

- No. 24. son's bond to liberate his father, unwarrantably detained, was found null. Yet Grotius, Lib. 2. De jure belli et pacis, Cap. 11. asserts, that he who pactions to pay a sum to liberate his friend from unjust bonds *tenetur, quia tu a paciscente coactus non es*. The Lords found Wiseman's intromission unwarrantable; and therefore reduced the bill given by Boddom to him, not only as extorted, but likewise in respect of the subsequent discharge and relaxation of the escheat by a quorum of the Commissioners of Justiciary; and assoilzied from the debt.

Fountainhall, v. 2. p. 89.

1700. July 18. DUNDAS against HARDIE.

No. 25.

A Sheriff-depute having fined an heritor for divers absences from head-courts, and having summarily poinded the tenants for the amerciamment, the Lords thought that this procedure was precipitant, being without a previous decree of poinding; and without deciding whether these unlaws were *debita fundi*, they found the poinding illegal, and the bond granted to stop it null, and reponed the master and tenants to their defences.

Fountainhall.

* * This case is No. 16. p. 6860. *voce* INDUCIÆ LEGALES.

1706. June 28. HAY against CUMMING.

No. 26.

A wife having subscribed consenter to a disposition granted by her husband of a subject life-rented by her, the want of a judicial ratification was not sustained as a reason of reduction thereof, since neither force nor *justus metus* were pretended in the case.

Jean Hay being infeft by James Skeen, merchant in Aberdeen, her husband, in the life-rent of a house and some acres, her husband's affairs obliged him to dispoise the said lands, in 1666, to one Forbes, for 2000 merks, from whom Robert Cumming of Birnies now derives right; and in that disposition the said Jean is a consenter for any right of life-rent she had, but she never judicially ratified the same upon oath. After her husband's decease, she revokes her consent, and raises a reduction, on this ground, that, by this consent, she had denuded herself of all she had in the world, which was a lesion with a witness, and being a donation in favours of her husband, and for his conveniency, though made to a third party, it was revocable, *ne mutuo amore se spolient*, especially since it was never judicially ratified, law presuming it to be through importunity, and for fear *et ob reverentiam maritalem*, as was found, 9th January, 1623, Marshall, No. 7. p. 16482.; 4th February, 1623, Guild, No. 77. p. 6521.; and 19th June, 1629, Gray, (see APPENDIX); where wives were allowed to quarrel their renunciations, if not judicially ratified, because presumed illicit; and the later decisions go the same way, 17th July, 1677, Paterson *contra* Maclean, No. 97. p. 10284. Yea, further, on the 15th February, 1678, Gordon *contra* Maxwell, No. 353.

p. 6144. a wife was reponed against a judicial ratification, being revoked by her as a donation in favours of her husband. For though her oath excludes her privilege of revoking on the head of force, fear, and concussion, yet it nowise renounces other legal remedies; that a wife being ever reputed minor and *sub mariti curatela*, the Roman law and ours have secured her against ruining herself by such renunciations, especially as she has no other fund left, nor any thing given in remuneration thereof, as this gentlewoman has nothing *aliunde* but this mean life-rent to subsist on, which, out of simplicity and reverence, she quitted, and the purchaser has warrandice to recur on, *et sibi imputet* that he did not obtain her judicial ratification. Answered, This position strikes at the foundations of our law; for when one buys land for a full and adequate price, what takes he more than the consent of the disponent's wife? It is true, *ex superabundanti*, some cause her judicially renounce, which excludes her from ever alleging, at any time thereafter, force, threats, or ferocity; but without it she is fully divested, unless she qualifies *vis et metus*; which this woman does not pretend, except that *reverentia maritalis* which is not relevant. And Craig, Lib. 1. Dieg. 15. is clear, that her subscription binds her, unless she prove *se vi vel metum coactam consensisse*; and Spottiswood, p. 157. concurs; and Sir George Mackenzie, Instit. Tit. Of Marriage; and it was so decided, 24th January, 1674, Murray *contra* Jeffrey, No. 15. p. 16488.; and if this were otherwise, purchasers who adhibit the wife's consent to their dispositions would have no security; and they are not concerned to ask whether the wife be provided *aliunde* or not, he having acquired for onerous causes; and to alter this might brangle many rights and settlements in this kingdom. The Lords considered, that deeds done by a wife, in favours of her husband directly, or to a third party for his behoof, were indeed revocable as a donation *inter virum et uxorem*, and that deeds to the husband's father, or other persons bound for the husband in his contract of marriage, without consent of the wife or her friends, they are reducible as *contra fidem tabularum nuptialium*; but fair transactions for a price cannot be drawn in question on the want of a judicial ratification; and therefore repelled her reason of reduction, and sustained the disposition to cut off the life-rent, unless she offered to prove force or fear; though these act more cautiously who take their judicial ratification.

Fountainhall, v. 2. p. 338.

Forbes reports this case :

Jean Hay having subscribed consent to her husband's disposition of a tenement in Aberdeen, wherein she stood infeft in liferent; which disposition came by progress in the person of Robert Cuming of Birness; she revoked that consent, and raised reduction of that disposition against him, upon this ground, that she did simply assent thereto, not as conjunct disponent with her husband, and thereby, *stante matrimonio*, denuded herself of her whole liferent right in favours of her husband, without a judicial ratification; and a wife's deed with consent

No. 26. of her husband in prejudice of her liferent, though to a third party for onerous causes, is reducible if not judicially ratified, January 9, 1623, Marshal against Marshal, No. 7. p. 16482. February 4, 1623, Guild against Guild, No. 77. p. 6521. June 19, 1629, Gray against ———, (See APPENDIX); July 17, 1677, Paterson against M'Lean, No. 97. p. 10284; which privilege was introduced by our law in favours of wives, to save them from the importunity of their husbands, and from being imposed on through the ignorance of business. And as our custom agrees with the Romàn law, in allowing the reduction of deeds done by married persons in favours of each other, or to others for their behoof, *ne mutuo amore se spolient*; so much rather ought our law to remedy a wife renouncing the only fund of her livelihood to her husband's behoof, as in the present case. Nor needeth this to seem hard upon purchasers, who rely upon the security and warrantice of their authors, and take them with all the defects, and have themselves to blame for not adhibiting a judicial ratification. Yea, a wife having for onerous causes disposed her lands to a third person for her husband's behoof, was allowed to revoke, notwithstanding that she had ratified judicially, and sworn never to come in the contrary. Is not a wife perpetually minor *stante matrimonio*, and *sub curatela mariti*; and consequently allowed, as other minors, to reduce deeds to her prejudice, where she has not either judicially ratified, or taken herself to another fund?

Answered for the defender: A Wife's deed, either directly to, or indirectly for the behoof of her husband, is indeed revokable, as a donation. And if in favours of the father or other person bound on her husband's side in her contract of marriage, without concurrence of her friends who relied on the faith thereof upon her part, (such a deed being presumed gratuitous *inter conjunctas*) is quarrellable as *contra fidem tabularum nuptialium*. Besides, there is a vast difference betwixt a wife's consent to the disposition of a particular subject where the purchaser is not bound to know, but she is or may be provided *aliunde*, which is the present case; and her consent to such a deed as the purchaser knows or is bound to know, leaves nothing behind for her substance. Again, according to Craig, Lib. 1. Dieg. 15. § 20. *Antiquitus coram judice extra præsentiam mariti interponebatur uxoris consensus in alienatione per maritum facta illius prædii cujus usumfructum mulier habebat. Hodie, si subscripserit instrumento alienationis, sufficit coram testibus; nisi post se coactam vi et metu probaverit, &c.* Which is repeated by Spottiswood, Tit. Husband and Wife, P. 157, and is beyond all doubt our present law and custom. Among the decisions, that betwixt Marshall and Marshall, is the only one that hath any appearance of weight in it. And yet it doth not meet the case in hand; because, there a wife with consent of her husband discharged *per universitatem* his father's obligation in her contract of marriage for her liferent, without any visible onerous cause, while they all lived together, which was repudiate upon these grounds; *1mo*, The deed was presumed to have been to the husband's behoof, especially considering that he would reap the benefit of it by succeeding as heir to his father; *2do*, The husband was *in pessima fide* to consent

to his wife's renouncing her life-rent by that contract in which himself was a contractor ;—and the father was as unjust to accept thereof without any onerous cause, when he could not but know that his daughter in law had nothing else. None of which specialities are to be observed in this case, where at first the disposition was made to strangers, and that of a particular subject irredeemably for onerous causes, upon the faith whereof the subsequent purchasers did rely, and it hath taken effect by many years possession.

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Replied for the pursuer : With all respect to the learned Craig, the former custom is most reasonable. And if it be not adhered to, the women's privilege will be eluded : For how easy is it for a husband to order matters so, as the wife can have no means of proving force or fear ? Besides, it is known that soft insinuations and frequent importunities prevail as much with well tempered wives, as force or fear doth influence such as are stubborn and ill-natured : And our law ought not to be less indulgent and favourable to the former, than to the latter. Whereas the adhibiting the judicial ratification, publishes to the wife's friends the danger she is in, that they may interpose to prevent it. Therefore the principle advanced by Craig, is to be understood where a wife consenting to the alienation of her life-rent, gets an equivalent fund from her husband. But where the husband is known to have no other fund to compensate the wife's deed, a purchaser ought to adhibit all the requisite solemnities of law, otherwise he partakes of the husband's fraud. And a wife *fraude inducta* should not be denied the protection of law, more than she who is *vi coacta*.

The Lords repelled the reason of reduction of the disposition, that it was not judicially ratified ; seeing neither force nor ferocity in the husband were alleged.

Forbes, p. 114.

1706. July 11. GRANT of Dalahaple against MAJOR ALEXANDER ANDERSON.

Major Alexander Anderson having granted Dalahaple a bond of corroboration of a debt for which his father was in the messenger's hands under caption at the time, with this quality, that the creditor should supersede payment for two or three years, and use all legal diligence to affect his father's estate by adjudication and inhibition ; and after using of the diligence against the father, and elapsing of the *supersedere*, being charged upon the said bond at the instance of Dalahaple ; he raised suspension and reduction *ex capite vis et metus*, upon this ground, that he had granted the said bond of corroboration to the charger in order to relieve his father, who was carried prisoner through the hills from place to place in his night-gown and slippers, while sick and not able to put on his clothes, with the hazard of his life.

Answered for the charger : 1st, That the bond of corroboration was a plain transaction ; in so far as the suspender got thereby more terms of payment than were contained in his father's original bond, and the charger obliged to adjudge his

No. 27.

Effect of transaction in a case where force or fear are alleged.