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self to go to the horn, his escheat will fall to the King. THE LORDS considered the bond granted to Mr John Ellies, and his back-bond being fulfilled *in terminis* before the denunciation, the same was so purified, that that bond of borrowed money was absolutely void and null, conform to the express-declarator in the back-bond; and that albeit the allegiance resolved in a compensation, yet that the same being actually applied, and the instructions acknowledged and made use of, both by the Countess and Mr John Ellies her factor, they were *in pessima fide* to denounce the said Thomas Dalmahoy rebel, especially he being liable only *pro interesse*, and being living in England when the execution was used against him at the market cross of Edinburgh, and pier and shore of Leith, and so probably could not know the same till the days of the charge were expired; it being farther *replied*, That the back-bond did only declare the principal bond void and null, as to the rents and penalties, but not as to the principal sum, as to which, the execution of the horning was valid. THE LORDS did likeways find, that the principal being truly satisfied, and so acknowledged as said is, the debt being thereby truly extinguished, and the condition of the back-bond pacified, the horning was null, and the debtor's escheat could not fall to the fisk. But the question in law, Whether or no a widow having granted bond for her own proper debt, being thereafter married;—her husband, who did not consent thereto, nor subscribed the same, may be summarily charged upon letters of horning *pro interesse*, and denounced, and thereby his escheat fall to the King, was not decided, the former ground being sufficient to declare the horning null; but it seems the custom upon a bill to obtain letters against a husband, albeit not insert in the bonds or decreet, hath been acquiesced to; but in law and reason, if the same were to be decided, it ought to be otherways; seeing a husband may have his defence, being only pursued *pro interesse*, viz. That he is not *locupletior factus*, or hath renounced all benefit could accresce to him *jure mariti*, whereupon being secured, unless charged personally apprehended and did not raise suspension, his escheat ought not to fall to the King or his donatar.

Gosford, MS. No 658. p. 385.

1678. January 23. WILKIE against STUART and MORISON.

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Upon a decree obtained against a wife, horning, denunciation, and arrestment, followed. After this, the wife died. Found that

AGNES WILKIE having pursued Christian Morison, spouse to George Stuart, as heir to Henry Morison, to fulfil the contract of marriage betwixt the said umquhile Henry Morison and the said Agnes, and recovered a decreet against the said Christian and the said George Stuart her husband for his interest; whereupon she arrested certain sums belonging to George, and charged and denounced him upon the decreet; and Christian Morison being now dead, she insists now against the said George, as being liable *jure mariti*, not only by the decreet against him as husband, but by the arrestment and horning; and also

against Mr Henry Morison as heir to Christian. It was *alleged* for George Stuart absolvitor, because he being liable, and decerned only *jure mariti*, his wife being dead, and that interest ceasing before poiding or decret, for making furthcoming, he and his means are now free; for by our law, there is a communion of moveable goods and debts between man and wife, by an universal society in moveables; so that without consideration of what moveables or debts either party had before their marriage, the moveable debts of either affect the whole moveables of both; if execution be used during the marriage, poiding or adjudging these goods or moveable sums to the creditor of either husband or wife; but after the death of either party, that universal society of moveables is dissolved; and law hath determined the division thus, 'That the wife has the third, if the children be forisfamiate, and the half if there be none;' the husband's moveable debts being taken off the whole head; and therefore George Stuart can be liable no further than as to his defunct wife's share of the moveables, which must proceed by confirmation of her testament; and can be liable no further, as being *lucratus* by the marriage, in so far as the benefit arising from the marriage exceeds *onera matrimonii*, and the hazard of the wife's provision; that being only competent when the wife has no other estate; but here the wife has a visible estate, whereunto Mr Henry Morison succeeds, and should be first discust; for marriage inferring an universal society, and importing a legal assignation, whereby the husband may freely dispoise of the whole moveables, during the marriage; that assignation is most favourable, and though in some part it were gratuitous, yet it were only quarrelable by the creditors preceding the marriage, as being fraudulent in their prejudice; which could not take place if there were another visible way to affect the estate, so that the wife by the marriage was not rendered solvent.

THE LORDS found, that seeing poiding, or decret for making furthcoming, did not proceed during the marriage, whereby the moveable rights of the husband were transferred to the wife's creditor, that he was free, notwithstanding the decret, arrestment, and horning; albeit the creditor might insist against the donatar of the husband's escheat, for the debt of the wife contained in the horning, for which the husband was denounced; and therefore sustained no process against the husband until the heir of the wife were first discust.

*Fol. Dic. v. 1. p. 391. Stair, v. 2. p. 601.*

1698. November 16. JOHN BRYSON *against* MARJORY MENZIES.

IN a competition betwixt John Bryson merchant in Glasgow, and Marjory Menzies, relict of Turner, and Dr Alexander her factor, this question occurred; where a decret is obtained against a wife for her debt, and her husband *pro interesse*, and an adjudication led of the husband's lands, and then the marri-

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poiding or  
decret of  
furthcoming  
not having  
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marriage, the  
husband was  
free.

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Debated but  
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