

1667. June 4. YOUNG *against* YOUNG.

IN the case Young *contra* Young, it was agitated, whether a husband be liable for his wife's debt before the marriage, being proved no otherways but by her oath during the marriage, if the husband declare he does not distrust her, and believeth she hath declared truth.

THE LORDS did not decide the point; but some were of opinion, that if the husband declare upon oath, that he believeth she did declare truth, he will be liable; in respect that, by the law, the husband is liable for the wife's debt, being legally proved: And the question is only, whether the wife may declare in prejudice of her husband, which she cannot do, because otherways it may be in the power of an untoward wife to undo her husband; which inconveniency ceaseth when the husband declareth he hath no reason to distrust the wife, and that he believeth she hath told truth: The great question will be, whether the husband may be urged to give such an oath of credulity? seeing, whatever a husband thought, yet having an imperious woman, he should be forced to comply with her, and to declare that he believeth her, otherways he would have a miserable life.

Clerk, *Scot.*

*Dirleton, No 71. p. 29.*

1676. February 15. MARSHAL *against* FORREST and her Husband.

IN a pursuit at the instance of a minor against his tutrix, the pursuer having referred to the tutrix's oath, that she had intromitted with diverse particulars belonging to him, the husband of the tutrix *alleged*, That she could not declare in his prejudice. It was *replied*, That the pursuer having an action and *jus quaesitum* competent to him against his tutrix, he could not be in a worse case as to *modum probandi* by the tutrix's superinducing a husband; and that the intromission of a relict, after her husband's decease, being such as to money, bonds, and many other particulars, as could not be known to any person but to herself, nor proved but by her own oath, it were hard that the minor should be prejudged of his probation by her own deed; and the husband is not in the case where a debt is only to be constituted by the wife's oath, seeing the ground of the debt is constituted by writ, viz. by the nomination or letter of tutory; and when there is a pursuit against any person, that person cannot, by an assignation, prejudge his creditor of his probation by oath; and the minor is more privileged, seeing, by the common law, minors have a tacit hypothec of their tutor's estate; and, by our law, they ought to be favoured, at least so far as it should not be in the power of the tutrix to ruin them, by convolving *ad secundas nuptias ante redditas rationes*.

VOL. XIV.

32 Y

No 62.

Whether the wife's oath will be evidence of a debt contracted by her before marriage, so as to make her husband liable.

No 63.

A tutrix being afterwards married, whether her oath in a question with the minor, ought to affect her husband.

No 63.

THE LORDS thought the case considerable, and ordained the tutrix to declare; reserving to themselves to consider what her declaration should import.

Reporter, *Forret.*Clerk, *Gibson.**Dirleton, No 336. p. 165.*

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

1676. *February 11.*—IN a count and reckoning pursued at the instance of George Marshall, against Helen Basil, his mother and tutrix, and John Forrest, who was curator to the pursuer; the charge being fitted, and the intromissions offered to be proved by the wife's oath, it was *alleged*, That she could not depone, in so far as her oath should militate against her husband, but only against herself, it being the uncontroverted law and practique of this kingdom, that a wife cannot depone in prejudice of her husband; so that, unless there had been an action intented against her before her marriage, and she constituted debtor by a decreet, her husband cannot be liable for her debt; and if it were otherwise, a husband's fortune, and his children's of another marriage, might be in perpetual hazard, where her oath was to be taken in favours of her own children of a prior marriage. It was *answered*, That it being known to the husband that his wife was left tutrix, and was in actual administration before his marriage *ante rationes redditas*, he could not but foresee that by marriage here he would be liable in law to the pupil; and if her oath should not be taken, the inconvenience would be far greater, seeing she being nominated tutrix, and *in familia*, and having the sole custody of all money, counts, and moveables, whereof the young children were altogether ignorant therein, by marrying, before count and reckoning with her husband, if he were not liable upon her oath, pupils would be undoubtedly ruined, there being no other manner of probation, especially in this case, where she was tutrix intromitter before the late act of Parliament ordaining inventories to be made.—THE LORDS did find, that the charge was probable, by the wife's oath, to bind her husband, as being most consonant to law and reason, he himself having been curator, and knowing that she was tutrix, and so constituted debtor to count.

*Gosford, MS. No 851. p. 539.*

1682. *December.*SIMPSON against M<sup>c</sup>LELLAN.

No 64

The husband is liable indefinitely for moveable debts due by his wife before marriage,

WILLIAM M<sup>c</sup>LELLAN being charged at the instance of Isobel Simpson, for payment of a sum contained in a bond granted by his wife before the marriage, he suspended upon this reason, that he being convened only *pro interesse* as husband, he could not be liable for his wife's debts, but only *in quantum* he was *lucratus* by the marriage; but so it is, he had not gotten so much benefit by the marriage as