegations of intromissions by the agent, the creditor in the bills, it being admitted that the defender had received great advances from the agent, and the correspondence proving that, after the date of the bills sued on, the agent complained to the defender that no exertions had been made towards repayment. Found, (reversing the judgment of the Court of Session,) that it is incompetent for a married woman to make herself liable upon bills of exchange.

2d DIVISION.

Ld. M^r. Kenzie.

EARLY in the year 1816 John Buchan, writer to the signet in Edinburgh, entered, in his professional capacity, into the management of the Earl's (then Mr. Bowes) affairs, which had, previous to that time, got into considerable embarrassment.

Buchan's management continued for many years, in the course of which various bill transactions took place, in which his name was interposed, and various securities and effects belonging to the Earl were put into his hands. The bill transactions latterly became very numerous and complicated, and parties originally unconnected were from time to time drawn into them; and it was alleged that most of these transactions were

entered into for the purpose of raising money at the banks, without any sum being actually advanced at the time by the drawer to the acceptor, and that one bill was often granted in order to raise means for retiring or paying a former one.

Buchan died in August 1822, leaving his whole affairs in a state of great confusion. This event occurred without his having furnished to the Earl any accounts either of his advances for the Earl, or of his intromissions with the effects and securities which had from time to time been made over to him, belonging to the Earl.

Some time after his death, William Ewing, having been decerned executor qua creditor, in virtue of a debt due to him by the deceased, took the management of his concerns, and assumed the possession of the effects and documents found in Buchan's repositories.

Thereafter Ewing commenced an action against the Earl and Countess for constitution and payment of certain promissory notes found among Buchan's papers, and drawn or accepted by Lord and Lady Strathmore.

The defenders put in a general defence, that Buchan, like every other agent or manager, was bound to have rendered a specific account of his intromissions, on which alone the justice of the claim, made upon insulated transactions, could in any way be ascertained. There was also, in the course of the discussion, a written correspondence between Lord and Lady Strathmore and Buchan produced in process, in which the former uniformly acknowledged the pecuniary obligations under which they lay to Buchan; and, in particular, a letter by Buchan, of date posterior to the bill sued on, stating, that his advances had swallowed up his whole property,

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and complaining that no exertion had been made on his Lordship's part to repay him; and an answer from Lord Strathmore expressly admitting the great extent of his obligations. The Lord Ordinary decerned in terms of the libel, with expences, and adhered, on advising representation and answers.

In a second representation the Earl and Countess set up the defence, that it was incompetent to direct this action against Lady Strathmore, a married woman; and they craved access to Buchan's whole books and papers, or a diligence to recover these documents, and such other documents as might be necessary for the defence, so that the real state of accounts between the parties might be ascertained. The Lord Ordinary appointed the representation to be seen and answered, in so far as regarded Lady Strathmore, but quoad ultra adhered; and on the defenders reclaiming to the Inner House, their Lordships also adhered.

The Earl then raised an action of count and reckoning against the representatives of Buchan, and for a second time reclaimed, repeating his general defence, and enumerating various intromissions of Buchan, of which no account had ever been rendered; and also stating specific objections to the particular bills of which payment was concluded for in the original summons; and he repeated his demand for a diligence to recover the above-mentioned books and documents. But their Lordships, having advised the petition with the answers, adhered.*

The reserved question as to the liability of the Countess of Strathmore remained to be discussed; but

* 4 Shaw and Dunlop, 310.

before the case could be advised, the pursuer craved an immediate decree, on the ground of an adjudication having been led by another creditor against the separate estate of Lady Strathmore, which would exclude Ewing, unless he also led an adjudication within year and day thereof. The Lord Ordinary therefore decerned “in terms of the conclusions of the libel, but finds no expences due to either party in hoc statu; grants warrant for extracting the said decree immediately, and dispenses with the minute book; reserving to the defenders all their defences, and all objections competent against the said conclusions of the libel, as objections contra executionem.”

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Thereafter, the Lord Ordinary, having resumed consideration of the question raised for the Countess of Strathmore, in respect of the decret of constitution already pronounced, and under the reservation therein mentioned, “refused the desire of the representation as to the Countess of Strathmore, and adheres to the interlocutor represented against.” And on reclaiming by note to the Inner House, their Lordships, “in respect it is admitted that the decree in this cause has been extracted, refuse to send the note to the roll.”

Jan. 24, 1827.

Feb. 8, 1828.

The Earl and Countess appealed. No appearance was made for the respondent.

Appellants.—Considering the relative situations of agent and client, in which Buchan and the Earl stood to one another for so many years,—the long train of transactions and intromissions which took place between them, both in relation to bills and other matters,—and the object for which, in general, these bills were

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granted or negotiated, the respondent, as executor-creditor of Buchan, who had all the documents on both sides relative to those matters, is not entitled to pick out and select from the repositories of that gentleman such individual bills or documents as may best serve for the foundation of an action against the appellants, and to pursue for payment of these, without first, or at least unico contextu, exhibiting an account of Buchan's intromissions, and showing the state of the whole transactions between him and his clients, the appellants.

The appellants were entitled to a diligence to recover the papers and account-books in the repositories of Buchan, and relative documents, regarding their various transactions; and had this diligence been granted they could have proved that the bills in question were not due by them to him. But even independent of such diligence, they have been able to point out various intromissions with their funds by Buchan which have never been accounted for, and for which no credit is given in the present action; and an account of these has been demanded, in the action of count and reckoning raised against Buchan's representatives, by the appellants, since the commencement of the present action.

The appellants have also been able to state specific objections to the particular bills of which payment is demanded by Ewing; but this could be more satisfactorily done by production of the whole documents, books, and accounts, and an investigation of these by a professional accountant.

But on another ground the judgment of the Court below is clearly untenable. Certain of the bills and

notes libelled on in Ewing's summons have the name of the appellant, Lady Strathmore, as joint acceptor, upon them; and for these decree has been pronounced against her individually, and steps have been taken upon that decree against a separate estate which she has, exclusive of the *jus mariti*. But this is contrary to the principle of the law of Scotland, established by a long train of decisions, that *fæmina vestita viro* is not capable of incurring a personal obligation, even with the consent of her husband. — Stair, I. 4, 16; Ersk. I. 625; Banks, I. 5, 73; Greenlaw, 24 March 1626, (Mor. 5,957); Mitchelson, 30 Jan. 1635 (Mor. 5,960), and other cases voce Husband and Wife; Dollar, 10 Feb. 1827, (5 S. & D. 333.)

LORD WYNFORD: — My Lords, in this case of Lord and Lady Strathmore against Ewing, your Lordships are placed in rather an unpleasant situation. It was an *ex parte* proceeding, and I was afraid of giving judgment in it yesterday, having heard only one side, and thought it right, not to advise your Lordships to dispose of the case finally, till I had had an opportunity of reading every paper belonging to it. This was an action brought to recover the amount of certain promissory notes and bills of exchange. These bills and notes are found in the hands of Buchan, the person whom the pursuer in the action below represents. There is evidence that these bills of exchange were paid by him, and he is entitled to recover to the extent of these bills. With respect to the promissory notes, many of them are joint promissory notes by Lord Strathmore and Buchan. Now, without some evidence, it would be presumed that they were given for a joint debt; and it would be improper to charge Lord Strathmore with the whole. But,

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upon looking into the printed cases, I find that the judges below state, that there is very satisfactory evidence that these promissory notes were given for the benefit of the Earl of Strathmore; and if they were paid by Buchan, he has a right to recover for that amount in this action. The letters are not so explicit as I could wish, but they prove that most of these transactions, if not the whole, were for the accommodation of the Earl of Strathmore; and that this unfortunate man, Buchan, had been reduced to beggary by the advances he had made for Mr. Bowes before he became Lord Strathmore, and for the accommodation he afforded him, by becoming security for him upon these bills. There is one letter written after these transactions were closed, in which that is distinctly stated. It was argued that there was an account between the parties, and that your Lordships could not proceed till that account was taken. But after the letter written from St. Omer, long after the transaction had closed, it is clear that in this case Buchan became a party to these bills to save Lord Strathmore, and that has happened in this case which too often occurs, namely, instead of one, both are ruined together. I cannot, therefore, advise your Lordships, though we have heard nothing on the other side, under all the circumstances, to reverse that part of the judgment. But it appears, that in the course of these transactions, Lady Strathmore, then Mrs. Bowes, was in the habit of drawing promissory notes and bills of exchange to raise money; and upon these securities she is proceeded against as an unmarried woman. Now, by the law of England, it is perfectly clear, that an action cannot be maintained against a married woman for the amount of such securities; and that law is founded upon

sound sense and wise policy. Upon looking into the Scotch authorities, I find that the law is the same in Scotland as in England. It appears to me to be satisfactorily made out, that though a married woman, with certain solemnities that are intended to guard her from the attempts of designing persons, may bind herself in regard to her own property, that an action cannot be maintained against her on bills or notes. I have read the report of this case, and it does not appear to me that this point was raised in the Court below; the Court could not have pronounced the decision they have pronounced, if that question had ever been raised. I, therefore, recommend to your Lordships to reverse that part of the interlocutor in which the judgment is given against Lady Strathmore, and dismiss the appeal upon that part of the subject that relates to Lord Strathmore.

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The House of Lords ordered and adjudged, “ That the
 “ interlocutors complained of, in so far as the same have
 “ relation to the appellant the Earl of Strathmore, be, and
 “ the same are hereby affirmed, and that the said appeal be,
 “ and the same is hereby in so far dismissed this House :
 “ And it is further ordered and adjudged, That in so far as
 “ the said interlocutors have relation to the appellant the
 “ Countess of Strathmore, or her separate estate, such inter-
 “ locutors be, and the same are hereby reversed.”

VIZARD & Co.—Appellants’ Solicitors.