

1772. December 10. JOHN ROBERTSON *against* JAMES WATSON.

HUSBAND AND WIFE.

A Married Woman's personal obligation in an heritable bond, subjoined to which, as a corroborative security, she came under an obligation likewise to infest the creditor in a subject properly belonging to herself, not effectual to be the foundation of a process of adjudication against her heir.

[*Faculty Collection, VI. 107; Dictionary, 5976.*]

AUCHINLECK. If a woman should sell her estate, and there is a defect in the progress, may there not be an adjudication in implement?

PITFOUR. There is no doubt that a wife, with consent of her husband, may sell or grant an heritable bond: this consent is necessary, though his *jus mariti* or courtesy be not affected. But a wife, even with consent of her husband, cannot do an obligatory deed. The right, here, is not capable of adjudication, for the adjudication can only proceed upon the personal obligation, which is null.

COALSTON. A personal obligation by a wife is null, and cannot found an adjudication. A wife may do deeds to affect her estate. If she grants an obligation to dispo, that may be made effectual by an adjudication in implement; but the case here is different. *1st*, There is an obligation to pay; *2d*, An infestment in annualrent. The last will be effectual, but it will not authorise an adjudication.

GARDENSTON. The real obligation is good; why may it not be made effectual by adjudication? I have no notion of a right which cannot be carried into execution by legal diligence.

MONBODDO. This was just the principle of my judgment. I thought that it was the implied obligation, in the heritable bond, that the creditor should either have his money or be allowed to do diligence against the estate. Every person that grants an heritable bond becomes virtually bound in this alternative.

JUSTICE-CLERK. At first I thought that this was no more than a quirk on the part of the wife's heir. We are agreed that the personal obligation by the wife is good for nothing, and that the wife may grant real rights with consent of her husband. The question here is, how far an adjudication can be led upon the heritable bond? The law will not suffer the wife to affect her lands beyond what she is specially bound to do. The infestment on the heritable bond is perfectly good, so far as it goes; but the wife has not consented that her estate shall be liable to adjudications, to an expired legal, &c.; therefore, the law will not suffer an adjudication to carry off her estate.

PITFOUR. This may be expressed in brief thus:—The maxim of law is, that

an adjudication proceeds on this, that the debtor had become bound to pay, and had neglected to fulfil his personal obligation. There was no personal obligation on the wife, and therefore an adjudication cannot proceed against her lands.

On the 10th December 1772, "The Lords found that the adjudication cannot proceed on the personal obligation of the wife, and therefore sustained the defences, and assoiyled;" altering the interlocutor of Lord Monboddo.

*Act. J. Douglas. Alt. J. M'Laurin.*

1772. December 10. JOHN HEBBURN and WILLIAM CHEAP *against* GEORGE AIKMAN.

SALE.

Case where a purchaser of an heritable subject was held bound, either to accept of the disposition, and progress offered, or to depart from the bargain.

[*Fac. Coll. VI. 103; Dict. 14,179.*]

PITFOUR. When I was consulted as to defects in progress, I always told the parties, You must either take the progress or quit the bargain. When they said they would not quit the bargain, because it was a good one; then I advised them to keep their charter-chests shut, and try to make a good title to themselves by the aid of prescription.

AUCHINLECK. The rule, *loco facti imprestabilis subit damnum et interesse*, only takes place when a purchaser is led ignorantly to buy the subject. Here Mr Cheap knew that the progress was bad, and indeed bought because he knew it was bad. If he prevails, he may call the tenement Cheap-House; for he will retain the price, and is in possession of the subject *qua* tacksman. After the purchase he is no longer tacksman, so will pay no rent. As the seller cannot give him a progress, he will retain the price in his own hands.

HAILES. If Mr Cheap will not say that the seller can complete a progress, he must submit to have the bargain set aside.

PRESIDENT. Here is a *factum imprestabile*: Mr Cheap does not say that the progress can be made better, neither does he say that he has suffered any damage. He has got into possession, and says that he will hold the subject, and not pay the price.

On the 10th December 1772, "The Lords found that Cheap must either take the subject or give up the bargain, and found expenses due;" altering Lord Kennet's interlocutor.

*Act. J. M'Laurin. Alt. R. Sinclair.*