

No 65.
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never be liable for the principal sum, because his *jus mariti* gives him right only to his wife's moveable sums, and so *a pari*, he can only be liable for her moveable debts, for *quem sequitur commodum, eundem debet sequi incommodum*, and no farther; as has been oft decided, betwixt Menzies and Osburn, No 23. p. 5785; Captain Gordon and Cesnock, No 24. p. 5787. and many others.—*Answered*, Whatever be in that principle, it only takes place where the husband is not *lucratus* by the marriage; but here the husband gets 5000 merks of tocher.—*Answered*, This comes not by the father, but is a *peculium adventitium*, gifted to her by her grandfather, and affords no present benefit, being liferented by the mother.—THE LORDS found the husband liable *in quantum lucratus*; but in regard he had not present access thereto, they ordained him and his wife to assign him to as much of that sum, to take effect when their right commences by the mother's death. The third reason of suspension was, that she was minor the time of subscribing the bond, and lesed; for though it bore an onerous cause of her education at schools, yet this is not probative; for there is nothing more easy than to insert a specious narrative of onerous causes in minor's bonds; and here, being *in familia* with her father, he must be liable, and by his consenting could not be *auctor in rem suam*.—*Answered*, The testificate of her baptism is no authentic proof, and the presbyterian parents did then keep their children long unbaptized, till they got a minister of their own persuasion to do it. Next, if she be so ungrateful as to deny his paying the money, and relieving her, and the onerous cause, he will prove her staying at that school, providing it be *cum onere expensarum*.—THE LORDS repelled the minority, the cause of the bond being first instructed and adminiculated to have been *in rem versum*, and for her board-wages.

Fol. Dic. v. 1. p. 390. Fountainhall, v. 2. p. 422.

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1708. July 13.

GORDON against DAVIDSON.

THE husband is liable for annualrent of heritable debts contracted by the wife prior to the marriage, and falling due during the marriage.

Fol. Dic. v. 1. p. 390. Forbes. Fountainhall.

*** See this case, No 25. p. 5789.

1714. January 22.

LOCKHART of Carnwath against EUPHAN DUNDAS, and Mr JOHN DUNDAS of Philpstoun, Advocate, Her Husband.

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The husband
found not
lucratus by
getting a
competent

GEORGE LOCKHART of Carnwath, in January 1693, obtained a decret against Catharine Swinton, daughter and heir to George Swinton of Chesters, and

David Dundas of Philpstoun, her husband, for his interest, for payment of L. 1,000 principal, annualrent, and penalty, contained in a bond granted in *anno* 168c, by the Lord Mersington as principal, and the said George Swinton his brother as cautioner, to Sir George Lockhart President of the Session, the pursuer's father. The lands of Chester, then affected with a liferent annuity of 600 merks in favours of Euphan Brown, Catharine Swinton's mother, being sold to a third party for 12,000 merks, there was a contract of marriage perfected 20th December 1693, betwixt the said David Dundas and Catharine Swinton, whereby the husband got the 12,000 merks, the land's price, in name of tocher, to be applied for payment of his debts; in recompence whereof, he secured his wife in a liferent annuity of eight chalders of victual out of his own estate of Philpstoun, and Euphan Brown, his mother-in-law, in another annuity of 600 merks in lieu of the equivalent renounced by her out the land of Chester, and disposed his estate with these burdens to the heirs male of the marriage, and provided the daughters to L. 1,000 Sterling, which contract expressly referred to marriage articles formerly commenced upon. No diligence been done upon the decret against David Dundas, as husband to Catharine Swinton, *stante matrimonio*. Carnwath pursued Euphan Dundas his heir, and Mr John Dundas her husband, for payment of the sums decerned upon these grounds, *imo*, That David Dundas was *lucratus* by the marriage with Catharine Swinton; *2do*, Seeing Catharine, as heir to her father, was liable before the marriage for the debt claimed by the pursuer, she could not *stante matrimonio* dispone, or her husband, a conjunct person, accept of a right to the price of her lands in prejudice of an anterior lawful creditor. Then the pursuer repeted a reduction of the said fraudulent deed upon the act 18. Parl. 1621.

THE LORDS found, *imo*, That David Dundas was not *lucratus* by his marriage with Catharine Swinton; *2do*, They repelled the reason of reduction upon the act of Parliament 1621, notwithstanding that the decret against Catharine Swinton and David Dundas her husband, for his interest, was before the sale of the lands of Chester and the date of the contract of marriage.

Fol. Dic. v. 1. p. 390. Forbes, MS. p. 16.

1715. February 16.

ROBERT INGLIS Chirurgion in Queensferry *against* MARGARET HARVEY, and ARCHIBALD OGILVY Brewer, her Husband.

MARGARET HARVEY having accepted a bill payable to Robert Inglis before the marriage, which was not protested, he now insists both against her and her husband for payment; and the Lord Ordinary having found the husband liable for the sum in the bill, it not bearing annualrent, but ordaining the pursuer to prove that the husband was *lucratus* by the marriage, before he could be liable

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tocher, which he recompensed by suitable provisions to the wife and children of the marriage

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Found in conformity with Simpson against M^r. Lellan, No 64. p. 5853.