

Ordered and adjudged that the interlocutor be affirmed, with the following addition, viz. without prejudice to any question that may arise upon the death of Janet Irvine, the testator's widow.

1791.

BAILLIE
v.
CHALMERS.

For Appellants, *Sir J. Scott, W. Tait.*

For Respondent, *Alex. Wight, W. Grant.*

[Mor. p. 6083.]

JAMES BAILLIE of Olivebank, Esq., *Appellant;*
MRS. ELIZABETH CHALMERS, *Respondent.*

House of Lords, 6th April 1791.

HUSBAND AND WIFE—DELICTS—EXPENSES.—An action of damages for scandal was brought against a married woman, calling her husband for his interest ; and judgment with expenses pronounced against her. The Court of Session held the husband liable for the expenses of process (£688). Reversed in House of Lords, and held him liable in expenses, only in so far as he was responsible for the conduct of his defence, as this might be found to be malicious, vexatious, or calumnious ; and remit made to inquire into this.

An action of damages for slander was raised by the respondent, with concurrence of her husband, against Mrs. Helen Douglas or Baillie, the appellant's wife, and also against the appellant, for his interest. Defences were lodged to this action for Mrs. Baillie, and the appellant, *for himself*, and *as curator for his wife*, setting forth " That however painful it must be to a person of an ingenuous mind to be accused in a court of justice of maliciously defaming and slandering a neighbour from motives of malice or ill will ; yet the defenders feel less concern at being involved in such an accusation, than at being obliged, in their own defence, to set forth facts, which if the pursuers have any sense of honour and delicacy, must tend to hurt them more than all the expressions the defenders are charged with." Then followed a detail of certain slanders. The defences offered were found to be irrelevant by the Court of Session, after much litigation ; and this judgment being taken by appeal to the House of Lords, was affirmed, and remit made to proceed *quoad ultra*.

1791.

BAILLIE

v.

CHALMERS.

Sep. 16, 1786.

The question now is, Whether the appellant Mr. Baillie is personally liable for the expenses of the suit, taxed at £688?

The case going back to the Commissaries, they pronounced this judgment, finding “ That the defender Mrs. Baillie, “ was guilty of the scandal libelled : That the defender had “ not proved the facts set forth in her condescence, in “ so far as she was allowed by the Court of Session to prove “ the same ; and that the other articles of the said conde- “ scence were not *relevant*, and could not be allowed to “ go to proof, and therefore finding *her* liable to a fine to “ the procurator fiscal, and in damages, expenses, and a “ palinode to the pursuer.” The expense, by a subsequent interlocutor, was fixed as above. The damages at £500 ; and found the defender, Mrs. Baillie, liable in £300 more to the procurator fiscal of court as fine. But *they assoilzied the appellant, in respect the libel was not proved against him ; and found him entitled to his expenses, which they modified to £5.*

These points, so determined by the Commissaries, being brought under review of the Court of Session by advocacy, on report to the whole Court on the question, Whether there were grounds in law for subjecting Mrs. Baillie’s husband in payment of the taxed amount of expenses?

The respondent maintained that the appellant, Mr. Baillie, stood forth not only as curator for his wife, but also as an individual, and strenuously pleading the competency of bringing evidence of the truth of the charge made by his wife. That in either capacity, whether as curator or as individual, the conclusion could not be different ; he becomes a party to the suit, and is responsible for the defence which is maintained, and which, if either groundless or injurious, it is enough to warrant the Court to subject him in the payment of the costs. It was answered for the appellant, that his conduct was not blameable in regard to the defence. He had been acquitted, and costs given to him, though the respondent had charged him as equally guilty with his wife ; at least that he “ had approved and acquiesced in what she so “ said of the complainers and their family.” This was not the case, and he was the mere passive engine of the law, lending his name to enable his wife to stand in her own defence.

Feb. 13, 1790. The Lord Ordinary, of this date, pronounced this judgment: “ Having advised with the whole Lords on the “ whole cause, refuses both bills, and remits the cause to

1791.

BAILLIE
v.
CHALMERS.

“ the Commissaries, with the following instructions: 1. That
 “ they adhere to their interlocutor, finding Mrs. Helen
 “ Douglas liable in damages to Mrs. Elizabeth Chalmers,
 “ and a fine to the procurator fiscal, but they restrict the
 “ damages to £100, and fine to £10 Sterling. 2. That they
 “ alter their interlocutor with respect to the palinode, and
 “ dispense with the same. 3. That they find that legal
 “ execution cannot pass against the person of Mrs. Helen
 “ Douglas during the subsistence of her marriage, for any
 “ sum awarded in name either of damages, fine, or expenses,
 “ and that the effects and person of James Baillie, her hus-
 “ band, cannot be affected for the sums awarded in name of
 “ damages and fine. 4. That they adhere to their interlo-
 “ cutor finding Mrs. Helen Douglas liable in expenses of
 “ process, and in the expense of extract; and modify the
 “ same to £688; and that they also find the said James
 “ Baillie personally liable to Mrs. Elizabeth Chalmers for
 “ the said £688 of expenses.”*

* Opinions of the Judges :—

LORD ESKGROVE.—“ The expenses are a part of the damage ; and I cannot distinguish between them. It is a tutor’s duty to defend.”

LORD HENDERLAND.—“ The husband holds the goods in communion without account. Principle of delict does not apply here. Suppose the husband had said, ‘ I will not defend this cause, because it is bad’. The Court would not have controlled him. He is the administrator of her funds, and entitled to give up her case. The expenses arise here from his own fact and deed. He is the *dominus litis*, and *temere litigans*.”

LORD DUNSINNAN.—“ Of same opinion.”

LORD MONBODDO.—“ The husband is not liable.—All the expenses incurred by departing from the maxim of law, that *veritas convicii non excusat*.”

LORD HAILES.—“ *Veritas convicii* certainly does not exculpate. Mr. Baillie sued in his wife’s name in the Commissary Court.”

LORD SWINTON.—“ The husband truly acted here as the pursuer of a counter action.”

LORD ROCKVILLE.—“ I think the husband is liable for the expense of the suit. He has an interest.”

LORD GARDENSTONE.—“ The husband is not liable for his wife’s delicts. Where persons called, not as parties, but only nominally as guardians, &c., it does not follow that the person brought in for forms sake, is liable in expenses. Besides, he offered to make any palinode.”

LORD DREGHORN.—“ The husband may disclaim the action, and

1791.

BAILLIE
v.
CHALMERS.

Against this interlocutor the present appeal was brought, against that part of it which finds James Baillie personally liable for the £688 of expenses.

then a curator *ad litem* will be appointed, as in case of Barclay and Gordon. A distinction ought to be drawn between what was preceding to the condescence, and what after. No apology can be made for the condescence. Even as to that part of the expenses, Mr. Baillie had information as to the matter that led him to proceed."

PRESIDENT.—“ The question is, whether the husband be liable for expenses awarded against his wife, in an action of damages *ex delicto* ? I am of opinion that the husband was liable for the damages. This, the law of England as well as the civil law, and founded on principle, because, whenever a wife's person is bound for a debt, the execution *stante matrimonio* must be, not against her person, but against that of the husband, *e. g.* case of an heritable bond with a personal obligation. If granted after marriage, personal obligation null. If before good, and will receive execution against husband.

“ As to expenses of suit, the husband is something more than the curator of the wife. He acquires by marriage a power over the person and estate of the wife. Her person is sunk, and she cannot act except through him. She has nothing that can be called her own, except the fee of her heritable estate, subject to his management, the rents or interest being his property. She does not act as a minor does, with consent of the curator, except in matters relating to the fee of her estate. In every other respect, and consequently in all personal matters, and in all things relative to goods in communion, or in rents of estate, the husband alone is the actor.

“ In the case of a minor, the curator acts not for himself but for the ward ; but husband acts for himself as well as for wife, in all matters relative to common estate. He is *præpositus negotiis*, and in some respects *owner*. He has more ample powers than the acting partner in *society*.

“ It is not enough to call him in a suit edictally. He must be called specially, and when called for his interest, or when he insists in any suit for self and wife, he has the sole management and direction of it. He may proceed or abandon it, or state his defences in any manner he pleases, and it is not his duty to insist either in a bad action, or in a bad defence.

“ When costs are given in any such suit, though relating to the wife's property, a debt is thereby constituted, which must be made effectual, and, whatever the nature of the action may be, it cannot be said that the demand of costs arises *ex delicto*, unless in so far as it is a wrong in the husband to maintain an improper suit or defence, which suit is imputable to him more than to the wife. The husband lays out the expense on one side, without recourse

1791.

BAILLIE
 „
 CHALMERS.

Pleaded for the Appellant.—By the law of Scotland, the husband is not liable for the consequences of his wife's delicts, or any obligation following as a consequence therefrom. These can only affect her separate estate, unless, as Mr. Erskine says, p. 95, he be convicted of accession to the crime or delict which produced the obligation. Accordingly the Court found, in this very interlocutor, that the appellant's person and effects cannot be affected for the sums awarded in name of *damages* and *fine*; but the costs in which she is condemned, being in fact in the nature of *damages*, the same principle ought to govern, as there is no solid distinction between them. The reason of this is obvious. The appellant acted in this suit merely *curatorio nomine*, and therefore ought not to be subject in costs, unless he was blameable in the defence set up—guilty of impropriety in its conduct, or exceeded the strict line of his duty, neither of which has he been found to have done.

Pleaded for the Respondent.—The question is, Whether, when costs are awarded against the wife, in an action against her and her husband for his interest, the decree in which declares him personally liable therein, execution cannot go out against the person and effects of the husband? Against the person of the wife it cannot go *stante matrimonio*, and her effects, while under coverture, are her husband's, so that, unless execution is allowed against the husband for these expenses, the decree on that point is abortive. That the husband is liable, is manifest from many considerations. He made himself a party by his defence, and as a party he ought to be liable. It was not compulsory on him to appear in the action along with his wife; he might have declined his name and concurrence, and in that case a curator *ad litem* would have been appointed. His appearance was therefore voluntary, and every step of the procedure must have had his concurrence, just because it is reasonable to presume that a married woman is guided by her husband's advice. But the pleadings in Court in regard to him assumed a double character; they were FOR HIMSELF, and FOR HIS

against the wife's estate.—He has an interest to defend the goods in communion from being liable even eventually. Besides, there is a charge of recrimination. I do not inquire whether he conducted himself improperly or not; but go upon this, that expenses have been found due.”

1791.

 BAILLIE
 v.
 CHALMERS.

INTEREST, that is as curator ; he therefore took the consequences *on himself* personally, distinct from his office. In the conduct of the defences for himself, he pleaded that common report was a justification of slander. He pleaded next *compensatio injuriæ*, and attempted to prove it ; and lastly, stated the plea of *veritas convicii*.

After hearing counsel,

LORD CHANCELLOR THURLOW said :—

“ MY LORDS,

“ Though I approve of the expediency of this decision, yet it was contrary to the law of Scotland. But, taking this case on its own bottom, here was an action brought for a most malignant charge. The defences made, which must be attributed to the appellant as *dominus litis*, aggravated that charge. At every step this malignancy seems to increase. He says he offered apologies—they were insults,—they were properly rejected. He says, in many steps of the cause he was successful. True,—but successful in getting leave to prove, what he must be held to have known he could not prove. He was right in his law ; but the very plea, the offer to prove, was a fresh and cruel injury.

“ I am therefore of opinion that he must pay costs, in so far as he has blameably and maliciously conducted this defence ; but I cannot say the costs generally, for part of the proceedings in defence may have been innocent. He ought to pay the costs occasioned by his own calumny, and that must be a great part ; for every calumny and impropriety in the conduct of the cause is, and must be imputable to him.—But, in other respects, I move to reverse as follows.”

It was “ ordered that the part of the interlocutor complained of be *reversed*, in so far as it finds generally
 “ that James Baillie is personally liable to Mrs. Elizabeth Chalmers for £688 of expenses of process and
 “ extract, which Helen Douglas was decerned to pay
 “ to the pursuers. But it is declared that the said
 “ James Baillie is responsible for the conduct of the
 “ cause, in so far as the same was malicious, vexatious,
 “ and calumnious. And it is ordered that the cause be
 “ remitted back to the Court of Session to inquire how
 “ much of the said sum of £688 of expenses of process
 “ and extract has been occasioned by the conduct of the
 “ defender in the said cause.”

For Appellant, *Alex. Wight, W. Tait.*

For Respondent, *Sir J. Scott, W. Adam.*