

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not liable for the wife's heritable debts, yet in this circumstantiate case there was some difficulty; therefore they superseded to determine that point, till the nullities objected against the adjudication were discussed; for, if it fell by these, there would be no need of the other.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.

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 Pollomount, to make payment to him of the mails and duties of the lands of Pollomount, 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

mails and duties belonged to him *jure mariti*, neither can he be liable for this debt *jure mariti*, because it was not established against him during the lady's life; neither could be, because the term of payment was after her death. The pursuer answered, That he did not insist against Thomas Dalmahoy as husband, but as intromitter with the rents of Pollomount, due at the Dutchess' death, wherewith he hath meddled since, which could not belong to him, *jure mariti*, being assigned before the marriage; and if they could belong to him *jure mariti*, yet it must be with the burden of this debt.

THE LORDS repelled the defence, in respect of the reply, for they thought a husband, albeit he was not liable simply for his wife's debt, *post solutionem matrimonii*, yet that he should have no more of the wife's means, *jure mariti*, but what was free of debt, and so behoved to pay her debt, so far as he enjoyed of her means.

Fol. Dic. v. 1. p. 391. Stair, v. 1. p. 90.

* * See Gilmour's report of this case, No 55. p. 2816.

1665. December 23.

BURNET against LEPERS.

If a husband get more with his wife than an ordinary and competent tocher, effeiring to his circumstances, he will be liable for his wife's debt, after dissolution of the marriage, *in quantum lucratus est*, and the *lucrum* will be considered to be the benefit he has gotten above an ordinary tocher.

Fol. Dic. v. 1. p. 391. Stair.

* * See this case, No 78. p. 5863.

1668. November 25.

PATRICK ANDREW against ROBERT CARSE.

PATRICK ANDREW having sold twelve pieces of wine to Margaret Henderson, who kept a tavern, after she was proclaimed to be married to Robert Carse flesher, a part of which wines was vended before the marriage, and a part thereof vended after the marriage, but the marriage dissolving within three or four months by the wife's death, the most part of the wine remained unsold at her death; the merchant pursued the wife for the price, and the husband for his interest, some days before she died; after her death, her husband vended no more of the wine, but caused the magistrates inventory the same, and delivered the keys to them. Patrick Andrew who sold the wine, doth now pursue Robert Carse the husband for the price of the wines; who *alleged* absolvitor, because there was no ground in law to make him liable for his umquhile wife's contract and obligement *ex empto*, he being only liable *jure mariti*; which being

No 82.

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No 84.

A husband, after his wife's death, was sued for the price of wines sold to his wife immediately before the marriage, upon the ground that the property fell to him by the marriage. The defence that the marriage was dissolved in a few months,