

No 169. of such bonds ; *3tio*, If it was done to evite behaviour, it would not do, for the taking the back-bond imported a *gestio* by the act of sederunt in Nithsdale's case. THE LORDS did not regard this, because not proponed by the parties ; but this shews the cause deserves to be again considered.

Fountainhall, MS.

1705. November 15.

WILLIAM DUNCAN in Woodend of Drum *against* MARJORY FORBES, Relict of ALEXANDER IRVINE of Drum.

No 170.

Bonds granted by a wife *stante matrimonio*, found null, and not obligatory upon her, although the husband was a simple man, and she, at the date of these bonds, was empowered by an act of the Privy Council to uplift and discharge a certain yearly aliment for the subsistence of the family.

WILLIAM DUNCAN, as having right to three bonds granted by the Lady Drum to his father, having charged for payment, she suspended on this reason, That the bonds were null as granted by her *vestita viro*, without her husband's consent.

*Answered* for the Charger, Albeit by a common rule with us, a wife's obligation for debt contracted during the marriage is null, and not obligatory upon her, who is understood to be *sub potestate viri*, and to have nothing at her own disposal, yet this admits of several exceptions ; such as a wife may contract and oblige herself *stante matrimonio*, where she has a separate *peculium*, estate, or aliment, exempted from the husband's *jus mariti* ; December 19. 1667, Gairns against Arthur, No 155. p. 5954. ; February 23. 1672, Neilson against Arthur, No 184. p. 5984. Or when she is *præposita negotiis*, as has been often decided ; and the charger is precisely in the case of these exceptions. For the suspender, of the granting at the bonds charged for, had a yearly aliment of 6000 merks for subsisting of Drum's family, which she was impowered to uplift and grant receipts for to the administrators of the estate, without the concurrence or consent of her husband, who as a weak and simple man, might be understood to have been *sub potestate uxoris* ; and it was her fault only, that the sum she borrowed was not paid out of that alimentary fund, which was altogether at her own disposal.

*Replied* for the suspender, A wife's bond *stante matrimonio* is null, November 28. 1623, Schaw against Maxwell, No 5. p. 2074. ; December 21. 1629, Ayton against the Lady Halkerton, No 151. p. 5952. without the husband's consent, and sometimes with it ; as in the case of the husband and wife's joint obligation to pay sums, or perform deeds ; March 24. 1626, Greenlaw against Galloway, No 162. p. 5957. ; Hope, HUSBAND & WIFE, (Douglas of Tofts *contra* Elphinston, No 161. p. 5957.) ; December 15. 1665, Ellies against Keith, No 191, p. 5987. The reason is, because, *republicæ interest* to secure wives from being induced to exhaust by obligations the mean of their subsistence after dissolution of the marriage ; nor can the suspender be

denied the privilege of married women, upon the *squint* suggestion of the Laird's simplicity, since he was never declared incapable to be a husband, and law distinguishes not betwixt the case of one husband's wife and another's. It doth not follow from his being weak and unfit for business, that his wife could be effectually bound by any transaction *tanquam soluta*, without a special act of Parliament, as was obtained for Mistress Anderson the printer, and that was ever thought somewhat singular, and out of the road of common law. *2do*, The decisions adduced by the charger do not meet the present case; for Elisabeth Arthur had a separate *peculium* or fund from her children's grandfather, for those very uses for which she had granted bonds; whereas, the Lady Drum's bonds are not for aliment; nor had she any peculiar fund of aliment, for the act of Council allowed of receipts to the administrators by her or him alternative. *3tio*, A wife that is *præposita negotiis*, is not liable by the *præpositura*, after dissolution of the marriage, but only the husband's representatives; January 29. 1631, Porter against Law, Div. 9. *h. t.* And the act of Council, authorising the suspender to uplift and discharge the aliment, was but a *limitata causa*, which could have only a limited effect, to warrant payments made to her by the managers of the estate, and not to empower her to grant bonds for borrowed money.

*Duplied* for the Charger, Seeing *mulieribus deceptis, et non decipientibus, jura subveniunt*, the suspender hath no reason to quarrel her own bonds granted by her in such circumstances, for most onerous causes; nor should the charger be put off to seek payment of his debt from the husband's representatives; but she should be decerned to pay, and left to seek relief at their hands; November 20. 1630, Rutherford *contra* Halcro, Div. 9. *h. t.*

*Triplied* for the Suspender, No respect to the case of Rutherford against Halcro; for there it was thought reasonable, that the wife as *intus habens* her husband's effects, should be decerned; and it cannot be subsumed, that the Lady Drum had any effects of her husband.

THE LORDS found, That the bond granted *stante matrimonio*, was null, and the Lady not liable; and, therefore, suspended the letters.

*Fol. Dic. v. 1. p. 398. Forbes, p. 41.*

\* \* \* Fountainhall reports the same case :

MARJORY FORBES, when married to the late Irving of Drum, borrows from William Duncan L. 800 Scots, by bonds; and being charged for payment, she suspends, on this reason, That being clothed with a husband at the time of her granting these bonds, they are *ipso jure* null, and cannot affect her, but only her husband's heirs or executors. *Answered*, Though it be a rule in law, that a wife's obligation for debts contracted *stante matrimonio*, while she is

No 170. *femme coverte*, is not obligatory, yet this brocard admits of sundry exceptions ; and particularly, where she has a separate aliment, or estate exempt from the *jus mariti* ; *quoad* these she may contract and oblige herself during the marriage ; but so it is, she had 6000 merks per annum, modified by the privy council, for the aliment of her husband and the family, whereof the whole management and administration was committed to her, and her discharges declared sufficient, her husband being simple and fatuous, and much doubt about the validity of the marriage ; and in parallel cases the Lords have sustained wives bonds, as on the 19th December 1667, Gairns, No 155. p. 5954. ; 23d February 1672, Neilson, No 184. p. 5984. ; 20th November 1630, Rutherford, Div. g. h. t.. *Replied*, The maxim of law is founded on good reasons ; because she is *sub potestate et curatela mariti* ; and her deeds as to personal obligations are so far null, that her husband's consent and concurrence to the bond does not make it subsist against her, except it be to grant infestment out of her lands, belonging to herself in property ; but not for personal execution, 24th March 1626, Greenlaw *contra* Galloway, No 162. p. 5957. ; Hope, Tit. HUSBAND AND WIFE, (Douglas *contra* Elphinston, No 161. p. 5957.) ; Stair, 15th Dec. 1665, Elies *contra* Keith, No 191. p. 5987. It is true, a cautioner for a married woman in a bond will be liable, but she herself is free, even so as that the cautioner will have no recourse against her for his relief ; and tho' a merchant's wife as *præposita negotiis* may validly grant bond, yet that does not bind her, but only her husband ; and as to Gairns' case, the motive inducing the Lords to sustain her bonds, was because she had a *peculium* flowing from her father, given for her own and children's aliment ; and the debts pursued for were for drugs and necessaries furnished to them. Some of the Lords thought her marriage was so questionable in itself, and he known to be so weak, that her debts might very well affect her ; and that people were *in bona fide* to lend her, and ought not to be defrauded of their debts. Others argued, if there was any aliment of the 6000 merks resting at the time of Drum's death, and she uplifted it, she should be liable in so far to this debt ; but the plurality would not recede from the common ground of law, and found the bonds null, and her not liable for the same ; though the poor man may, by this interlocutor, be at a loss, the present heir of tailzie of Drum refusing to pay the same.

*Fountainhall, v. 2. p. 290.*