

standing of that clause secluding her husband, she might transfer her right to him, or any others for his behoof.

The Lords found the letters orderly proceeded, notwithstanding of the reason libelled ; and, notwithstanding that the husband was secluded, found, That the wife might transfer her right, which was founded upon her assignation,

Page 401.

1674. *January 27.* MR JOHN SPREULL *against* MR ROBERT STEWART,

IN a suspension of a decret, obtained at the instance of the said Mr John Spreull, as having married Katharine Marshall, against Jean Darach, relict of John Marshall, and Robert Stewart, her second husband, for payment of the sums of money due to the said Katharine, as her bairn's part of gear, and as assignee by William Marshall, her brother, for his bairn's part, which fell to them by decease of their father ; upon this reason, That the decret recovered against him was only as representing his father, who had married the said Jean Darach, who was executrix to her husband, John Marshall ; and the decret being against him *pro interesse*, after his death his son could not be decerned as representing him, that interest having ceased :

It was ANSWERED, That the reason was noways relevant ; because his father was *locupletior factus* by the said marriage, in so far as his wife, being executrix, did assign him to the whole benefit of the executry ; which amounting to a great sum, and he having married her within less than a year of her first husband's decease, he is liable to count to the bairns for the whole inventory, unless he can show that he hath done exact diligence against the debtors who were insolvent.

It was REPLIED, That the suspender's father having right, by his contract of marriage, to no more but 7000 merks, which was due to his wife as relict, for her third part, and having intromitted with no more after the marriage, the said sum being only a competent tocher for a man of his fortune, and such as was necessary *ad sustinenda onera matrimonii* ; and, unless that the chargers can prove that his father intromitted with more, he is not liable, in law, to count for the same, his father being now dead, and his interest ceasing.

It was DUPLIED, That the suspender's father, having married an executrix, and being assigned to the same, and a decret recovered against him during the marriage, he was thereby constituted debtor, and any representing him must be made liable.

The Lords found, that her intromission, as executrix, with the sum of 7000 merks, could not be attributed to the third part only of the whole inventory of the testament ; but that she was countable to the bairn's legators for two parts thereof : As likewise, they found, That her office of executrix did not cease by her subsequent marriage, her husband being obliged to authorise her to pursue and execute the office during the marriage. But the decret being given against him *pro interesse*, if his representatives were liable thereto after the dissolution of the marriage, unless they could prove that he or his wife did intromit during the marriage, was not decided.

Page 402.