

No 163.

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.

No 164.

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

actus geminati, and all conjoined together, are of that same strength as if her husband and she had disposed the lands, and that she had judicially ratified the disposition;—THE LORDS found the exception relevant, notwithstanding of the ratification produced; for the LORDS found that the bonds, albeit subscribed also by the woman, yet being of borrowed money, and done by her with her husband *stante matrimonio*, could not be obligatory against her, nor produce caution against her; and also found, That a ratification, being done by an act extracted out of the town books, as said is, under the clerk's subscription, did not derogate to the defender's right of conjunct-fee, seeing it was done by her in the time of marriage standing, her husband then being in life, and that the same was not warranted by her subscription, nor was there any other writ made before this judicial act, whereby she had given her consent, and subscribed the like ratification, without which her subscription of some preceding writ of this tenor, and the said ratification judicially made of the comprising, and renunciation of her foresaid right, under the clerk's hands only, and not subscribed by herself, with her own hand, or by notaries for her, if she could not write, could not prejudice her right. See PROOF.

No 164.

Act. Cunningham et Johnston.

Alt. Mowat et Deans.

Clerk, Scot.

Fol. Dic. v. 1. p. 398. Durie, p. 747.

* * * See Spottiswood's report of this case, Div. 9. *b. t.*

* * * In conformity with the above was decided a case, July 1725, Irvine against Representatives of Dougal. See APPENDIX.

1663. January 14.

BIRCH against DOUGLAS.

SARAH BIRCH widow in London, charges Catharine Douglas relict of John Muir merchant, for payment of a sum of money contained in a bond granted by him and her to the charger. She suspends upon this reason, that the bond is not obligatory but null, as being granted by her *stante matrimonio*, during which time, no wife can validly bind herself, (though she may dispone with consent of her husband) and if she do, the bond is *ipso jure* null, whether it be judicially ratified by oath or not. This matter having never been decided before, was ordained to be heard *in presentia*, where it was fully debated among the advocates and among the Lords themselves, from the civil law, our law and practiques, and from the consequences: From the civil law it was *alleged*, That a woman might *renunciare beneficio senatus consulti velleiani* made *contra intercessionem mulierum*, and oblige herself notwithstanding thereof, *multo magis* in this case, where an oath is interposed not to come in the contrary of the bond. From our law and practise K. James III.'s 11th Parliament, cap. 83., it is declared, that a woman may not come in the contrary of her oath; and hence it is, that

No 165.

A personal bond granted by a woman *stante matrimonio*, found to be ineffectual against her, though her husband had subscribed it and she had ratified it upon oath.