

1802. February 11. AITKINS *against* ORR.

No. 95.

A husband who raises an action in the name and in the right of his wife, may be obliged to produce her concurrence.

A summons of reduction upon the head of deathbed, was raised in the name of Margaret Aitkin, spouse of John Carsewell, and Mary Aitkin, spouse of William Robertson, and their respective husbands for their interests, against Margaret Hugh Orr, the daughter of one of the pursuers by a former husband, in whose favour the deed under challenge had been conceived.

It was objected, *in limine*, to the title of the pursuers, That the action had been brought by the husbands, without the concurrence of their wives ; and the Lord Ordinary, before answer, ordained the pursuers to produce a written consent of their wives authorising the action. This order, however, not having been complied with, the Lord Ordinary, (21st January, 1802), in respect that the pursuers failed to produce this consent, assoilzied the defenders from the conclusions of the reduction.

The pursuers presented a petition to the Court against this interlocutor, in which they

Pleaded : *1st*, When an action is brought by a husband for the benefit of his wife, the legal presumption is, that it is brought by her concurrence, and this presumption is not to be set aside without evidence to the contrary. *2do*, A husband is by law the curator of his wife ; and a married woman, without the consent of her husband, cannot exercise any act of administration, either with respect to heritage or moveables ; Erskine. B. 1. Tit. 6. § 27. Accordingly, she has no right to decline insisting in any action which is brought by him for her benefit. *3tio*, The husband has a separate right of his own to insist in a reduction *ex capite lecti* ; for he is by his *jus mariti* entitled to the rents of the estate, if the deed should be set aside. The wife cannot defeat this right of the husband, by a direct alienation *inter vivos*, and she has as little right to do this indirectly by refusing to adhibit her concurrence to an action.

But the petition was refused, without answers, and the Lords, by a great majority, adhered to the interlocutor of the Lord Ordinary.

It was observed from the Bench : That the husband's *jus mariti* has no place until the property be vested in the wife ; she is therefore a necessary party in an action of reduction which relates to the property of the estate, and not merely to the management of it.

Lord Ordinary, *Methven*.For Petitioners, *Fletcher*.Agent, *D. Macgowan*.Clerk, *Colquhoun*.

.L.

Fac. Coll. No. 22. p. 45.