

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 concourse 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.

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.

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

husband, for his interest, to make him payment of the duties of certain acres in Broughton belonging to him, and wherewith she intromitted during all the time of his minority as tutrix.—*Alleged*, That after her first husband's decease she was married certain years to Thomas Kay, who intromitted as her husband with these duties; in respect whereof his heirs and executors were only conveneable for these years, and not her husband who now is.—*Replied*, She having once intromitted as tutrix, and after her marriage with Thomas Kay continued that same intromission, she must be liable for the duties of these years, and her present husband; *quia quæ se gessit pro tutrice, et qui se gerit pro tutore, tenentur in omnibus et per omnia tanquam tutor*.—THE LORDS found, That the pursuer ought first to discuss the heirs and executors of Thomas Kay for the duties of these years; after which, if they were not responsal, he might have his recourse against the tutrix and her present husband.

Fol. Dic. v. I. p. 392. Spottiswood, (TUTOR & CO-RATOR.) p. 346.

* * Durie reports the same case :

A son pursuing his mother, who was made his tutrix, and her present husband, with whom she was married the time of the pursuit, for payment of the particulars intromitted with by her, in the time of his pupilarity for diverse years, in which she was married with another second husband in these years; and the present third husband *alleging*, That he could not be convened for these years wherein she was married with another husband, seeing that husband intromitted with the pupil's estate these years, and whose heirs and executors ought to pay the same to him, and ought to be called therefor, and not this third husband; specially seeing the wife having married that husband, she by that second marriage fell from her tutory, and by the law was removed therefrom, whereby the intromission had by her or her husband could not be ascribed to her tutory, but the husband's heirs or executors ought to be answerable therefor.—THE LORDS found, That this third husband, now defender, could not be convened for any intromission had by the wife, or her second husband, in these years wherein they had intromission the time of their marriage, before that the heirs and executors of that second husband were called and discussed; whom the LORDS found, that the minor ought to pursue therefor, *primo loco*, and discuss them before he could have any action against the wife, or her third husband for the same; and found, that if it should be tried by that pursuit, and discussing of them, that they should be found *non solvendo*, and that no payment might be recovered from them, that then the minor's action against the wife and her third husband should revive and convalesce to him; also the LORDS found, that the said third husband, and his wife, might be convened for the intromission had by her in these years which preceded her second marriage, and wherein she was then tutrix, after the decease of her said first husband, father to the pursuer, and which pursuer was her own son, for which years the action

No 87.
found sub-
sidiarie liable,
for intromissions of his wife as a tutrix, while she had a former husband.

- No 87. was found proper to the pursuer against his said mother, and against her said present third husband; and that it was not necessary for him to pursue the heirs and executors of the second husband therefor, seeing the action was proper against herself, she being then tutrix in these years, and consequently against her present husband.

Act. — —

Alt. Craig.

Clerk, Scot.

Durie, p. 443.

- No 88. 1663. February 18. DUNBAR against LADY FRASER.

A HUSBAND being pursued for the price of moveables intromitted with by his wife, *alleged*, That her former husband had got these moveables, and his successor should be liable, at least, in the first place; which was repelled, without prejudice to the present husband to pursue the successors of the former husband for repetition, as accords.

Fol. Dic. v. 1, p. 392. Stair.

* * See this case case, No 5. p. 2367.

- No 89. 1678. January 23. WILKIE against STEWART.

AFTER the wife's death, the husband, though decree had been taken against him, is not liable for her debts, although *lucratus* by the marriage, until her representatives be first discussed.

Fol. Dic. v. 1. p. 392. Stair.

* * See this case, No 80. p. 5868.

- No 90. 1683. February 27. EARL of LEVEN against MONTGOMERY.

A HUSBAND being convened for payment of his defunct wife's moveable debts, *in quantum factus erat locupletior*, the LORDS found the husband liable *subsidiarie* only, the heritable estate being first discussed and exhausted, in regard that the *jus mariti* being equivalent to an assignation *inter vivos*, the creditors could have no ground of quarrel, so long as there was sufficiency remaining for their payment.

Fol. Dic. v. 1. p. 392. P. Falconer, &c.

* * See this case, No 43. p. 5803. and No 41. p. 3217.