

## S E C T. IV.

## Personal Bond not binding upon a Wife, although her Husband consent.

1611. June 12. L. of ULYSSES-HAVEN *against* LADY BONNINGTON.

A WOMAN being bound by an obligation with her husband to pay a moveable sum, and to relieve those that are his cautioners in the bond; if, after the husband's decease, she be charged to pay the sum, or to relieve the cautioners, the same will have no execution against her, because the bond will not in that point concern her, unless it were for securities to be made forth of her conjunct-fee lands; and albeit the party or cautioner allege and offer to prove that she received the money, was *praposita negotiis*, and had persuaded the cautioners to be bound, and had promised to relieve them, that will not sustain the bond against her.

*Fol. Dic. v. 1. p. 398. Haddington, MS. No 2208.*

No 160.

A personal bond, granted by a woman *stante matrimonio*, is not effectual against her; and it does not alter the case, whether she be principal or cautioner, or whether her husband consent or not.

1616. February 3. DOUGLAS *against* HAMILTON and ELPHINGTON.

IN an action of removing pursued by Archibald Douglas of Tofts, who had comprised the lands of Limpy from Mr Robert Elphingston and Susannah Hamilton his spouse, upon bonds made by them, and certain creditors from whom Tofts got assignations, and that to the behoof of Samuel Johnston, who was cautioner for Mr Robert and his spouse, and had paid the sums; the LORDS sustained an exception proponed by the said Susannah upon her liferent infestment, granted before the comprising led, both against her, and upon bonds subscribed by her; *ratio* because the comprising was led *stante matrimonio*, and the bonds could not be obligatory against her.

*Fol. Dic. v. 1. p. 399. Kerse, MS. fol. 65.*

No 161.

1626. March 24. GREENLAW *against* GALLOWAY.

IN a reduction betwixt Greenlaw and Galloway, wherein Greenlaw pursues for reduction of a bond, made by her umquhile husband and her to Kinloch and his spouse, conjunctly and severally, for a sum of money to be paid by them to the said Galloway defender, at the term contained in the bond; and failing thereof, obliging them to pay annualrent therefor out of their lands, as well not infest as infest, the wife, after the death of her husband, desiring this bond to be

No 162.

Found in conformity with No 160. *supra*.

No 162.

reduced, with the comprising which was deduced thereupon against her lands, pertaining to her in heritage, because it was made by the husband and her *stante matrimonio*, which could not oblige her to pay after the husband's death, and for which no execution, either personal or real, could follow against her, her proper goods or lands, but only against the husband's goods and lands; and it being *excepted*, That she was bound conjunctly and severally with her husband, that as the husband might sell her land with her own consent effectually, so he might give an annual out of the same with her consent, and therefore might with her consent burden the land with sums of money, and borrow money, which might affect the land, albeit she might not be personally compelled to pay the same;—likeas the defender declared, that he craved not her to be personally decerned to pay the principal sum, but only restricted the force and execution of his obligation against the tenements pertaining to her for paying off the annualrent of the said principal sum, and not for the principal sum; notwithstanding of the which restriction, the reason was sustained, and the exception repelled, and the obligation and comprising of the wife's land was reduced; and the LORDS found that the bond was not obligatory, neither personally against the wife, nor against her own proper goods nor lands, neither for the principal sum, nor for any annuals thereof; for albeit the wife and the husband may annalzie or wadset the wife's lands *stante matrimonio*, if it be legally done; yet being done after another manner and form than is allowed of the law, as this bond was, which contained no clause to infeft in the wife's land, but was drawn up in a bond to pay the principal sum, and failing, to pay annualrent out of their lands generally, not obliging formally to infeft in this land controverted; therefore the same was not sustained, for the bond controverted was made for payment of borrowed money.

In this process there was an old practick produced betwixt Mr William Naper and Margaret Mowbray, wherein she having consented to grant an infeftment with her husband to a creditor, of an annualrent out of the lands, wherein she was infeft in conjunct-fee, after her husband's decease; she being personally convened for payment thereof, seeing she possessed the said land, conform to her right foresaid of conjunct-fee, the LORDS decerned her to make payment of the said annualrent in time coming, so long as she bruiked by her right, albeit she only was consentor to that contract made by her husband, seeing she then had the right of conjunct-fee in her person when she consented, and after the husband's death possessed the land; which the LORDS found did not agree with this case now controverted.

Act. Hope,

Alt. Aiton &amp; Lawrie.

Clerk, Gibson.

Fol. Dic. v. 1. p. 398. Durie, p. 198.