

jure null, being granted by a wife *stante matrimonio*; *ergo*, the accessory one is also null. *2do*, That this is a donation by a wife to her husband, being to his eldest son, who is *eadem persona*, and so is revocable, and she had *de facto* revoked it now. *Answered* to the *first*, Though the personal obligation of a woman *vestita viro* be null, yet where she is principal disposer, with her husband's consent, of rights out of her own lands, that is valid. See Stair's Instit. B. 1. tit. 4. § 16. To the *second*, This was neither to the husband nor son, but to a third party, the son's wife; and so it is not *donatio revocabilis*. This being reported by Redford, the LORDS repelled the two reasons, and found the obligation on the wife's lands valid and effectual, and not revocable.

Fol. Dic. v. 1. p. 400. Fountainball, v. 1. p. 400.

* * * Harcarse reports the same case :

GEORGE JOHNSTON and Alison Paton his spouse, who was an heiress infest, having, in their son's contract of marriage, obliged themselves, conjunctly and severally, to pay a sum to him and his wife at the first term after the granter's decease; and the mother having obliged herself, with consent of her husband, to dispoise their whole tenements in favour of their said son and his wife, in conjunct fee and liferent; the father and son being dead, the son's wife pursued her mother-in-law upon her obligation to dispoise.

Alleged for the defender; That the bond containing a personal obligation *stante matrimonio*, it could not oblige her. *2do*, The obligation being in favour of the son, who is *eadem persona* with the father, is *donatio inter virum et uxorem*.

Answered; Though personal obligations to pay do not oblige a wife, yet an obligation to dispoise a right in her person is valid. And as her actual dispoising, with consent of her husband, would have been valid, so an obligation to dispoise must oblige her to fulfil. *2do*, The wife who is a stranger here, pursues, and not the son's heirs.

THE LORDS decerned against the mother-in-law to dispoise, in so far as concerned the daughter-in-law's liferent.

Harcarse, (STANTE MATRIMONIO.) No 882. p. 251.

1715. June 14.

JANET KER against SHEARERS.

JAMES HODGE, and Janet Ker his spouse, grant an heritable bond to Andrew Shearers, whereupon infestment followed, in a tenement of the husband's provided to the wife in liferent; whereupon Shearers the creditor having led an adjudication, his daughters, as having right from him, pursue mails and duties.

Janet Ker the wife compeared, and craved to be preferred by virtue of her liferent, her husband being dead; and *alleged*, That though she concurred

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with her husband in granting the bond, and that thereby she has prejudged herself so far; that the real right of annualrent is a burden upon her liferent-tenement; yet she is preferable for the superplus mails and duties; because the adjudication was led upon the personal obligation in the bond, which is null as to the wife.

It was *answered*; That the bond being an heritable bond, bearing a clause for infefting in an annualrent in the tenement liferented, the wife's concurring and consenting to that bond was effectual to all that might follow upon it, and as much as if she had in concurrence with her husband disposed the tenement. It is granted indeed, that the wife's obligation is ineffectual as to all personal diligence, but is valid as to real diligence; and an adjudication is as good as a disposition, against which a wife could not be restored.

It was *replied*; A wife's obligation is null, not only as to personal execution, but as to all effects, and cannot be the warrant of any diligence, real or personal, even although it were judicially ratified upon oath, 8th November 1677, Sinclair against Richardson, No 185. p. 5985. Likewise a comprising upon a wife's bond was found null, Greenlaw against Galloway, No 162. p. 5957.

'THE LORDS found the obligation (adjudication) upon the personal obligation null as to the wife's liferent, and preferred her with the burden of the annualrent bygone and in time coming.'

Fol. Dic. v. 1. p. 400. Dalrymple, No 144. p. 198.

* * * Bruce reports the same case :

JAMES HODGE, with consent of the said Janet Ker his spouse, grants an heritable bond to the said Shearers, whereupon they were infeft in some lands in Edinburgh; part of the sum being paid, they thereafter adjudge for a balance.

And in a process of mails and duties, compearance is made for Janet Ker and George Fleming her second husband, who also deceasing during the dependence, the pursuers applied, after his death, to the Ordinary for a hearing, and then craved that the tenants might be decerned in the mails and duties, due at the term subsequent to Fleming's decease. And here again compearance being made for the relict, and her infeftment produced,

It was *answered* for her, *imo*, That she ought to be preferred to the mails and duties, with the burden of the current annualrent of the balance due to the pursuers, because the personal obligation upon which the adjudication proceeded is null *ipso jure*, and therefore (as to her) the adjudication itself; so that the pursuers could only recur to their infeftment of annualrent to which she had consented, which afforded only a pointing of the ground for the annualrent of the above balance. *2do*, She only consented to the annualrent to be uplifted out of her liferented tenement; but not that it should be carried away for the principal sum and whole bygone annualrents.

Replied for the pursuers, *1mo*, that they pretend not to do diligence upon the wife's personal obligation in the bond, but to prosecute the real right given them by both husband and wife; and though the personal obligation be null, yet that cannot stop this real execution, to which she consented. *2do*, An heritable bond in its ordinary stile, and the infestment of annualrent in the legal effect thereof bears an assignation to the mails and duties of the tenement; so that the liferenter cannot stop the pursuers getting payment of all their bygone annualrents; as to which, this action for mails and duties has the same effect with a process for pointing of the ground. And the LORDS have found, that an annualrenter, who is an adjudger, may use the one or other action at his pleasure, and that they will have one and the same privilege and effect; for the pursuer's adjudication is not founded only upon the personal obligation in the bond, but proceeds upon the whole obligations, and obtains preference according to the date of the real right; because the tenement itself is subjected to the payment of the whole sums contained in the heritable bond; and the liferentrix giving consent to it, imports an acquiescence to all that may follow upon it.

THE LORDS found, That there can be no mails and duties upon the adjudication founded on the personal obligation in the bond granted by the wife *stante matrimonio*; but found that the heritable bond is a good title for pointing the ground for the bygone annualrents, and in time coming.

Act. *Spotiswood.*Alt. *Fleming.*Clerk, *Robertson.**Bruce, v. 1. No 96. p. 118.*

 S E C T. VIII.

Effect of alienation by a Wife of her own Property, with her
Husband's consent.

1566. February 12.

MELVILL against DUMBAR.

HELEN MELVILL made a renunciation of a tenement in Kinghorn in favours of her son David Dumbar, without consent of her husband, who was then absent. The husband afterwards being come home, ratified the renunciation. Yet the LORDS found it null from the beginning, and that the husband's ratification supervenient could not make it valid, unless the wife had made a new renunciation with her husband's consent.

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Spotiswood, (HUSBAND AND WIFE.) p. 155.

* * * See Maitland's report of this case, No 206. p. 601.