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but for their own share; another, February 15. and March 21. 1634, Watson *contra* Orr, *voce* PASSIVE TITLE, whereby one of the daughters having a disposition of the whole estate, was found liable for the whole debt; and another, January 24. 1642, Scot against Hart, *voce* SOLIDUM ET PRO RATA, where one of the heirs-portioners having disponed her share to the other, and thereby being insolvent, that other was found liable *in solidum*.

THE LORDS having considered the case, found the heir-portioner liable, *primo loco*, only for her own share, until the rest of the heirs-portioners were discust, but determined not whether these who were *solvendo* should be liable *in solidum*, albeit the debt exceeded their portion, or only entirely for their own share, and for as much more as the value of their succession could amount to. See SOLIDUM ET PRO RATA.

Fol. Dic. v. 1. p. 390. Stair, v. 1. p. 329.

*** Dirleton reports the same case:

IN the case betwixt Leper, and Dame Rachel Burnet, and the Laird of Preston her present husband, these questions were agitated and decided,

1mo, If a husband get in tocher with his wife, being an heretrix, more than an ordinary and competent tocher, which he might have gotten with another, the husband and his heirs will be liable, after the marriage is dissolved by the wife's decease, *in quantum lucratus est*, for the wife's debt; and the *lucrum* will be considered to be the benefit he has gotten above an ordinary tocher.

2do, The Lords inclined to think, that though a decreet of registration was obtained against the wife and her husband for his interest, the husband will not be liable, the marriage and his interest ceasing; and that an ordinary tocher being *ad sustinenda onera*, is not *lucrum*.

3tio, Heirs-portioners are liable for their own part; reserving action in case any of them become irresponsal; and if the creditor, having done diligence, cannot recover their parts, he may have recourse against the rest.

4to, It was moved (but not decided), Whether, the others being *non solvendo*, the responsal heir should be liable for their proportion *in solidum*? Or only for what he has gotten of the defunct's estate?

Dirleton, No 10. p. 5.

1668. *February* 25. LORD ALMOND *against* THOMAS DALMAHOY.

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A husband was charged and denounced upon a

THE Lord Almond pursues a declarator of the escheat of Thomas Dalmahoy, who *alleged* absolvitor, because he was denounced upon a bond granted by the Dutchess of Hamilton, wherein he being only charged as husband for his interest, and denounced at the market cross of Edinburgh, and pier and shore of

Leith, being then residenter in England, and now the marriage being dissolved by the Dutchess's death, his interest ceaseth as to all effects, and so as to this horning. *2dly*, The denunciation being upon a bond due to the Dutchess' own mother, done by John Elleis commissioner for her, it was without warrant, and so null.

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THE LORDS repelled both defences, and found, that the contumacy incurred by not paying, or suspending *debito tempore*, which is the cause of the denunciation, was not taken away by the dissolution of the mariage.

1673. *December* 23.—The Earl of Dirleton having left a legacy of L. 500 Sterling to his daughter, the Dutchess of Hamilton, Mr John Elleis, factor for the Countess of Dirleton, his executrix, did deliver to the Countess L. 5000 Scots, and took her bond, bearing borrowed money from Mr John, and payable to him, and at the same time gave a back-bond bearing, 'That if the Dutchess 'should make it appear, that her father had left her any sums, and that her mother 'was liable therefor,' then the Dutchess' bond should be extinct, and esteemed as paid to her off his own proper means; and, upon the margin, it bears, 'At least 'in so far as may be extended to the annualrent thereof.' Shorly thereafter, there is an account betwixt the Countess of Dirleton and Mr John Elleis, the factor, who, in the discharge, gives up the sum lent by him to the Dutchess, and the account bears the instructions given up to the Countess. Thereafter the Dutchess having married Thomas Dalmahoy, and her mother the Countess being displeased therewith, the Dutchess' bond was registrate, and she, and Dalmahoy her husband for his interest, were charged, and denounced thereupon; and there was a gift of his escheat, in name of the Lord Almond, to the behoof of the Dutchess' daughters. Thomas Dalmahoy raiseth a reduction of the horning on these reasons, *1mo*, That it was against him as husband; and before any declarator, that interest ceased by the Dutchess' death. *2do*, That albeit the sum was taken as borrowed money due to Mr John Elleis, yet the true intent was to advance it to the Dutchess in part of her legacy of L. 500 Sterling left to her by her father, as appears by Mr John Elleis's back-bond, which not only contained a ground of compensation, but before the denunciation the debt due by the Dutchess was extinct, in so far as the Countess, who, as executrix, was debtor to the Dutchess for the legacy, did take up the Dutchess' bond from Mr John Elleis in his account, without declaring *quo animo*, whether to stand as a debt upon the Dutchess, or to stand as an exoneration of so much of the Dutchess' legacy. It must be presumed and understood, that the bond was taken to make a discharge by the Dutchess, seeing that was most just, the Countess being owing her a greater sum; and seeing the Countess took no assignation from Mr John Elleis, which was requisite, if she intended to charge the Dutchess with this as a debt; and it is also clear, by Mr John Elleis's back-bond, to have been the meaning of parties, so that, whether it were considered as a compensation applied by the Countess, or as a ground of discharge against the Dutchess, the ground of the horning was extinct before denunciation; for al-

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beit compensation cannot annul a horning, unless it had been actually proponed and applied, either judicially in a process, or extrajudicially by consent of parties; yet here being actually applied by the Countess taking in the bond without assignment, the debt was thereby extinct. It was *answered* for the donatar, That nothing can annul a horning but actual payment before denunciation; for the charge being to pay under the pain of rebellion, if payment was made before the charge, there is no contumacy; but this cannot be extended to compensation, which is in the arbitriment of the party to offer or not. So in this case there is no payment, neither any compensation actually interposed for the Countess, as she might have taken a bond in name of her factor to her own behoof, so she might take up such a bond from the factor without an assignation, and might have charged the Dutchess upon the bond. Neither is the bond extinct by the condition of the back-bond, 1*mo*, Because, within the time mentioned in the back-bond, the Dutchess instructed no legacy, which behoved to have abidden a long account of the defunct's debts and other legacies; for nothing could be due to the Dutchess till the defunct's debts were satisfied out of the dead's part, and if the remainder thereof could not satisfy the whole legatars, it behoved to suffer proportional abatement. 2*do*, The back-bond reaches only the annualrent by the marginal addition, and so the principal was justly charged for. It was *replied*, That the addition on the margin was unwarrantably foisted in against all reason; for, if there was a sum due to the Dutchess, exceeding both principal and annual, there was no reason to retrench it to the annual; and the back-bond was not made use of so much for the tenor of it, as to show, *quid actum inter partes*, that it was not lending to the Dutchess, but paying to her so far as the Countess was her debtor; and Mr John Elleis did most unwarrantably charge, unless he could show a warrant from the Countess, seeing, after the account, his interest ceased, and he was no more creditor to the Dutchess. It was *duplied* for the donatar, That he opponed the back-bond, which must be taken as it stands, and cannot be extended by parity of reason contrary to the tenor of it; for, in writs, it is not to be considered what was rational to be done, but what was actually done; nor can the addition upon the margin be proved to be superinduced by Mr John Elleis, for the pursuer produces the back-bond, which was never in Mr John Ellies's hand, since it was subscribed, neither needs any warrant for the registration and charge to be instructed, but is presumed, unless the creditor disclaim the same, otherways all legal executions might be easily evacuated, for which there is seldom or never a warrant in writ.

The Lords had no regard to the reason founded upon the ceasing of the *jus mariti* of the husband, in respect of his contumacy in not giving obedience while he was husband, either by payment or suspension; and the Lords found, that the Countess taking up the Dutchess's bond without assignation, and not having declared her mind to make the Dutchess debtor thereby, it was presumed and understood to be taken only to make a ground of discharge against the Dutchess, and that thereby the Dutchess' bond was extinct, not only as to Mr

John Ellies, but as to the Countess for any other effect, but to make it an article of discharge to the Dutchess in part of her legacy, unless it were made appear, there were not so much due of the legacy at the time of Mr John Ellies's account.

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Fol. Dic. v. 1. *p.* 391. *Stair, v.* 1. *p.* 533. & *v.* 2. *p.* 244.

*** Gosford reports the same case:

IN a declarator of Thomas Dalmahoy's escheat, at the instance of my Lord Almond, as donatar by the gift passed in the Exchequer, it was *alleged* for the defender, That there could be no declarator, because the horning whereupon the gift proceeded was upon a bond granted to the late Dutchess of Hamilton, who was then married to the said Thomas Dalmahoy, wherein he was not at all bound; and albeit the bond was granted to Mr John Ellies for borrowed money, yet the same was not affected by a back-bond, and whereby the said Mr John Ellies did declare, that in case the said Dutchess should make it appear within year, that the Countess of Dirleton was debtor to her in as much as the sum contained in the bond, that the same should be void and null, and no execution should pass thereupon; but so it is, that the Earl of Dirleton, the father of the Dutchess, by his testament, wherein he had nominated the Countess of Dirleton his executrix, and left to the said Dutchess, in legacy, the sum of L. 500 Sterling, for an yearly aliment during her lifetime; which testament the said Mr John Ellies, as factor for the Countess, had confirmed and become cautioner for her; after which the Countess, after count and reckoning with Mr John Ellies, had allowed that article whereby he gave up the money lent to the Dutchess on her bond; which being a clear fulfilling of the back-bond *in terminis*, the said Mr John Ellies was *in pessima fide* to use execution, and denounce the said Dutchess and Thomas Dalmahoy, then her husband, upon that pretence, that he having married the Dutchess was liable for that debt *pro interesse*, albeit he had not subscribed the same; and therefore the bond whereupon the horning proceeded, being extinguished by compensation, actually acknowledged both by the Countess of Dirleton and Mr John Ellies, as said is, before letters of horning, or denouncing of the defender, the gift could not be declared in favour of the pursuer. It was *replied*, That the allegeance resolving in a compensation, in so far as the Countess of Dirleton, for whose behoof the bond was taken by Mr John Ellies, as her father, in his own name, was debtor to the Dutchess in as much as the bond amounted to, that was a good reason whereupon the Dutchess and Mr Thomas Dalmahoy might have suspended the letters of horning; but not having done the same, but suffered to be denounced to the horn, their escheat did fall to the King, and the donatar had right thereto; seeing compensation, unless it be proponed and applied in law, doth not extinguish a debt; but, notwithstanding thereof, if the debtor suffer him-

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self to go to the horn, his escheat will fall to the King. THE LORDS considered the bond granted to Mr John Ellies, and his back-bond being fulfilled *in terminis* before the denunciation, the same was so purified, that that bond of borrowed money was absolutely void and null, conform to the express declarator in the back-bond; and that albeit the allegeance resolved in a compensation, yet that the same being actually applied, and the instructions acknowledged and made use of, both by the Countess and Mr John Ellies her factor, they were *in pessima fide* to denounce the said Thomas Dalmahoy rebel, especially he being liable only *pro interesse*, and being living in England when the execution was used against him at the market cross of Edinburgh, and pier and shore of Leith, and so probably could not know the same till the days of the charge were expired; it being farther *replied*, That the back-bond did only declare the principal bond void and null, as to the rents and penalties, but not as to the principal sum, as to which, the execution of the horning was valid. THE LORDS did likeways find, that the principal being truly satisfied, and so acknowledged as said is, the debt being thereby truly extinguished, and the condition of the back-bond pacified, the horning was null, and the debtor's escheat could not fall to the fisk. But the question in law, Whether or no a widow having granted bond for her own proper debt, being thereafter married;—her husband, who did not consent thereto, nor subscribed the same, may be summarily charged upon letters of horning *pro interesse*, and denounced, and thereby his escheat fall to the King, was not decided, the former ground being sufficient to declare the horning null; but it seems the custom upon a bill to obtain letters against a husband, albeit not insert in the bonds or decreet, hath been acquiesced to; but in law and reason, if the same were to be decided, it ought to be otherways; seeing a husband may have his defence, being only pursued *pro interesse*, viz. That he is not *locupletior factus*, or hath renounced all benefit could accresce to him *jure mariti*, whereupon being secured, unless charged personally apprehended and did not raise suspension, his escheat ought not to fall to the King or his donatar.

Gosford, MS. No 658. *p.* 385.

1678. *January* 23. WILKIE *against* STUART and MORISON.

No 80.
Upon a decree obtained against a wife, horning, denunciation, and arrestment, followed. After this, the wife died. Found that

AGNES WILKIE having pursued Christian Morison, spouse to George Stuart, as heir to Henry Morison, to fulfil the contract of marriage betwixt the said umquhile Henry Morison and the said Agnes, and recovered a decreet against the said Christian aud the said George Stuart her husband for his interest; whereupon she arrested certain sums belonging to George, and charged and denounced him upon the decreet; and Christian Morison being now dead, she insists now against the said George, as being liable *jure mariti*, not only by the decreet against him as husband, but by the arrestment and horning; and also