

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, effecting 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* absolutor, 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.

No 83.

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,

No 84.
and the wines
returned to
the wife's ex-
ecutors, was
sustained.
For such
part of the
wine only as
was consum-
ed during
the marriage,
the husband
was found
liable; but on
him lay the
onus probandi.

dissolved by her death, he is free, for he is neither heir nor executor to her. The pursuer *answered*, That the husband having allowed the wife to continue the vending of the wine, she was thereby *præposita negotiis mariti*, and thereby her meddling must be the husband's meddling, who must be liable for the whole price, especially seeing he never made offer of the remaining wine to the pursuer, though he knew his interest, and had pursued him for the price; so that the wines having perished, it must be attributed to his fault; and the merchant, who knew not the condition thereof, cannot lose the same. *2do*, The pursuer offered to prove that the defender put in his own nephew to be taverner, after he married the woman. *3tio*, The ground in law that the pursuer insists on against the husband is, *in quantum lucratus est*, by his intromission with the wine, and price thereof, and any thing that has been lost through his fault, is alike as he had been profiter in the whole. The defender *answered*, That he declined not to be liable, in so far as he was profited, *viz.* for the price of the wine vended during the marriage, which he was content to refer to the pursuer's probation, how much was vended then; but he could not be liable for what was vended before the marriage, though after the proclamation, much less for what remained unsold after the wife's death; neither was he in any fault by not offering the wine to the pursuer, nor might he lawfully do the same, because the marriage dissolving within year and day, the property of the whole wines returned to the wife's executors, and nearest of kin; and the husband had no interest therein, as he would have had if the marriage had continued year and day; neither had the merchant any right to the wines, (the property whereof was in the wife and her executors) but had only a personal obligation for the price; and therefore he could not deliver the wine, nor meddle therewith, without vitious intromission, so that he did the most exact diligence by inventorying, and delivering the keys to the Magistrates; so that there being ten pieces of wine then in the cellar, the defender could only be liable for so much of two pieces as the pursuer should prove sold during the marriage. The pursuer *answered*, That the defender having once intromitted and meddled with this parcel of wine, he is in so far *lucratus*, and he can no more sever some puncheons unspent from the rest, nor one part of a puncheon vended from the remainder; so that he can offer nothing back of the parcel, *re non integra*, nor can he allege that the whole ten pieces were of the pursuer's wine, because the pursuer offered to prove, that his deceased wife bought other wine from other persons at that time; and it were against law and reason, to put the merchant, who is a stranger, to prove what was vended during the marriage, and how much of the pursuer's wine remained after the marriage, for that was the defender's part to inquire, and not the pursuer's part, who is a stranger.

THE LORDS found the defender not liable for that part of the wine vended before the marriage, nor yet for what remained unspent after the wife's death, seeing he inventoried and abstained; but they found the husband obliged to prove both what was spent before the marriage, and what of this wine remained after

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.