

ories, in such circumstances as these, would, it was observed, in the end prove hurtful to the women themselves, by preventing them from gaining a livelihood in trade, at a time when their husbands could not afford them any support.

The bill of suspension was refused by the Lord Ordinary. And

A reclaiming petition being preferred, it was refused without answers.

Lord Ordinary, *Gardenstone*.

For the petitioner, *John Erskine*.

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Fol. Dic. v. 3. p. 285. Fac. Col. No 78: p. 141.

No 298.

1790. February 19.

MRS ELISABETH CHALMERS *against* MRS HELEN DOUGLAS and her Husband.

IN an action of defamation and damages, the Commissaries having found sufficient evidence that the defender Mrs Douglas, 'was guilty of the scandal libelled,' decreed her to pay to the procurator-fiscal of court a considerable fine, and to the injured party farther sums in name of damages and of expenses, as also, to make a palinode; the fine, however, being to be restricted to a third of its former amount, 'in case she should appear in court, and judicially repeat and subscribe the palinode.'

Both parties brought the judgment under review by advocacy; the defender, beside objecting to the judgment in general, complaining, that the Commissaries had not qualified their sentence by declaring that no execution during her marriage could issue against her person, or her effects falling under the husband's *jus mariti*; and the pursuer complaining, that they had omitted to decern against the husband for the expenses of process.

The Lord Ordinary on the bills reported the cause, and afterwards a hearing in presence took place on the following points:

1. Whether execution ought to pass against the defender's person, to compel payment of damages and fine.

2. Whether the husband, or the goods in communion, were liable for payment of the money awarded in name of damages, or of fine,

3. Whether the expenses of process found due to the pursuer, could be demanded from the husband, as having in that character concurred in the defence.

On the first point, it was

Pleaded for the defender; A married woman, it is unquestionable, can come under no civil obligation, though with the consent of her husband, which shall be the ground of diligence, either against her person or her separate estate. Neither ought a different rule to be followed, if a fine has been imposed, or money decreed against a wife for reparation of damage. As not only her moveables, but the rents also of her heritage, belong to the husband *jure mariti*, it

No 299.

No execution against a wife's person for a debt *ex delicto*, incurred during the marriage; nor is the husband liable, or the goods in communion, on that ground; but for the expenses awarded to the pursuer, the husband is liable as *dominus litis*.

Upon appeal it was found, that the husband was responsible for the conduct of the cause, and liable in expenses only in so far as the same was malicious, vexatious and calumnious.

No 299.

is evident, that without infringing his right, nothing could be recovered by diligence against her. Even were her paraphernalia to be attached, it would be incumbent on him to replace articles so indispensably necessary. Unless, therefore, where there is an estate exclusive of the *jus mariti*, no such diligence can proceed. Bankt. b. 1. tit. 5. § 69; Ersk. b. 1. tit. 6. § 24; Stewart *contra* Bannerman, 16th February 1633, No 281. p. 6071; Home, Edgar, 2d July 1724, Murray, No 293. p. 6079; Kilkerran, 5th December 1738, Gordon *contra* Paine, No 294. p. 6079.

Answered; By that rule, married women may, with impunity, commit scandals, batteries, or any crime the punishment of which is pecuniary. For not only is it a chance whether the wife shall survive her husband or not, but the communion may be so destined, that nothing can be attached on the dissolution of the marriage. Such a departure from the maxim, that *culpa tenet suos actores*, would be alarming to society. Nor are instances wanting in our law of a contrary tendency. Thus, 'horning against a married woman for not finding 'caution in a lawburrows was sustained,' Haddington, 27th July 1613, Lord Roxburgh *contra* Countess of Orkney, No 276. p. 6069; again, 'caption was 'ordained to proceed against a wife, seeing the horning was not upon a debt, 'but upon her delinquency,' Stair, 8th January 1679, — in Glasgow suppliant, No 286. p. 6074. And 'execution was ordered to pass against a wife, for her contumacy in refusing to exhibit writings,' Fountainhall, 16th November 1678, Sibbald, No 285. p. 6074.

Every wife may have effects exclusive of the *jus mariti*; and *paraphernalia* at least are always in that situation. A son living in family with his father, or a bankrupt whose funds have been sequestrated, might, with as much reason be exempted from diligence, as being not less presumed to have nothing of their own; but since notwithstanding this, it has never been supposed that they enjoy any such immunity, the same circumstance must be an equally insufficient ground for the exemption in question; nor has any other been assigned. The only legal criterion by which to determine in any of the cases, whether an estate from which the debt may be repaid, exist or not, is the use of personal diligence, and therefore in all of them it ought to be alike permitted.

A married woman is as liable to other punishments, to imprisonment, for example, as if she were sole. But if she may be imprisoned *in modum pœnæ*, why not also when this legal step is taken towards the recovery of a fine or of damages?

Replied, All the cases quoted on the other side, were either those of lawburrows, in which imprisonment follows of course until bail is found, or of obstinate refusal in a party legally required *ad factum præstandum*.

The Court were of opinion, that execution ought not to be allowed to pass against the wife's person during the subsistence of the marriage.

With respect to the *second* point, viz. Whether execution could proceed against the husband, or the goods falling under the *jus mariti*, he

Pleaded, If execution were to pass either against a husband's person, or against the goods in communion, the maxim already appealed to would be in some measure reversed, one party being punished for the offence of another. No doubt a husband would be interested in the corporal punishment of the wife, as all near relations must be in the fate of one another. But there is a very palpable distinction between such a case, and that where a fine for her transgression is levied out of funds to which he has right; and, therefore, as a husband is not liable for any civil obligation contracted by the wife during marriage, so he is as little responsible for her debts arising *ex delicto*; a conclusion fully warranted by the authorities formerly quoted.

Answered, It seems that no debt can ever subsist against a wife's person, without being extended against the husband. There are but two cases in which a personal obligation of debt can lie on a married woman; one, in which it has been contracted before marriage, and the other where it has originated in her delict. In the first case, it is indisputable that the husband is liable. Why then should a different rule obtain in regard to the second? Not surely, because a debt which is the consequence of the wife's offence, is not to be demanded from a husband innocent of the crime; for it is clear, when a debt has been incurred before marriage, that the husband is equally liable, whether it be *ex contractu* or *ex delicto*. Yet in the latter case, the defender's argument, that those who are innocent should not suffer the punishment of the guilty, would not be less applicable than it is at present. The goods in communion, it must be admitted, are subject to the husband's debts *ex delicto*; but is not this punishing the innocent wife for the fault of her husband?

In the Roman law, and likewise in that of England, it is established, that husbands are liable for their wife's debts arising *ex delicto*. *Voet. ad tit. D. De Judiciis*, § 17.; Bacon's Abridgement, *voce Baron et Femme*, p. 294. 295.; Blackstone, b. 1. c. 15. § 3.; b. 4. c. 2. § 6. And in the above cited case of Lord Roxburgh *contra* the Countess of Orkney, it was found, 'that a wife's lifeferent escheat fell on her denunciation at the horn;' the plain effect of which was, to deprive her husband of his possession *jure mariti*.

The opinion of the Court was, that neither the person nor the effects of the husband could be thus affected.

With regard to the husband's being liable for expenses of process, he

Pleaded, Finding a party liable in expenses of a process, implies some wrong done. But there was nothing wrong in a husband's voluntarily allowing his name to be used, along with that of his wife, in defending an action brought against her, a thing that he might have been compelled to do; or in affording

No 299. to her the means of supporting her defence, to which he might have been likewise compelled.

Answered, Such interposition is not to be understood as if it were nothing more than a matter of mere form. The husband became thus the *dominus litis*, and answerable for the impropriety committed by maintaining calumnious and injurious pleas.

The Court considered the husband to be liable in regard to the expenses of process.

With respect to that part of the Commissaries' judgment which decreed a palinode, the Court unanimously thought it improper, and seemed to reprobate the practice in general of requiring palinodes. Accordingly, in another action of defamation and damages, at the instance of George Lowther senior and George Lowther junior, against James Rae, a palinode awarded by the Commissaries was at the same time dispensed with.

In consequence of the opinion of the Court upon the whole cause, the Lord Ordinary pronounced the following interlocutor:

"Remits the cause to the Commissaries, with the following instructions: *1mo*, That they adhere to their interlocutor, finding the defender liable in damages, &c.: *2do*, That they alter their interlocutor with respect to the palinode, and dispense with the same: *3tio*, That they find, that legal execution cannot pass against the person of the defender during the subsistence of her marriage, for any sums awarded in name either of damages, fine, or expenses, and that the effects and person of her husband cannot be affected for the sums awarded in name of damages and fine: *4to*, That they adhere to their interlocutor, finding the defender liable in the expenses of the process, and in the expense of extract; and that they also find the husband personally liable to the pursuer for these expenses."

Reporter, *Lord Dregborn*. Act. *Lord Advocate*, *Solicitor General*, *Ross*, *Corbet*.

Alt. *Dean of Faculty*, *Wight*, *Cullen*.

S. *Fol. Dic. v. 3. p. 283.* *Fac. Col. No 117. p. 223.*

. This case was appealed.

THE HOUSE OF LORDS, 6th April 1791, "ORDERED, That the part of the interlocutor complained of be reversed, in so far as it finds generally, That James Baillie is personally liable to Mrs Elisabeth Chalmers for L. 688 of expenses of process and extract, which Helen Douglas was decreed to pay: But it is *declared*, That the said James Baillie is responsible for the conduct of the cause, in so far as the same is malicious, vexatious, and calumnious: And it is *ordered*, That the cause be remitted back to the Court of Session, to inquire how much of the said sum of L. 688 of expenses of process and extract has been occasioned by the conduct of the defender in the said cause."