

1761. December 8.

MENZIES *against* The CREDITORS of GILLESPIE:

No 174.

Adjudication of a wife's lands proceeding on a personal obligation contained in an heritable bond granted by her and her husband, is null, so far as it adjudges the lands; but effectual to carry the husband's interest in the rents.

IN the case of M'Menzies against the Creditors of Gillespie, a question occurred concerning the effect of an adjudication which Gillespie had obtained of the lands of Greenhill in November 1723, proceeding upon an heritable bond of corroboration, granted in 1720 by Mary Young and her husband Alexander Renton, for the sum of L. 5333 : 6 : 8 Scots, bearing an obligation to infeft in an annualrent forth of the lands of Greenhill, the property of Mary Young; and also a personal obligation to repay the principal sum and annualrents, in case Gillespie should rather choose to have his money than retain the security; upon which personal obligation he adjudged, and entered into possession of the estate.

Objected by M'Menzies; That Mary Young's personal obligation, while *ver-tita viro*, was void and null; and consequently the adjudication of her estate proceeding on this null obligation, must likewise be ineffectual.

Answered for the Creditors; It is indisputable, that a wife can, with consent of her husband, dispoise her lands at pleasure; she can grant annualrent-rights out of her lands; she can likewise wadset them; and in both cases, it will follow from the nature of the thing, that she can grant clauses of requisition in these rights, in order to entitle the creditor to call for his money, which, in default of payment will entitle him to adjudge the estate. It is true, she can grant no obligation to be the ground of an action against her person; but this does not hinder her from granting obligations which may be effectual to produce action against her estate. And indeed it would be incongruous to say that a wife could grant an heritable bond over her estate in security of a sum of money; and yet, that the creditor should not have it in his power, upon her refusal to pay, to adjudge that estate. Accordingly, a bond granted by a wife, *stante matrimonio*, with consent of her husband, was sustained, because the creditor had granted back-bond, that he was only to make use of it to lead an adjudication; Bruce *contra* Paterson, No 169. p. 5965. It is by no means a rule, that every personal obligation of a married woman is intrinsically null and void; there is only competent to her an exception against the debt which will protect her from being made personally liable; but still it is the foundation of an action which will have the effect of attaching her estate, as appears from the above decision, and may even in some cases be made effectual against her person; for example, if she should homologate the obligation after the marriage is dissolved, or if it was granted for an onerous cause, or to take effect only after death; No 173. *supra*.

There is nothing in the law that denies the proper effect of legal diligence against a wife's estate, upon any personal obligation relative to her estate: Thus, for example, if she is an apparent heir in an estate, she can grant a trust-bond to be the foundation of making up titles to it by an adjudication: For

the same reason, where a wife, with consent of her husband, grants a disposition of her lands with an obligation to infest, but without a procuratory and precept, this obligation may be made the foundation of an adjudication in implement, being the natural result of that power a wife has to dispose of her property; Stair, December 15. 1665, *Ellies contra Keith*, No 191. p. 5987. And there seems to be no reason why a creditor, to whom she has granted an infestment of annualrent, with a clause of requisition, should not have the same power of making such obligation effectual against her estate.

Replied, It is laid down in our law-books as an immemorial part of the consuetudinary law of this country, That a woman *vestita viro* cannot be personally bound for payment of any sum of money; Stair, Tit. Conjugal Obligations, § 16.; Dictionary, Div. 5. Sec. 4. *b. t.* And if the obligation is void, so must also be the diligence that follows upon it; and accordingly, adjudications upon bonds granted by married women have always been found void; as appears from a number of decisions, between the 1716 and 1725, collected in the Dictionary, Div. 5. Sec. 4 & 5. *b. t.* And, wherever creditors have attempted to lead judications upon a wife's personal obligation, contained in an heritable bond granted by her, their adjudication has been found void, though the heritable security was sustained; 14th June 1715, *Ker*, No 194. p. 5991.

25th November 1760. 'THE LORDS found the decret of adjudication of the lands of Greenhill, led at the instance of John Gillespie, in November 1723, against Mrs Renton, void and null; and reduced accordingly.'

The Creditors afterwards *insisted*, That, although the adjudication was reduced, on the nullity arising from the wife's personal obligation, yet it ought still to be supported, in so far as led upon the husband's bond, and in so far as it adjudged his interest in the rents during the marriage.

27th January 1763. 'THE LORDS find the plea now made, That Gillespie's adjudication may be sustained, so far as concerns the interest of the husband, competent and relevant; and that the intromissions had by Gillespie, during the husband's life, are to be ascribed to the accumulated sum in that adjudication.'

And, upon a reclaiming petition and answers, 'Adhered.'

For the Creditors, *Lockhart* and *M^eQueen*.

For Menzies, *James Fergusson* and *Ilay Campbell*.
Fac. Col. No 67. p. 151.