

prest; and as to this act of Parliament, it bears expressly, that all such bonds shall remain in their condition as they were before the act of Parliament 1641, *quoad fiscum et relictam*, before which the bonds bearing annualrent could not have burdened the relict; for the word, 'such bonds,' may not only be extended to bonds due to defuncts, but to bonds due by defuncts.

THE LORDS repelled also this defence, and found the relict's part not to be burdened with any bonds due by her husband bearing annualrent, unless they had become moveable by a charge, or that the term of payment of the annualrent was not come at the defunct's death.

Fol. Dic. v. 1. p. 386. Stair, v. 1. p. 576.

* * * Gosford reports the same case :

MARGARET M'KENZIE, relict of Gilbert Robertson, did pursue her husband's executors for the third of his moveables, wherein the LORDS found, that as bonds bearing annualrent due to the defunct, by the act of Parliament were heritable *quoad relictam*; so they found, that debts due by the defunct upon bonds bearing annualrent, could not diminish a third of the moveables, but that they should be first paid out of these bonds, which were only heritable *quoad fiscum et relictam*; and that they were not sufficient that they should affect the heir before the relict's third, because, as to payment of such debts, they found that the relict was in that same condition she was in before the act of Parliament.

Gosford, MS. No 73. p. 26.

1696. January 10.

OSBORN against YOUNG and MENZIES.

THE LORDS advised the point debated between Harry Osborn late of Pepper-mill, and Catharine Young, and Menzies, her husband, whether a wife's heritable bond granted before her marriage, and whereof the term of payment of the annualrent was then past, did make the husband personally liable in payment of the same? It was *alleged*, That the marriage was a voluntary novation, whereby *subibat personam mulieris*, and undertook all her debts, and which were compensated by the marital affection to her person, with her fidelity, and other qualifications, having taken her for better and for worse; otherwise women contracting a great deal of debt, might by marriage procure themselves a protection from personal execution, and knowing their husbands would not be liable, they might easily cheat their creditors thereby, and take away their rights, whereas *jus meum mihi invito auferri non potest*. *Answered*, The marriage introduced a communion of goods and debts, but not promiscuously of all, but only of moveable debts and goods; so that as the *jus mariti* reaches no heritable bonds (which in this case are understood to be any bonds bearing annualrent,

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The LORDS found a husband not liable for the principal sums of heritable debts due by his wife, whether heritable by a clause of investment, or by bearing annualrent; but found him liable for the bygone annualrents of the same, and in time coming during the standing of the marriage.

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where the term of payment is past before marriage,) due to the wife, *ergo a paritate rationis*, and by the same analogy of law, he should be liable for no heritable debts so due by his wife before the solemnization of the marriage; for *quem sequitur commodum, eundem et sequi debet incommodum*, and they are *correlata*; so that if law gives me no right to debts of that nature, it ought not to burden me with the like debts, but justly relieves me of the same. It is true, a husband has the administration of a wife's heritable rights, so as the fruits and annualrents arising from the same fall under his *jus mariti*, and may be disposed of by him without his wife's consent, at his pleasure; and therefore it may be justly argued, that he in like manner should undergo the payment of the annualrents of his wife's heritable debts, because these annualrents being moveable, (though accessory to an heritable security, and so might be alleged to retain the same nature,) they fall *sub communiione bonorum*. Only it is here debatable, whether they will simply affect the husband and his heritage, or only *in valorem* of his moveables, and *in quantum* both his wife's part of the moveables, and his own extend; or if he will be only liable *in quantum* he is *lucratus* by her. *Replied*, He ought to be personally liable, because if he pay an heritable debt for his wife, law presumes she may have another heritable debt owing to her which he may reach, and affect by arrestment, and so be no loser. THE LORDS tried if there had been any decisions on either hand; but found no pathed road, people having either paid voluntarily, or forborne to urge this point by a tacit acquiescence. Only Stair states the case in his Institutions, Book I. Tit. 4. § 17., and thinks it unreasonable to oblige the husband for the wife's heritable debts; and I find *Molineus ad consuetudines Parisienses*, with the late collection of the *Coutumes de Paris, tit. de communaute des biens*, makes only the husband liable for his wife's moveable debts and *personelles*, but not for the debts they call *realles* and *hypothecaires*, which answer to our heritable bonds. THE LORDS by plurality found a husband not liable for the principal sum of heritable debts due by his wife, whereof the term of payment was come and bygone the time of the marriage; but decerned against him for the bygone annualrents of the same and in time coming during the standing of the marriage allenary. The same decision was renewed in the case of Hay of Naughton against Robert Cleland and Jean Henderson, 12th February 1696; but several of the LORDS struggled much against it. If the husband be *lucratus* by getting a considerable tocher *ad sustinenda onera matrimonii*, it may be pleaded he ought to be liable even in heritable debts, *in quantum lucratus est*, if the tocher be considerable.

Fol. Dic. v. 1. p. 386. Fountainball, v. 1. p. 699.