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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^cLELLAN.

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

WILLIAM M^cLELLAN 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

the sum would amount to, and was content to renounce in favour of the pursuer, all the right he had to his wife's goods *jure mariti*, or otherwise; but also to make furthcoming whatever means he got with her, for the charger's use; as also the ground in law upon which the husband is liable for the wife's debt, is only because by the marriage there is a communion; and therefore law infers that there should be a communion of debts. And seeing bonds granted by the wife before the marriage bearing annualrent, being heritable, do not fall under the *jus mariti*, nor the communion of goods; so neither should bonds granted by the wife before the marriage, bearing annualrent, fall under the communion of debts; so that, seeing the bond bears annualrent, the husband cannot be liable for the same, but at most for the bygone annualrent.—*Answered*, That albeit he was only convened *pro interesse* as husband, yet the husband is always liable for the wife's debts, especially seeing the marriage is still subsisting; for the husband and wife being *eadem persona* in law, he is as well liable for the wife's debts as she is herself; and execution for the wife's debt must take effect against the husband and his goods during the subsistence of the marriage, he being the head of the wife, and *dominus bonorum*. And however a creditor of the wife's should recover a debt against the husband for his interest, yet if no execution follow thereupon before the wife's decease, he will not be farther liable, nor can the creditors use any farther execution against him, seeing his interest ceases by decease of the wife; but if the marriage be still subsisting, and the wife alive, he is liable for her debt whether he be *lucratus* by the marriage or not.—THE LORDS repelled the defence, and found the husband liable for the debt,

Fol. Dic. v. 1. p. 390. Sir P. Home, MS. v. 1. No 302.

. Harcarse reports the same case:

ONE found liable *jure mariti* for his wife's debt, contracted before her marriage, though he had no benefit or tocher by her.

Harcarse, (SUMMONS.) No 905. p. 255.

1708. January 23. LESLIE against WALLACE.

MARY WALLACE having been bred at Mr Aitken's school, and being debtor for her education and board-wages in L. 166 Scots, and her parents being unable, Mr Alexander Leslie pays it, and takes her bond, whereto her father is consentor for that sum. She being now married to Richard Howison, and charged on her bond, she suspends on these reasons, *imo*, That she is *vestita viro*, and so cannot be personally liable *stante matrimonio*.—*Answered*, He craved a decret to have effect against her on the dissolution of the marriage; which the Lords granted. *2do*, This being a bond bearing annualrent, the husband can

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without regard whether any thing came by the wife or not.
See No 68.
P. 5855.

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The husband found liable for his wife's heritable debt, contracted before the marriage, in *quantum lucratus*; but in regard he had not present access to the *lucrum*, the