

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-

No 80.  
poiding or  
decret of  
furthcoming  
not having  
proceeded  
during the  
marriage, the  
husband was  
free.

No 81.  
Debated but  
not deter-  
mined whe-  
ther an adju-  
dication led  
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No 81.  
 husband's  
 lands for the  
 wife's debt,  
 ought to fall,  
 upon the dis-  
 solution of  
 the marriage.

age dissolves by the wife's death, if the husband or his lands be personally liable for that debt, and if it will still affect his estate; or if the same be disburdened and liberated by the dissolution of the marriage, whereby his interest ceases. The *ratio dubitandi* is, that the communion of goods betwixt man and wife being only of moveables, by analogy of law, the same can only be of moveable debts, so as the husband's heritable estate cannot be affected, unless the decret had been completed by execution or payment *stante matrimonio*; and in a like case the husband was found not liable, 23d December 1665, Rachel Burnet *contra* Lepers, marked both in Dirleton and Stair's Decisions, (No 78. p. 5863); and Stair, in his Instit. lib. 1. tit. 4. § 17, says expressly, there is neither law nor decisions to make the husband's lands liable for the wife's debt, these not being *in communione bonorum*. On the other hand it was argued, That the diligence against the husband being brought the length of an adjudication against the husband's estate (which is *processus executivus*) during the standing of the marriage, it must be effectual as if he had disposed and granted bond; in which case the debt would have become the husband's own. Though the LORDS, in the case of Osburn No 23. p. 5785, and several others, lately found the husband not liable for the wife's heritable debts, yet in this circumstantiate case there was some difficulty; therefore they superseded to determine that point, till the nullities objected against the adjudication were discussed; for, if it fell by these, there would be no need of the other.

*Fol. Dic. v. 1. p. 391. Fountainball, v. 2. p. 15.*

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### S E C T. III.

The husband not liberated by the dissolution of the marriage if  
*lucratus.*

1662. February 1. SIR JAMES CUNNINGHAM *against* THOMAS DALMAHOY.

No 82.  
 A husband  
 found liable  
 in his wife's  
 debt, though  
 not establish-  
 ed against  
 him during  
 the marriage.

SIR JAMES CUNNINGHAME pursues Thomas Dalmahoy, and the tenants of Pol-  
 lomount, to make payment to him of the mails and duties of the lands of Pol-  
 lomount, resting at the death of the late Dutchess of Hamilton, because she had  
 granted bond of L. 500 Sterling to the pursuer, to be paid after her death;  
 and for security thereof, had assigned the mails and duties of her liferent lands of  
 Pollomount, which should happen to be due at the time of her death. It was  
*alleged* for Thomas Dalmahoy her second husband, absolvitor, because these