

and not that of his headship. THE LORDS were unwilling to recede from the late uniform practice ; and therefore found Sir Alexander not liable for the principal sums of his wife's heritable debts, but only for the annualrents.

No 24.

Fol. Dic. v. 1. p. 386. Fountainball, v. 2. p. 210. & 220.

1708. July 13.

GORDON against DAVIDSON of Newtoun.

NEWTOUN being charged as husband to the Lady Gight, for payment of 1300 merks contained in a bond bearing annualrent, granted by her before their marriage to Gordon of Cults ; He suspended upon this reason, That a husband ought not to be liable for the stock of the wife's debt bearing annualrent before the marriage ; because such principal sums belonging to her fall not under the *jus mariti*, as was lately decided in the case of Gordon against Cesnock, No 24. p. 5787. *2do*, Dirleton, in his Questions under the head *jus mariti*, page 106, is of opinion, That a husband should only be liable for his wife's debt *quatenus locupletior*, according to his intromission, and as a tutor, the wife being *in tutela mariti*, and his right *jure mariti* to what belongs to his wife being understood *debitis deductis* ; which is very consonant to the analogy of law in other general administrators, who are never liable *ultra valorem* of their intromissions, and *bona fides non patitur, ut quis cum alterius jactura locupletetur. 3tio*, If a husband's obligations for his wife's debt were not commensurate to the fund of gear he gets with her, marriage would be discouraged, against the interest of the State.

Answered for the charger ; *Esto* there was some hardship in a husband's being liable for his wife's debts, public utility must overrule it, for preventing embezzlement in prejudice of lawful creditors, and sopiting pleas betwixt man and wife ; *et quamvis durum, ita tamen lex scripta.* But then it is no greater hardship to subject a man to the payment of his wife's debts who is *eadem persona* with him, than to make an heir liable for his predecessor's. *2do*, There is a great difference betwixt the case of a tutor or curator, and a husband ; seeing the former, having but an office and trust of administration, cannot be liable further than *in quantum intus habet*, whereas the latter has the dominion, and right of disposal. Again, man and wife are understood to have entered in a society of well and woe, loss and gain, which implies an obligation to relieve one another of their debts and burdens ; and if the husband has right *jure mariti* to his wife's moveables, he must likewise be liable to her debts, according to the rule, *cujus commodum, ejus et incommodum. 3tio*. If a husband should escape free of his wife's debt, *a pari* her tocher and substance could not be affected for the husband's ; they would have separate patrimonies, and still contend they were not *lucrati* by the marriage, and put their creditors to new processes upon that head, contrary to our established custom. *4to*, The husband

No 25.

A husband found liable for the annualrents only of a debt contracted by his wife before the marriage, and not for the principal sum.

No 25. covers the wife from personal execution, and therefore himself should answer for her.

Replied for the suspender ; Those who contract with women, tacitly subject themselves to the legal consequences of their condition ; and *qui jure suo utitur, nulli facit injuriam, nec meretur pœnam*. Marriage being lawful, a husband should not be punished for it, more than the Prince for creating a peer, and thereby covering him from personal execution at the instance of creditors.

THE LORDS found the husband liable only for all annualrents due by the wife, and not for principal sums bearing annualrent.

Fol. Dic. v. 1. p. 386. Forbes, p. 262.

* * * Fountainhall reports the same case :

1708. July 15.—MR Alexander Davidson of Newton, having married Anne Gordon, heretrix of the lands of Gight, it was represented to him, that the debt affecting the estate was only L. 40,000, whereon, by his contract of marriage, his father obliged himself to advance that sum to disburden the lands, and accordingly paid it in ; but, after the marriage, debts emerged double of that sum, and far above 100,000 merks ; and being pursued by Gordon of Cults, for a debt owing to him by Gight ; and he insisting, *primo loco*, to have him made liable for the annualrents of that sum, he *alleged*, that being unluckily engaged for that family, he finds the debts so insuperable, and so far exceeding the value of the estate, that he is willing to renounce, and abandon the whole to the creditors, upon liberating him of the debts that had so unexpectedly and surprisingly emerged on that estate, even though he should lose the L. 40,000 his father had advanced. THE LORDS waved to give answer to this offer, however favourable it seemed. Whereon the creditors insisted *in primo loco* to make him liable for the bygone annualrents of their principal sums ; for, whatever husbands may plead to be excoemed from their wives heritable debts, yet it seemed to be an uncontroverted principle, that *jure mariti* by the marriage they became liable for all their wives moveable debts. *Answered*, He did not deny but he was liable for the annualrents of his wife's debts, but it was always with this quality and restriction, *in quantum lucratus est* by the marriage ; for it would be the greatest hardship in the world to make it a passive title, and wreath the universal burden of the debt upon him, without regard to the benefit accruing to him by the marriage, which would be worse than vitious intromission, which is a plain *expilatio hæreditatis* ; whereas here, he could never dream of such an intolerable prospect of sinking debts ; and by the Roman law, there is an express title, *ne maritus pro uxore, nec filius pro patre teneatur* ; and by our law, tutors and curators are only liable *in quantum intus habent* of the pupil's means ; and executors only *secundum vires inventarii*, and no farther. And my Lord Dirleton, in his *Dæubts and Questions*, p. 106. is positive, that this obligation of husbands to pay their wives moveable debt should go no fur.

ther than *in quantum locupletiores facti* by the marriage; and the *jus mariti* can extend no farther than a general assignation, which makes one represent *in valore* of the sum assigned, but no farther, else marriage may involve a man in an infinite plague of dormant debts, that no human prudence could foresee; and therefore the customs of other nations have obviated this hazard, by appointing the husband to make inventory, else to be simply liable. And whatever the Lords might regulate by an act of sederunt, so they may relieve a poor gentleman insnared to an overburdened estate, never contracted by him, so as neither *ex contractu* nor *delicto* should he be liable. *Replied*, By the marriage, husband and wife become one person, and run the same hazard by a communication of debts and goods; and it is just you be liable, for you cover and protect her so, that, during the marriage, no personal execution can pass against her, and so you substitute yourself as debtor in her place; and the laws of the sovereign courts of Europe have now fixed on this, that the husband becomes personally liable for all the wife's moveable debts, *Gudelin de jure novissimo, et les coutumes de Paris, p. 344.* And so it has been oft found with us of late, as in Captain Gordon's case against Cesnock, No 24. p. 5787.; Doctor Lawder's and Crawford, (See APPENDIX.); Osborn and Menzies, No 25. p. 5785.; and many others; and the reason is, the husband by his marriage has right to all the wife's moveable goods, *ergo* by analogy of law and *paritate rationis*, he must pay all her moveable debts; and, *a contrario sensu*, as he has no right *jure mariti* to her heritable sums, so he cannot be subjected to her heritable debt, though he is free of both by the dissolution of the marriage. THE LORDS thought Mr Davidson's case very hard, to make him liable in the annualrents of the debts far exceeding the rents of his wife's lands; yet, *ita lex scripta est*, the same was now turned into a fixed known custom and law. Only, he was thus far relieved, that the Lords did not think him liable in the principal sums, but left them to affect the lands by adjudication and other diligence for securing that.

Fountainball, v. 2. p. 451.

1713. January 27.

ISOBELL MONCRIEFF and her HUSBAND, against KATHARIN MONYPENNY.

IN the process depending betwixt Isobell Moncrieff and the Lady Sauchop, the defender insisted for one half of all the defunct's moveables, (there being no children of the marriage) free of debts bearing annualrent, which she contended must affect the dead's part only, and could not diminish her legal share; because bonds bearing annualrent being heritable *quoad relictam*, and so not falling under the computation of moveables whereof she hath a share, such debts of her husband cannot burden her share of the moveables, and if the contrary should obtain, the interest of relicts might be entirely cut off.

Answered for the pursuer, Seeing the husband during the marriage hath not

No 25.

No 26.

Bonds bearing annualrent affect the dead's part only, if sufficient to satisfy them.