

1789. November 27. Mrs ANNE ARBUTHNOT against ARCHIBALD COCKBURN, Esq.

SERVICE AND CONFIRMATION.

Adjudication by a general disponee, without confirmation, ineffectual although preceded by a decret *in foro*.

[*Fac. Coll. X.* 169 ; *Dict.* 14,383.]

ESK GROVE. In the case of Robert Grant, 1784, the Court decided that a confirmation was absolutely necessary; and many such cases have since occurred and have been determined in the same way. A debtor may save a creditor the expense of confirmation; but if he does not, the creditor must confirm, and, if he fail, it is at his own risk.

JUSTICE-CLERK. Before the Act 1690 there could be no doubt. A general disposition is a good title to pursue, and the debtor may pay; but you cannot compel him to pay unless there be a confirmation; and it follows that you cannot do diligence. Here the debtor did not object indeed, but neither did he make any judicial agreement to dispense with confirmation.

MONBODDO. The second decret was taken after the parties were heard;—this is equivalent to consent.

PRESIDENT. The debt was admitted to be just, but that is not enough. It was not admitted that decret might be taken without confirmation.

On the 27th November 1789, “The Lords sustained the general objection moved by Mrs Anne Arbuthnot, and found it not necessary to determine the special objections.”

For Mr Cockburn, A. Abercrombie. *Alt.* M. Ross.

*Reporter*, Henderland.

*Diss.* Monboddo.

1789, December 8, 1790; February 9. Mrs ELIZABETH CHALMERS against Mrs HELEN DOUGLASS and JAMES BAILIE, her HUSBAND.

HUSBAND AND WIFE.

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*.

[*Fac. Coll. X.* 223 ; *Dictionary*, 6083.]

1789. December 8.—JUSTICE-CLERK. There are cases where a husband is

not liable for the debts of his wife. Thus, in the case of a bond bearing interest against the wife, before marriage, the husband is bound for the interest, but not for the principal. Diligence cannot be used against the husband or against his estate. A husband may be thrown in jail for his wife's debt, and on her death he may obtain a suspension and liberation. As to all debts contracted during marriage, a husband cannot be hurt by them; for, in *law*, the wife cannot contract debts, whatever she may do in *fact*. She may indeed contract debts under a *præpositura*, binding on her husband, not on herself, and the husband may prevent this by inhibition, but still he must aliment and clothe. A wife cannot bind her moveable subjects. There was a very strong case of this nature where Samuel Mitchelson, who supported Lady Cranston, was the party. If a woman cannot bind her husband by her debts, much less can she bind him *delinquendo*. The husband can only suffer by having a bad wife. The wife binds herself to the public and to the private party injured. Here there is a good debt against the wife. The next question is, Whether can execution pass against the wife? It cannot lie against her person, for the decree is for a sum of money: the law supposes her to have nothing: execution, however, may go *in modum pænæ* notwithstanding the coverture. What has been said relates only to the *solatium* or damages; but as to expenses of process the case is different. The husband is curator to his wife, and she is his pupil: a pupil is not to direct her curator. Mr Baillie ought to have yielded up the point at once, and not have involved the parties in enormous expenses. He ought to have been guided by his own judgment. He is not called merely *dicis causa*, as has been suggested: every step has been taken in his name.

HENDERLAND. I agree as to the husband not being liable, but I doubt as to the next point. I think that the lady is *de præsentî* liable in her person. The consequence of obligation is, that diligence shall go unless a privilege against diligence be irrefragably proved. A wife may have subjects exclusive of the *jus mariti*; she might be imprisoned in order to force payment out of those subjects. Mrs Baillie may be imprisoned to show that she has nothing. It is a solecism in law to say that I have an obligation and cannot make it good. The law does not say that a woman can have nothing.

DREGHORN. The decisions on the points at issue have been generally in small causes, not fully argued. I wish that a line could be drawn. A married woman may be liable in assythment. If she burns a house, will she enjoy her husband's estate, while the person, injured by the loss of his all, must wait for reparation till the husband's death? As to the husband, I do not see how he can be liable, though there might be much equity in what Voet proposes, to make him liable *in rei uxoriæ quantitatem*.

ESK GROVE. I always understood that a husband had such a right in the subjects under communion as extinguished all right in the wife. I have never understood him to be liable *stante matrimonio*. Cases to this effect are numerous. Dict. I, 344 in 1610, the Lords assolyied the husband from a fine. How is it possible that the husband can be liable for a delict, and not for a fair debt. I cannot make a distinction between *majus* and *minus*, or find the husband liable either for the one or the other. I should incline to draw a line just the other way. I do not say that the opinions of writers bind us, but surely they give

evidence of what was understood to be fixed in practice. The principal use of diligence is to compel payment. In 1633, *Bannerman*, The Lords found a horning against a wife void and null. The case in *Edgar*, 1724, is express in favour of wives; and the case 1738, observed by Clerk Home, is still more express. Whenever there is an obligation turned into a sum of money, the wife is not liable in personal execution. I cannot answer for consequences. I cannot make law. As to expenses, I see no sufficient ground for them. When a husband, under his wife's name, is a pursuer, it might be fit to make him liable; but here he was defender, and the cause could not have been carried on without him. It would be going too far to make the husband always liable for the event of his wife's cause.

MONBODDO. The husband is not liable for any fine imposed on the wife; all are agreed as to that. [He supposed the sum awarded to be a fine.] As to the wife, I am clear that nothing can affect her for the present, because she has no *persona stante matrimonio*. As to expenses, the cause indeed could not have gone on without Mr Baillie: but how did he appear? As curator for his wife, and he has not acted right as a curator. He authorised his wife to demand a proof, which he ought not to have authorised, and he must stand the consequences.

ROCKVILLE. The husband is not liable in a fine and damages; the wife is not liable in personal execution. As to expenses, it is natural for a husband to support his wife; and Mr Baillie was naturally led to go on in the defence to the end.

GARDENSTON. I am clear for Mr and Mrs Baillie as to the general points, and I cannot think that there is sufficient ground for expenses. A husband is bound, in duty and decency, to defend his wife.

PRESIDENT. I feel for the honour of the law of my country, which, I think, will be hurt by the judgment that your Lordships consider yourselves bound to pronounce. I cannot understand the judgment of the Commissaries, in any other sense than that it decerns Mrs Baillie to pay a sum without any quality. The next question is, How is this to receive execution? Shall it receive execution against Mrs Baillie during the coverture? I think not, for it is a debt. If she has any separate estate, not falling under the *jus mariti*, execution must follow on it. But, during the coverture, the wife's person is safe, not because she has nothing, but because, during marriage, the wife's person is sunk as to all civil matters, and it signifies nothing whether she has effects or not. The question remains,—Shall execution go against the husband? If this debt had been contracted *ex delicto* before the marriage, the husband would not have been liable, but, after marriage, I doubt of the principle that she can do nothing to affect him. The husband takes a woman with what she has and what she may have: he must pay her debts although she brings nothing. I think that he takes her with her passions and prejudices and her power of doing ill. If any one suffers by my wife, I must answer for her. I must suffer by the loss of her society, when she commits offences.—Shall the husband, in this case, suffer nothing, and laugh at the law? If any man of plain understanding should be told that a large sum of money is due, and that it cannot be exacted, what would he think? I see no decision which finds that the husband is not personally liable. The decision in *Hume* is very dark. If I can neither do execution against the

wife, because she is clothed with a husband, nor against the husband, because *culpa suos tenet auctores*, then the decree is elusory.

On the 8th December 1789, "The Lords found the husband not liable in damages, and the wife not subject to damages *stante matrimonio*."

*Act.* R. Dundas, &c. *Alt.* Henry Erskine, &c.

*Diss.* as to husband, President.

*Diss.* as to wife, Henderland, Ankerville, Dreghorn.

1790. *February 9.*—ESKSGROVE. It has been already determined that Mr Baillie is not liable in damages. Expenses come under the same principle. A husband is not bound to *pursue* on behalf of his wife, and the same is the case with respect to curators and minors: so, if they pursue improperly, they may be made liable in expenses. But, as to *defenders*, if a minor fail in his defence, the curator is not liable; and the case is stronger as to a husband,—he cannot refuse to defend his wife. I must presume that he defended her by advice of agents and counsel.

HENDERLAND. Parties in their keenness have lost sight of the day of account, which, at any rate, will be a grievous one. I admit that this cause was considered by able counsel for the defender, but that has no influence on my mind; for, if that were to be a motive to relieve Mr Baillie from expenses, Mrs Baillie ought not to have been found liable in expenses. A husband is not liable for damages arising from his wife's delict. The principle is, *delicta tenent suos auctores*, otherwise a man might be ruined without any fault of his own. Mr Baillie might have said, "I think the defence is bad, and I will not defend." On probable cause shown, the Court would have appointed a curator *in litem* to the wife: but here Mr Baillie was *dominus litis*, so *he* is the *temere litigans*. Every law upon earth supposes that there is a power of coercion in the husband.

SWINTON. Mr Baillie, by the manner of defence, in undertaking to prove articles of accusation against Mrs Scott, made himself a pursuer. Besides, even a defender may be a temerarious litigator.

HAILES. I add, that Mr Baillie undertook to prove circumstances which he knew must have been disproved. Thus the expedition to the goats' whey quarters, *in the absence of the husband*, was offered to be proved, though Mr Baillie was told and forewarned that it was a fiction, or, at least, a mere mistake. Thus also, the interview at Newcastle, instead of bearing any marks of guilt, must, from the beginning of the inquiries concerning it, have appeared perfectly innocent; and the supposed congress in Pinkie Park, bore, from the very first sight, unequivocal marks of absurdity; so that the only thing that Mr Baillie had to rely on when he suffered his wife to involve Mrs Scott in a very expensive litigation, was the meeting at Fisherrow, to be proved by the testimony of a *single* witness, and *him* one who could not make out a probable or consistent story.

ROCKVILLE. The calling the husband implies that he has some concern in the mode of defence. Mr Baillie has been too passive.

GARDENSTON. When people are nominally called, they are not, in general, subjected to any thing. If Mr Baillie be found liable in expenses, it must be

from some impropriety in his conduct; but I see nothing improper in it: he had not the gift of prescience,—he could not know what was to be the event of the cause.

DREGHORN. I think that, when a husband refuses to defend, the Court may name a curator to take care of the interests of the wife. I would make a distinction between expenses *before* the condescence and *after*. But then again there ought to be a distinction between what related to Captain Messenberg and Mr Cardonel. As to the former, Mr Baillie must have known, from the beginning, that the condescence would be fully disproved. That charge was exceedingly unjustifiable.

PRESIDENT. Mr Baillie has been assoilyied as to his own concern, though I do not think that he was altogether blameless. I differed from the Court as to the question of damages, but I must submit to its judgment.

Expenses have no connexion with damages in this case: they do not arise *ex delicto*: the case of curators and minors is not similar to that of husband and wife. A curator acts not for himself, but for the minor: he is a mere name; that is not the case of a husband. Curators are cited edictally, not as parties. They may be punished, indeed, if they act improperly. The wife's person is sunk altogether in the husband; he has more than curatorial powers,—he is the uncontrollable manager of all the goods in communion; and, consequently, he has a most substantial interest,—sometimes more than that of the wife. Mr Baillie, called for his interest, was not bound to defend. I do not lay my judgment on his conduct in the cause,—he was a party,—expenses are found due,—Who shall pay them? Is the husband, in the end, to withdraw himself and leave the account unpaid? Mr Baillie cannot be freed from expenses incurred by himself as a party: they must be paid out of the goods in communion. I consider the husband as the acting partner in the matrimonial society, and more than the acting party, for he has a sort of exclusive property.

On the 9th February 1790, “The Lords found Mr Baillie liable in expenses.”

*Act.* R. Dundas, &c. *Alt.* H. Erskine, &c.

*Reporter*, Dreghorn.

*Diss.* as to expenses in general, Gardenston, Monboddo, Eskgrove.

*Diss.* as to whole expenses, opposed to part, Alva, Gardenston, Monboddo, Eskgrove, Dreghorn.

By President's casting vote.