

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