

1703. February 17. HELEN SCOT against PATON her Husband.

No 257.

The Court appointed curators *ad lites*, to prosecute for security of a wife's jointure, where her husband was *vergens ad inopiam*.

HELEN SCOT, spouse to Thomas Paton merchant in Glasgow, gives in a bill, representing, that, by her contract of marriage, she was provided to the life-rent of a certain sum of money, and that her husband, by misfortunes and bad government, was *vergens ad inopiam*; and that she, and her friends, had omitted to insert a clause, empowering some person at whose instance execution should pass, and that her husband could not authorise against himself; and that it would be necessary that one be named to do diligence, and carry on a process for her security, therefore craved Samuel Maclellan might be authorised to that effect. The bill being intimated, and none returning any answer, the LORDS thought the desire consonant both to the common law and the custom of other nations, and our own municipal practice; and first, by the Roman law, *regulariter uxor sine consensu mariti non potest agere, nec ulla contra eam stante matrimonio currit præscriptio, nisi ubi maritus vergit ad inopiam, l. 30. C. de jure dot. l. 7. § 4. C. de præscriptione 30 vel 40 annor.* It is so by the French law, if the husband refuse to concur with his wife in her pursuits, the Judge authorises another; and so did the Lords decide, 9th January 1623; Marshall *contra* Yule, observed both by Haddington and Durie, No 245. p. 6036; and accordingly the LORDS authorised the said Samuel to pursue in this woman's name, as her curator *ad lites*, for securing her jointure against her husband and his creditors.

Fol. Dic. v. 1. p. 406. Fountainball, v. 2. p. 181.

1704. November 16. KATHARINE ROSS, Petitioner.

No 258.

The Court, though they will appoint curators *ad lites*, to a wife to prosecute for security of her legal provisions, if her husband be *vergens*; still they will require evidence that he is so, but this summarily.

KATHARINE ROSS, spouse to John Denoon merchant in Tain, gives in a petition to the Lords, bearing, that, by her contract of marriage, there is a sum provided to herself in life-rent, and her children in fee; but the writer has forgot to insert a clause, naming persons at whose instance execution should pass, for implement and performance thereof; and that her husband is now *vergens ad inopiam*, and his creditors are affecting his estate, whereby she may be prevented in diligence, and lose her right; therefore craving the Lords would supply that defect, and name her brother, or any other they please, to see to the execution, and securing of her provision. This case being argued amongst the Lords, some thought it could not be done summarily on a bill, without a process; else wives, instigated by bad influence and counsel, might disturb their husbands, and so were for refusing the desire of the bill: Others thought this event could not be without a remedy. Shall a wife lose her jointure for a writer's omitting that clause? and that by the common law, and the French customs, where the husband will not concur, the Judge may authorise a third

party to pursue ; as is observed both by Haddington and Durie, at the 10th of January 1623, Marshall *contra* Yule, No 245. p. 6036. For the Roman law, see l. 30. C. de jur. dot. et l. 7. § 4. C. de præscript. 30. vel 40 ann. And for the French law, Argentæus ad consuetudines Britanniae Aremoricæ, art. 427. et seq. And if with us a wife were seeking an inhibition against her husband, there is no necessity of a process in that case ; and to put her to it here, before she can get it executed, her husband's estate may be affected. The plurality of the LORDS ordained the bill to be intimated, to see if the husband would appear and make any answer. The next question here will be, though the Lords authorise a curator *ad litem* to the wife, to pursue her husband, yet if they will allow the same to the bairns of the marriage while their father is in life, to oblige him to secure them also ?

No 258.

After sundry intimations, none appearing for the husband to make answer, the LORDS resumed the consideration of the bill ; and, on the one hand, thought it hard she should lose her liferent provision for the writer's omitting that clause ; and, on the other hand, being unwilling to give a handle to malicious and froward wives to disturb their husbands, they remitted to the Ordinary on the bills, to examine if the husband's condition was turning worse, or if his creditors were going on in diligence, that so they might proceed, not upon her allegation, but *cum causæ cognitione*, and yet summarily, lest she might be prevented by anterior diligences.

Fol. Dic. v. 1. p. 406. Fountainball, v. 2. p. 239.

1748. February 5.

FINLAY against HAMILTON.

ANNA FINLAY having pursued John Hamilton, her husband's brother, before the Sheriff of Lanark for beating her, the Sheriff ' Sustained the objection to the instance, that her husband did not concur.'

No 259.
The Lords authorise the wife, when she is to pursue, and the husband will not concur.

But upon a bill of advocation, the LORDS ' Directed the Ordinary to remit the cause with an instruction, that the Sheriff should authorise her to carry on the action.'

Fol. Dic. v. 3. p. 284. Kilkerran, (HUSBAND AND WIFE.) No 14. p. 267.

* * D. Falconer reports the same case.:

ANNE FINLAY, spouse to William Hamilton, having, with concurrence of the procurator-fiscal of Lanark, raised a process before the Sheriff against John her husband's brother, for beating and maltreating her, the Judge sustained the defence made against the instance, that her husband refused to authorise her therein.

A bill of advocation being presented, the Lord Ordinary refused it ; but on