

the marriage; if the pursuer proved there were other wines in the cellar; and so found the defender liable for the whole, except in so far as he proved was sold before the marriage, and remained after the wife's death.

*Fol. Dic. v. 1. p. 391. Stair, v. 1. p. 565.*

\* \* \* Gosford reports the same case :

ROBERT CARSE, flesher in Edinburgh, being pursued at the instance of Patrick Andrew for the price of twelve pieces of wine, bought by his wife betwixt their contract and marriage, which was dissolved by her death, within four months thereafter, the defender was only found liable for so much as was vended in his house during the marriage, amounting only to two puncheons; but for the other ten he was assoilzied, seeing they were extant at the time of the wife's death, and offered to be delivered to the pursuer; and that notwithstanding it was alleged that he having married the wife, and lived in family with her, the wines were in his possession, and he might have disposed thereof as he pleased, and therefore was liable in payment of the price.

*Gosford, MS, No 52. p. 18.*

1674. January 27. SPREUL against STUART.

MR JOHN SPREUL and Marshall his spouse, having obtained decret against Dqroch as relict and executrix to her father, for her portion of the goods contained in the testament, and against Mr Robert Stuart, her second husband, for his interest, pursues now a transference of the decret against Stuart, as representing Mr Robert; who having *alleged* that his father, being only decerned as husband, and no execution against his estate thereupon during the marriage, that interest ceasing by the dissolution of the marriage, the decret cannot be effectual against the husband, or any representing him; and it having been *replied*, That the husband was liable at least in *quantum lucratus est*,

THE LORDS sustained the reply, and ordained the pursuer to condescend.

Who condescended upon the whole inventory of the first husband's testament, which must be presumed to have been introrried with by the relict and by her second husband, whom she married within the year, and lived with him many years; and as the wife, even after the marriage, continued obliged by the office of executry to pay the childrens portions, or to do diligence; so the second husband, under whose power she was, and who was obliged to concur with her, and to do diligence, was liable in the same manner.—It was *answered*, That as to a third part of the goods confirmed, it belonged to the relict herself, and did not exceed 5000 or 6000 merks, which was no more than a competent tocher, the husband being a gentleman of 2000 merks of rent, and was not lucrative but onerous, *ad sustinenda onera matrimonii*; and for any further introrission it was

No 84.

No 85.  
Found in conformity with  
Burnet against Lepers,  
No 83.  
p. 5871.

No 85. denied, and cannot be inferred by any presumption, but a positive probation ; neither is the husband liable for diligence to execute the testament, but only for giving his concurrence to his wife.

THE LORDS found, That whatsoever the wife intromitted with as executrix, behoved to be divided, and she or her husband could only retain a third part thereof for her own interest. They found also that it was presumed that the whole inventory was meddled with by the wife and husband, unless the defender did instruct in whose hands it was, or that it was exhausted, or diligence done ; but did not determine that point, whether the husband would be liable for diligence with and for his wife, as to what should be proved not uplifted, but remaining in the debtor's hands.

*Fol. Dic. v. I. p. 391. Stair, v. 2. p. 257.*

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No 86. 1676. February 11. M'QUAIL against M'MILLAN.

A PURSUIT being intended against the wife as universal intromitter to a defunct, and her husband *pro interesse* ; and the wife having deceased, it was found, that the husband should not be liable, unless it were proved that he had intromission with the same goods ; upon the intromission with which the former pursuit was intended against his wife.

This was not without difficulty ; and upon debate amongst the LORDS, though it was not the present case, yet the LORDS inclined to be of the opinion, that the husband, having gotten a tocher *ad sustinenda onera matrimonii*, if the wife had any other estate, whereunto the husband had right *jure mariti*, he should be liable *in quantum locupletior*.

Reporter, Newoy.

Clerk, Robert Hamilton.

*Fol. Dic. v. I. p. 391. Dirleton, No 332. p. 159.*

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#### S E C T. IV.

Only *subsidiarie* liable after the dissolution of the marriage, although *lucratus*.

1629. March 28. MATHESON against WARRISTON.

No 87.  
A second  
husband

JAMES MATHESON convened Margaret Crawford his mother, who was tutrix-testamentar left to him by his father, and Thomas Kincaid of Warriston, her