

1673. June 28.      *ARNOLD against SCOT and FREER.*

— *ARNOLD*, relict of umquhile *William Baxter*, pursues for mails and duties of her liferent-lands, wherein she was infeft upon her contract of marriage.—It was *alleged* for the wadsetter of the lands, That she was denuded by her consent to the contract of wadset of the lands granted to him by her husband, wherein, albeit there be a back-tack; yet it is set to the husband, his heirs and assignees, and was apprised from him, to which apprising the defender hath right.—It was *answered*, *imo*, That the pursuer hath only subscribed the last sheet of the contract of wadset; in which sheet there is nothing to exclude her; and for the remanent sheets, subscribed only by her husband, his necessity might have forced him to collude with his creditor to her prejudice, which is very manifest, seeing the back-tack is not taken to the husband and her, whereunto she never consented, but only to secure the creditor; so that the surplus of the duties by the back-tack might have belonged to herself. *2do*, The taking of the back-tack in favour of her husband only, is a donation between man and wife, which the pursuer, by this process, hath revoked, and doth revoke; for albeit she cannot revoke that which is done in favour of the wadsetter, being a third party, yet she may well revoke the acceptance of a back-tack to her husband, excluding herself.—It was *replied* for the wadsetter, That the pursuer could not revoke the acceptance of the back-tack, because she had judicially ratified the whole contract of wadset, and sworn never to come in the contrary thereof; which judicial ratification contains the whole tenor of the contract, and doth abundantly supply the subscriptions on the margin; neither are these requisite to consenters, who use only to subscribe at the foot.—It was *duplicated* for the pursuer, *imo*, That the judicial ratification is without a warrant by the pursuers subscription; and the Lords, both by the act of sederunt, and many decisions, have found, that the acts of inferior courts, without the parties subscription, prove not, as in the acceptance of tutors, curators, &c. *2do*, Oaths so given are unwarrantable, and not binding, being *contra jus publicum*, to take away a law introduced for preservation of the interest of spouses against insinuations and persuasions of each other; for, by the same facility that they may be induced *mutuo amore se spoliare*, they may be also induced to ratify it judicially; and it hath been lately found, that a wife's bond, though judicially ratified with an oath, is null. *3tio*, Albeit the ratification and oath relate to the whole contract, yet it can only be extended to the wadsetter's interest, at whose desire and behoof only it was taken, and not at the desire of the husband.—It was *triplied* for the defender, That such ratifications being done upon a subscribed contract, have a sufficient warrant; and the custom of Edinburgh, that such ratifications have been so done past memory, puts the same beyond question. And albeit personal obligations of wives have not been validated by their oaths, because they are null deeds, yet that is not to be extended to this

No 303.

A wife's consent to a contract of wadset, of her liferent lands, with a back-tack to the husband, his heirs and assignees, was found valid as to the creditors, but revocable as to the husband; so that she might have the mails and duties, which exceeded the wadsetter's annualrent.

No 303.

case, where the consent is valid of itself, but is revocable ; and is like the case of minors, who, swearing not to come against their deeds, cannot be restored by that famous novel *Sacramenta puberum*, and yet the pretence of being induced with equal facility, is as much there as here.

THE LORDS found, That the judicial ratification of the wife could only be extended to the interest of the wadsetter ; and found the back-tack, being only in favours of the husband, a donation revocable ; and found the wife to have right to the mails and duties, more than the wadsetter's annualrent.

*Fol. Dic. v. 1. p. 409. Stair, v. 2. p. 196.*

\* \* \* Gosford reports the same case :

IN a removing pursued at the relict's instance, as being infeft in a liferent of a tenement of land, and so had right by the death of her husband to possess the same, it was *alleged* for the defender, That she had consented and judicially ratified a wadset, granted by her husband, with a back-tack set to him for payment of the annualrent of the principal sum contained in the wadset, which not being redeemed, but the right of reversion and back-tack comprised from her husband by Scot, she could never pursue a removing, or for mails and duties, which are only competent to the wadsetter, or the compriser of the back-tack.—It was *replied*, That the consent of the pursuer could only operate, so far as to give the wadsetter a right to the back-tack duty, to which she could be liable in case of possession ; but the compriser of the reversion and back-tack can never defend in this removing, seeing the husband being dead, the pursuer, as liferenter, hath undoubted right to remove tenants, seeing she was not denuded by her consent, but in so far as concerned the wadsetter, who can only have right to the back-tack duty ; but the compriser of the reversion and back-tack could only have right during the husband's lifetime ; but he being dead, by virtue of her liferent infeftment, long prior to the comprising, she hath only right to remove tenants.—THE LORDS did sustain the pursuit, notwithstanding of the defence, and found that the rents of the lands exceeded the annualrent of the money lent upon the wadset, her consent being to that particular deed only, could not prejudice her as to the rest of the profits ; and the comprising from her husband, the back-tack and reversion by the death of the husband, was ineffectual during her lifetime, who had a prior liferent, and had done no deed in favour of the husband to take away the same.

*Gosford, MS. No 603. p. 346.*