

1704. *January 11.* GORDON *against* CAMPBELL of Cesnock.

THE deceased Sir George Campbell of Cesnock disposes his estate to Dame Margaret Campbell, his second daughter, and Sir Alexander Home, her husband, and their heirs; which failing, to Captain Gordon's lady, and the heirs of her body, &c. with the burden of his debts. Cesnock being debtor to the said Captain by two bonds in 60,000 merks, he pursues Sir Alexander and his lady, for payment, and likewise for registration of the disposition, as having a near interest therein, being the second branch of the tailzie. *Answered* for Sir Alexander, That charter and sasine having followed on the disposition, there was no necessity to registrate it, which may render the principal subject to losing, seeing private parties will have a better care to preserve their writs than any trusted with the keeping them by the clerks; and if an improbation were raised, and they amissing, one runs the hazard of losing their interest. *Replied*, There was no such danger here to be feared; but, on the contrary, if Sir Alexander should put the disposition out of the way, and transact with Cesnock's heir-male, Captain Gordon may be prejudged of his succession. THE LORDS found the Captain's lady, being the next heir of tailzie, had a sufficient interest to crave its registration; though some thought a judicial transumpt would have been as good. Then Sir Alexander *alleged* against the payment, That he, nor his lady, could not be decerned for payment, because the disposition founded on as the *medium concludendi* gives a preference to Sir Alexander for his own debts, and entrusts him only with a power of management and administration for payment of the creditors' annualrents, and selling of lands to defray their principal sums. *Answered* by Captain Gordon, He opponed the express conception of the clause, bearing, that not only the lands, but likewise the said Dame Margaret, his daughter, shall, by the acceptation thereof, be liable to all the debts. THE LORDS found the lady personally liable to the debts, (only it could have no effect by execution while she was *vestita viro*,) and found Sir Alexander *jure mariti*, and as intromitter, liable for all the annualrents bygone, and in time coming, during the standing of the marriage, but not personally liable for the principal sums, reserving always to consider how far he shall be liable after the dissolution of the marriage, or in case the estate could not pay the debts due to both.

February 4.—IN the action pursued by Captain Gordon against Sir A. Campbell of Cesnock, mentioned 11th January 1704, the Captain reclaiming against the interlocutor, finding the husband not liable for his wife's heritable debts personally; and being heard in presence, he *alleged*, That a man, in marrying, takes his wife for better and for worse, for richer and for poorer; and as he has all the conveniencies following on the society, so he ought not to grudge the inconveniencies thereof; and it is a mistake of our law to think the husband's o-

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Found in conformity with
the above.

No 24. obligation to pay the wife's debt arises only from the communion of moveable goods betwixt them; for it is truly founded in his headship and gubernative administration of the wife, who, by his deed, becoming *femme coverte*, is exeemed and liberated from personal execution, being *sub potestate mariti*, and therefore he becomes substitute in her place; even as one who exeems another from judgment, *ipso facto* becomes liable for the debt; and if it were otherwise, a flood of inconveniences would follow; for I lend my money to one who is master of an opulent fortune; he dies, leaving a daughter behind him; she, by marrying, mortifies my sum, it may be, for the space of forty years; she cannot be reached, being *vestita viro*: he pleads immunity against all personal execution, because it is a sum bearing annualrent, to which he has no right; so that the creditor is wholly disappointed, and is cast in prison for debts, and cannot raise his own to relieve himself: And it was never pretended by any husband, before the late decision Osborn against Menzies, No 23. p. 5785. which is but one single practise not fully debated; before which a husband *stante matrimonio* was liable, and after dissolution according to the length that diligence had been done against him before it, such as the obtaining a decree or adjudication against him for his wife's heritable debt; and it is the interest of creditors the Lords return to that which was the law before. *Answered* for Cesnock, That nothing more shocks the analogy of law than to subject a husband *personaliter* to his wife's heritable debts owing by her, when his *jus mariti* gives him no right to the heritable debts owing to her; and common equity tells us, that *quem sequitur commodum idem debet et habere incommodum, et e contra*; and till the Parliament, or the Lords by an act of sederunt, give husbands right to their wives heritable sums, it is impossible to make them liable for their wives heritable debts, for that is to cause them make brick without straw: And this is certainly our law, as Stair observes, L. 1. T. 4. where he states the question, If the wife's heritable debts will reach? but he concludes, the communion being only of moveable goods, therefore it should, *a paritate rationis*, be only of moveable debts. And whereas it is urged, a man may this way lie very long out of his money; it is *answered*, *Imo, Incommodum non solvit argumentum*; and this may fall out in other cases as well as here. My debtor dies, and leaves his heir an infant of a month old; I must patiently supersede all personal execution till he be past fourteen; and what if my debtor either turn fatuous or furious? I cannot then put him in prison. *2do*, You may affect his estate by adjudication, and if it be bankrupt, you can bring it to a roup. And the liberating husbands from the wife's real debts is borrowed by us from the *consuetudines Parisienses*, where they have the same custom; and *est* Osburn's case were the first (as it is not) yet there is an uniform tract of decisions since that time, finding husbands not personally liable for their wives real debts, so that to alter it again would brangle the securities of many subjects: And the communion of moveables has been always reputed the ground in law for paying the wife's debts,

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.

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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

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