

1626. December 19. MATTHEW *against* SIBBALD.

IN a suspension and reduction betwixt Matthew and Sibbald, both upon one reason, viz. for suspending and reducing of a bond made after this tenor, viz. whereby Blyth the husband, and Matthew his wife, granted them to have borrowed from Sibbald a sum of money, which they both obliged them and their heirs to pay again to the creditor at any term thereafter, upon requisition, conjunctly and severally; and obliged them both, and each one of them, and either of their heirs, to infest the creditor in an annualrent effeiring to the principal sum, furth of the land specially mentioned in that obligation pertaining to the wife, ay and while the principal sum was repaid; upon the which bond, the wife called Matthew, after her husband's decease, being charged to infest the creditor in an annualrent out of the said land, she having right thereto; she suspended, and reduced upon that reason, because it was a bond made by her *stante matrimonio*, which, after the decease of her husband, ought not to be obligatory against her;—THE LORDS having heard the parties dispute thereupon, they found, That albeit a woman *stante matrimonio* could not be obliged to do any deed which might affect the goods and gear, which might befall to her after her husband's decease, or which might make her personally obliged to perform any deed, which was to receive inplement in moveable sums, by reason that during the time of the marriage, betwixt her and her husband, and while they were both living together, she has no property *in mobilibus*, because the same belongs to her husband; and for that part of the goods, which of the law will fall to her through her husband's death, she can do nothing therein in her husband's lifetime to prejudge her thereof, before the same fall, and before that it be thereby constant, if she will fall any or not, and what the quantity of the same is. But as concerning a woman's obligation with her husband, in things whereof the wife had any actual or other real right, as in liferent, or heritable property of land or annualrent, constituted by infestment, the LORDS found, That she might be effectually bound with her husband in things of that nature, the same being formally and legally made. And concerning this obligation controverted, the LORDS found it not obligatory against the woman, but only against the husband and his heirs; because, albeit the woman was heritor of the land, whereout of the annualrent was ordained to be uplifted by the bond; yet that bond binding the husband first therein named, and then the wife nominated in the second place, to be obliged, and their heirs to give that infestment, could not effectually bind the wife, who ought to have been bound *primo loco*, (if the same should have denuded her) as disponer herself, and her husband as consentor, and authorising her therein, and with his express advice and consent; and therefore this bond, binding first the husband and then the wife, and their heirs *æque principaliter*, ought to receive execution against the husband and his

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heirs, and not against the wife, who was not formally bound thereby, as said is, and therefore the letters were suspended *simpliciter*.

Act. *Halyburton & Russel.*Alt. *Hope & Oliphant.*Clerk, *Gibson.**Fol. Dic. v. I. p. 398. Durie, p. 248.*

* * Spottiswood reports the same case :

IN an action of suspension raised by Christian Matthew, relict of David Blyth, against Janet Sibbald, relict of Mr Henry Duncan, the LORDS found, That in case a man borrow money, and he and his wife be obliged for re-payment thereof; as also they be both obliged to infeft the creditor in an annualrent effeiring thereunto furth of the land pertaining to the wife in heritage; that yet after the husband's decease, the bond made thereupon can have no execution against the wife, in respect she is not bound *principaliter et primo loco* therein, but only in the second place with her husband conjunctly.

Spottiswood, (HUSBAND AND WIFE.) p. 159.

1635. *January 30.* MITCHELSON *against* MOUBRAY.

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An apprising on a bond for borrowed money, granted by a husband and wife, found null; though it was argued that a woman, with her husband's consent, can bind herself effectually to grant a security upon her lands; and her subscribing the bond, though it cannot bind her personally, must at least be equivalent to a consent, that the creditor, upon the husband's obligation, should have access to apprise her lands.

THE deceased Gavin Mitchelson, and Elizabeth Moubray his spouse, being addebted by their bond in certain sums borrowed from the deceased Mitchelson their creditor, for not payment whereof, the said creditor comprises from the said debtor some dwelling-houses in Leith, and thereupon is infeft in the same; likeas thereafter the said Elizabeth Moubray, (who was infeft in conjunct-fee in the same lands before the comprising,) compeared judicially before the Bailies of Edinburgh, and ratified the said comprising, and the Lords' allowance thereof, together with the bonds foresaid, whereupon the comprising was deduced, with the infeftments to follow thereupon, and renounced all right which she had to the said lands, either by conjunct-fee, liferent, or terce, or any way whatsoever, and made faith, that she was not compelled thereto, but that she did it voluntarily, and of her own free will, and obliged her never to come in the contrary thereof, as the said act, under the hand of Mr Alexander Guthrie, town-clerk of Edinburgh, bears; and George Mitchelson, chirurgion in Edinburgh being infeft in these lands, as heir to his umquhile father, a compriser, he pursues removing therefrom against the said Elizabeth Moubray; who, defending herself with the said infeftment of conjunct-fee, granted to her before the comprising, and the pursuer opposing her judicial renunciation and ratification, the defender *duplicated*, That that ratification could not prejudice her, because it was not subscribed by her, but was only the assertion of a clerk to an inferior court, which ought not to be of force to take away her liferent infeftment; and the other opposing the solemnity thereof, and the preceding bonds and comprising, which, being so ratified by her, add strength to the bonds, albeit they in law had not been of force to have produced personal execution against her, seeing they are