

David Dundas of Philpstoun, her husband, for his interest, for payment of L. 1,000 principal, annualrent, and penalty, contained in a bond granted in *anno* 168c, by the Lord Mersington as principal, and the said George Swinton his brother as cautioner, to Sir George Lockhart President of the Session, the pursuer's father. The lands of Chester, then affected with a liferent annuity of 600 merks in favours of Euphan Brown, Catharine Swinton's mother, being sold to a third party for 12,000 merks, there was a contract of marriage perfected 20th December 1693, betwixt the said David Dundas and Catharine Swinton, whereby the husband got the 12,000 merks, the land's price, in name of tocher, to be applied for payment of his debts; in recompence whereof, he secured his wife in a liferent annuity of eight chalders of victual out of his own estate of Philpstoun, and Euphan Brown, his mother-in-law, in another annuity of 600 merks in lieu of the equivalent renounced by her out the land of Chester, and disposed his estate with these burdens to the heirs male of the marriage, and provided the daughters to L. 1,000 Sterling, which contract expressly referred to marriage articles formerly commenced upon. No diligence been done upon the decret against David Dundas, as husband to Catharine Swinton, *stante matrimonio*. Carnwath pursued Euphan Dundas his heir, and Mr John Dundas her husband, for payment of the sums decerned upon these grounds, *imo*, That David Dundas was *lucratus* by the marriage with Catharine Swinton; *2do*, Seeing Catharine, as heir to her father, was liable before the marriage for the debt claimed by the pursuer, she could not *stante matrimonio* dispone, or her husband, a conjunct person, accept of a right to the price of her lands in prejudice of an anterior lawful creditor. Then the pursuer repeted a reduction of the said fraudulent deed upon the act 18. Parl. 1621.

THE LORDS found, *imo*, That David Dundas was not *lucratus* by his marriage with Catharine Swinton; *2do*, They repelled the reason of reduction upon the act of Parliament 1621, notwithstanding that the decret against Catharine Swinton and David Dundas her husband, for his interest, was before the sale of the lands of Chester and the date of the contract of marriage.

*Fol. Dic. v. 1. p. 390. Forbes, MS. p. 16.*

1715. February 16.

ROBERT INGLIS Chirurgion in Queensferry *against* MARGARET HARVEY, and ARCHIBALD OGILVY Brewer, her Husband.

MARGARET HARVEY having accepted a bill payable to Robert Inglis before the marriage, which was not protested, he now insists both against her and her husband for payment; and the Lord Ordinary having found the husband liable for the sum in the bill, it not bearing annualrent, but ordaining the pursuer to prove that the husband was *lucratus* by the marriage, before he could be liable

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tocher, which he recompensed by suitable provisions to the wife and children of the marriage

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Found in conformity with Simpson against M<sup>r</sup>. Lellan, No 64. p. 5853.

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therefor, the pursuer acquiesced in the first part of the interlocutor, as being consequential to a late decision 15th July 1713, Watson *contra* Gordons, No 3. p. 475, where the LORDS found, that a bill did not bear annualrent, in respect it was not protested; and therefore contended, that this bill, for that reason, not bearing annualrent, must affect the husband, who *jure mariti* would have right to all bills due to his wife, and not protested, *et quem sequuntur commoda, &c.* But as to the second part of the bill, the pursuer reclaimed upon the following grounds:

*1mo*, That as the husband hath right *jure mariti* to moveable debts due to the wife, so he must be liable for all debts of that kind due by her; which, as being founded on natural equity, and the analogy of law, and as arising from the communion of moveables betwixt married persons, is expressly maintained by Sir George M'Kenzie, Inst. p. 35. and Viscount Stair, Inst. 1. tit. 4. § 17. *2do*, The husband being an incontrollable administrator of the goods in communion, if he were not subject to the diligence of creditors, till after a tedious and uncertain process of count and reckoning, whether the husband be *lucratus* or not, the moveables in the mean time might be conveyed away or embezzled, and creditors disappointed of their payments. *3tio*, The husband is always found liable, even for heritable debts *in quantum lucratus*; therefore to make him liable for moveables only in the same manner, would take away all distinction which law and practice have made betwixt heritables and moveables.

*Answered* for the defenders, As to a bill's not bearing annualrent when not protested, that by the acts 1681 cap. 20, and 1696 cap. 36, bills bear annualrent, in case of not acceptance from their date, and in case of acceptance and not payment from the day of their falling due; and it was so decided 8th June 1705, Blair *contra* Oliphant, No 1. p. 473; and therefore the term of payment being in the present case past before the marriage, the bill is like a bond bearing annualrent; and if it were otherwise, it would be in the power of the possessor of a bill to make a third party liable or not as he thought fit. And as to the decision Watson *contra* Gordon, *answered*, That the specialty of that decision was, that the executors of the possessors of the bill were pursuing, and the debtor did not know to whom to pay, until they had made up a title, and so he was not *in mora*; therefore the Lords thought it not reasonable that he should be burdened with annualrent.

As to the grounds of the petition, with respect to the husband's being *lucratus*, *answered*, *1mo*, That the Ordinary's interlocutor is to be understood *in terminis habilibus*, viz. that if a man should be found liable for the sums in a bill, it must be understood to be to the extent of the moveables that *jure mariti* he got by the marriage. And this is certainly the meaning of all our lawyers, such as Stair, M'Kenzie, &c. writing on that subject, and is clear from Dirleton, p. 106. And as to the distinction betwixt heritables and moveables, *an-*

*swered*, That the defenders were not concerned to argue what effect the wife's heritable debts may have against the husband's moveables, which is a point that the Viscount Stair owns to be dubious, but that it is enough for them to say, that the husband ought to be but liable for the wife's debt, in as far as he has her effects, whether heritable or moveable, which is confirmed by a third decision, *Gordon contra Lady Gight*, No 25. p. 5789.

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' THE LORDS found the husband liable for a moveable debt, whether he be *lucratus* or not by the marriage; but their Lordships determined nothing as to the bill in question, only reserved to the parties to be heard before the Ordinary, whether the same be heritable or moveable.

Act. Binning.

Alt. Rigg.

Clerk, Gibson.

*Fol. Dic. v. I. p. 390. Bruce, v. I. No 84. p. 100.*

1738. January 24.

DICK against CASSIE.

A HUSBAND who got made over to him, in the contract of marriage, all that belonged to his wife, *per aversionem*, found liable to pay an heritable debt contracted by her before the marriage; for a husband cannot lawfully take a right to all his wife's effects, without being liable to all her debts. See APPENDIX.

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*Fol. Dic. v. I. p. 390.*

1738. November 3.

WEIR against PARKHILL.

By the contract of marriage between John Parkhill and Mary Weir, relict of Malcolm M'Gibbon musician in Edinburgh, she, in consideration of the provisions made in her favour, 'disponed to her future husband, in name of dote and tocher, all lands, heritages, debts, and sums of money, heritable or moveable, goods and gear, and others whatsoever pertaining or due to her any manner of way, &c.' But with the reservation of a power and faculty to her 'to dispose of the sum of 10,000 merks to such person or persons as she should think fit.'

And Mary Weir having assigned this 10,000 merks to John Weir her brother; in an action at the instance of a creditor of Mary Weir's, brought after her death, both against John Weir and John Parkhill, the only question being, Which of the two should be found ultimately liable to the creditor? the LORDS found, 'That John Parkhill not having alleged that there were not sufficient effects intromitted with by him to pay the debts and answer the faculty, he was liable to the debts, and also to implement the faculty, to the extent of the subjects received by him.'

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A disposition *omnium bonorum* by a wife to a husband in a contract of marriage, renders the husband liable to implement all conditions of the grant, *tanquam quilibet*.