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same, yet they cannot subject themselves to personal execution; and Sir George Mackenzie, Instit. Tit. Marriage, page 55, says the same. Likeas, Lord Dirleton, in his decisions, 5th July 1676, observed, the LORDS found the oath not obligatory, No 168. p. 5965.; and President Gilmour, gives us that case of Birch and Douglas at great length, No 165. p. 5961., and concludes, That the LORDS found the bond null, notwithstanding of the oath. And this appears to be Stair's own opinion, Instit. B. I. Tit. 17. Sec. 14.; and in his decisions, 8th Nov. 1677, Sinclair *contra* Richardson, No 29. p. 5647.; and although the *jus digestorum* allowed women to renounce the benefit of the *Senatusconsultum Velleianum*, yet the law of the novels altered that, *Novel. 134. cap. 8.* and we have now a special statute in 1681, declaring oaths of minors null. THE LORDS having pondered all the decisions, they found no reason to recede from so constant a tract, where there could not so much as one practise in the contrary be adduced; and therefore declared the bond null, notwithstanding of her oath; and ordained her to be set at liberty; and that it needed not abide the reading in the minute-book, not being in a process, but required only an act for the keeper of the prison's warrant; but refused to find it a riot, or to modify expenses, seeing the charger, who imprisoned her, wanted not a probable ground of doubting. And found the assignation to the tack-duty valid and obligatory, but repelled the homologation founded on, that she had proponed payment, and produced partial receipts for instructing thereof, that being less binding in law, than the oath from which human laws assoilzied her; though it had been both more honest and conscientious to have kept it.

*Fol. Dic. v. 1. p. 398. Fountainball, v. 2. p. 348.*

\* \* \* The like judgment was pronounced in a case, Lithgow against Armstrong, July 1730, though in that case the creditor offered to restrict his bond to be the foundation of real diligence against the debtor's estate only. See APPENDIX.

1711. July 13.

WILLIAM and JEAN PRINGLES, Children of the deceased David Pringle, Chirurgion Apothecary in Edinburgh, *against* THOMAS IRVINE of Gribton.

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A wife having granted a bond for borrowed money without consent of her husband, and pledged her paraphernalia in security thereof, it was found that the nullity of the

IN a process at the instance of William and Jean Pringles, against Thomas Irvine, for exhibiting to the pursuers five rings belonging to them, which ——— Maxwell Lady Kirkhouse had pawned to the defender for L. 16 Sterling, owing by her to him by bond, granted while she was *vestita viro*,

*Alleged* for the pursuers; *imo*, The bond granted by the Lady for borrowed money *stante matrimonio* being null, the pledge is null in consequence; for a pledge being *res creditori data in securitatem debiti*, where there is no debt, there can be no effectual impignoration in security thereof, *accessorium sequitur*

*suum principale.* So the *Senatusconsultum Velleianum* declaring *intercessionem mulierum*, women's obligations for others to be null, comprehended pledges to be granted by women, *L. ult. § 2. D. Ad Senatusconsultum Velleianum*; because otherwise, that law might easily have been eluded. *2do*, A wife, being *sub potestate viri*, cannot pledge her paraphernalia without consent of her husband, *Reg. Majest. Lib. 1. Cap. 30. § 6.*; *Quon. Attach. Cap. 21.*; January 5. 1666, The Lady Bute against the Sheriff of Bute, Div. 7. Sec. 2. *b. t.*; Dec. 19. 1626, Matthie against Sibbald, No 163. p. 5959. For all her pactions or deeds (except obligations *ad factum præstandum* relating to the alienation of her lands, &c.) without consent of her husband, are alike null, as the deeds or pactions of minors, without the consent of their curators. Now, a minor cannot pledge his moveables without consent of his curators for money borrowed by him without their consent; again, as a woman cannot, without her husband's consent, assign her bonds that fall not under the *jus mariti*, though the husband's interest were reserved; neither can she pledge her jewels, watch, rings, or other paraphernalia, wherein the husband hath no interest; for otherwise, a wife might ruin her husband by alienating her whole *mundus mulieb. is*, which he for his own credit would be obliged to make up again.

*Answered* for the defender; The *Senatusconsultum Velleianum* is misapplied; for that favours only women whether married or not, engaging themselves as cautioners for others, and doth not concern such as bind principally for themselves, as the Lady Kirkhouse hath done; and it was only a woman's giving a pledge for another person that was accounted *mulieris intercessio* in the civil law. Our law hinders not women from becoming cautioners for others. A wife's obligation for borrowed money is indeed null with us; but the pledge given in security thereof is valid, there being no necessity of a bond for money borrowed upon the faith of a pledge. *2do*, Albeit it be a general rule in our law, that bonds granted by a wife without the husband's consent are null, there are several exceptions: As a wife being *præposita negotiis domesticis*, may without her husband's consent buy things necessary for the use of the family; for the price whereof, though misapplied and squandered away, he will be liable. She may pledge the furniture of the house, which is *sub cura ejus*; yea, a wife's having her husband's bond of borrowed money in her custody, was found to infer a warrant from her husband to borrow the money, Feb. 4. 1665, Paterson against Pringle, *voce PRESUMPTION*; and *multo magis* may she dispose of her own paraphernalia, especially rings, which may be best wanted, and whereof she hath the absolute property, possession, and administration. The pursuers citations out of *Regiam Majestam*, and the Lords decisions, are foreign to the case, for they relate only to rights belonging to the wife, which by their nature could not be transmitted without writ; whereas rings and the like, are transmitted by simple delivery *de manu in manum*. Nor is there any parity betwixt a wife's obligation and that of a minor; the latter being ineffectual *ob defectum rationis*, for want of a free

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annul the  
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No 172. and solid consent, (the essential of obligation) which a married woman is as capable of as one that is single, or any other person.

THE LORDS found, That the nullity of the bond annulleth not the pledge; and that the wife might pledge her paraphernalia without consent of her husband.

*Forbes, p. 524.*

\* \* \* Fountainhall reports the same case :

1711. *July 17.*—THOMAS IRVINE of Gribton, in May 1698, lends to ——— Maxwell, Lady Kirkhouse, L. 16 Sterling, and takes her bond for it; but in regard she was married, and her obligation null in law, he for his farther security, gets five gold rings in pawn, and gives a bond narrating the impignoration, and that how soon the Lady repaid him the money, he should restore the rings. It seems the rings belonged to Marion Maxwell, relict of David Pringle; and her children after her death, procure a declaration from Kirkhouse and his Lady, bearing that the rings were only deposited for custody and preservation in her hands, being their aunt, and that they truly belonged to them. But this was not till 1701, three years after she had impignorated them to Gribton for her own debt, which was a very unfair action; but wholly unknown to him. Upon this the Pringles pursue him for exhibition and delivery up of the rings to them. *Alleged*, That rings being *inter paraphernalia* of the wife, she might dispose upon them at her pleasure as proprietor without her husband's consent; and so the Lady Kirkhouse having borrowed money on them, she could legally pawn them; that such jewels and ornaments gifted to wives fall not under the *jus mariti*, nor are arrestable for his debts, nor poindable; that law, for the benefit of commerce and easy transmission of moveables, permits wives to bargain anent the utensils and domicils of a house, by selling or impignoring them for necessaries to the family without her husband's concurrence, she being *præposita quoad* such domestic affairs; much more then may she dispose on her own jewels, which are her proper *peculium*, like that given *servis et filiis familias* in the Roman law; and with us on the 4th February 1665, Paterson against Pringle, *voce* PRESUMPTION, the Lords found a wife's impignoring her husband's bond was valid, though without his special warrant, she having the bond in her hand implying that; and on the 26th of July 1709, Lady Pitferran against Wood, No 38. p. 5799., a compliment of L. 100 Sterling given for the Lady's gown and consent to a sale of some lands made by her husband, was not compensable by the husband's debt; such things not falling under the communion of goods, nor under the husband's executry, though given up in the inventory of the testament; but she may gift them in her own life, or legate them in her testament without his consent; and if the husband find her extravagant, law has given him a curb and remedy by inhibiting her. *Answered*, That *pignus rei alienæ non valet*, and it does not import whether he knew it or not; for it is a *vitium reale* following the thing *ut lepra*

*leprosum*. And it is *juris in controversi* that the bond given by the Lady Kirkhouse for the L. 16 Sterling is simply null, being *stante matrimonio*; *ergo*, the impignoration as a consequence thereof is likewise null, *sublato principali tollitur accessorium*. It is true, though law refuses its assistance to womens bonds, so as to produce any civil effect, yet there is a natural obligation in consequence to repay them; which goes so far that a cautioner in a wife's bond is effectually bound, though she is free, *quia accedit obligationi naturali*; but that can never support the impignoration here, which is so connected with the bond, that it is every whit as void and null as it, and it were of the most dangerous and last consequence to allow wives to dispose upon their jewels and paraphernalia at their pleasure; for it is to be feared when they are gone, the husband must make them up again, by putting others in their place, which may ruin families in a short time. And as the Roman law put the wife *sub cura et tutela mariti*, that he was her curator and administrator in law, that her deeds were as much null without his consent as a minor's without his curators, so our law trode in the same footsteps; for in the case of the Lady Bute and her Son, Jan. 5. 1666, Div. 7. See, 2: *b. t.* an assignation of a part of her jointure after proclamation of bans and her second contract, though not yet married, was found null, because it wanted the second future husband's consent; and our old law quadrates with this, as appears by *Regiam Majestatem, lib. 1. cap. 30. § 6.*; and *Quon. Attach. cap. 21.* where a wife can make no contract or paction whatsoever without her husband's consent; and if so, then far less can she alienate or impignorate her paraphernals without his express consent. This does not hinder but she impignorate moveables to furnish necessaries to the family, for that is *in rem versum mariti*; but it is not pretended here that the L. 16 Sterling she borrowed from Gribton came one penny of it to Kirkhouse's behoof; and though as *preposita*, she may contract debts, yet these do not bind her, but her husband, as has been oft found; 21st December 1629, Ayton, No 151. p. 5952.; and 29th January 1631, Porter, Div. 9. *b. t.* So the impignoration is absolutely null. THE LORDS by a scrimp plurality found wives had the sole administration of their jewels, when in straits to raise money; and therefore sustained the Lady Kirkhouse's impignoration, though done without her husband's consent. Some merrily said this was too great an interlocutor in favours of women.

*Fountainhall, v. 2. p. 660.*

1720. February.

COLQUHOUN of Tillihewn and ELIZABETH ANDERSON His Lady against  
EXECUTORS of the Lady ROSEBURN.

A WOMAN, *vestita viro*, granted bond for 5000 merks to the heirs of her daughter's marriage, reserving her own liferent. THE LORDS sustained the obligation, it not being to take effect during the granter's life. See APPENDIX.

*Fol. Dic. v. 1. p. 399.*