

an heritable and moveable estate belonging to her representatives which may satisfy her debts; in respect they found the husband's *jus mariti* was equivalent to a general assignation of the wife's moveables, which could not be quarrelled at the creditors instance, so long as there was a sufficient estate, either heritable or moveable, for payment of her debts; and found, that the disposition of the other moveables being upon death-bed, was but of the nature of a legacy, and could not prejudge the heir of his relief of the moveable debts; and ordained the King of Sweden's jewel to be restored back to the heir; but assoilzied Mr Francis from giving back the rest of the jewels, in respect they being paraphernalia, the Lady might dispose thereupon in favour of her husband; and found, that the same were not subject to the heir's relief, as other moveables.

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*Sir P. Home, MS. v. 1. No 467.*

1684. *January.* MARY CRAIG *against* GEORGE MONTEITH.

In a pursuit at the instance of a wife's executors against her husband for her paraphernalia, it was *alleged* for the defender, That the pursuers were cut off from any pretention to the paraphernalia, because the defunct had, in her contract of marriage, accepted of a jointure, in satisfaction of all that she or her executors could claim by her husband's death, except the household plenishing.

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Gold gifted to a wife before marriage, may be affected by her husband's creditors, but ought to be refunded by him to her executors.

*Answered,* The defence ought to be repelled, because the clause in the contract related only to the husband's estate, as is clear from the exception of household plenishing, but the paraphernalia are the wife's property.

THE LORDS sustained the answer. But there being some controversy, how far the wearing rings, watches, or jewels, by the wives of merchants that treaded in such things, might import paraphernalia, they remitted to some of their number to settle the parties.

1684. *March.*—Found, that *ornamenta morgnetica* were not revocable by husbands; that they had the privilege of paraphernalia, and were not affectable by the husband's debts; but found, that gold gifted to a wife, even before marriage, not being *ornamentum muliebre*, was liable to his debts, if affected by the diligence of creditors; but if extant at the wife's decease, should belong to her executors without division. Hence it may be inferred, that if such gold gifted be affected by the diligence of the husband's creditors, it ought to be refunded by him to the wife's executors.

*Fol. Dic. v. 1. p. 388. Harcarse, (CONTRACTS OF MARRIAGE.) No 363. & 364. p. 93.*

\* \* \* Sir P. Home reports the same case :

MARY CRAIG, executrix to Anna Craig her sister, pursues George Monteith merchant for delivery to her of her sister's cloaths, rings, and other paraphernalia.—*Alleged* for the defender, That Anna has renounced all right and interest she or her executors could crave of the moveables, in so far as by the contract of

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marriage betwixt her and the defender, she accepts of a liferent provision in satisfaction of all that she could claim by his decease, if he die before her, or that she, her heir, executors, or nearest of kin, could by her decease, if she die before him.—*Answered*, That the clause in the contract of marriage can only be understood of such moveables as fall under the communion of goods betwixt the husband and wife, but cannot be extended to the wife's wearing cloaths, or her paraphernalia, which do not fall under the communion of goods, nor can be affected with the husband's debts.—THE LORDS decerned against the defender for the wearing cloaths; but, before answer to the paraphernalia, ordained the pursuers to condescend what these paraphernalia were, and what the defunct brought with her, and what was given her by the defender.—And the pursuer having given in a condescendence of several diamond rings, and a watch, and bracelets of gold, with some small pieces of gold, amounting to the value L. 1000, that the defender did give to the pursuer's sister the time, and after her marriage, *alleged* for the defender, That she could not be obliged to deliver the particulars condescended upon as belonging to his wife as paraphernalia; for whatever may be pretended that noblemen and baron's wives may have such paraphernalia, yet these are not proper to merchants wives; for if that were sustained, then any goldsmith, watchmaker, or merchant's wife, that were in use to trade in such particulars, if she did once wear any rings, bracelets, or watches belonging to her husband, her executors might pretend right to the same as paraphernalia, and by that means pretend right to a great part of the husband's stock that traded in such things; and the bracelets did belong to the defender's first wife, and consequently her children have right to the same; and albeit he had given them to the pursuer's sister, his second wife, yet it was *donatio inter virum et uxorem*, and so was revocable; and coined gold cannot be understood to be a part of the wife's paraphernalia, but must return to the husband.—*Answered*, That merchants being in use to grant rings, bracelets, and watches to their wives, for their wearing and ornament, and tokens of gold, the same do also properly belong to them, and must be understood to be their paraphernalia, as well as if such things had been given to noblemen and baron's wives, seeing the law makes no distinction; and albeit goldsmiths, watchmakers, or merchants wives that use to trade in such particulars, should wear the same for some time, that would not make them to fall under their paraphernalia, in respect they were the subject of her husband's trade; but that cannot be alleged in this case, seeing the defender was not in use to trade with these particulars, as also he had given over all trading before he was married to the pursuer's sister; and albeit the bracelets had belonged to the defender's first wife, and that the children would have had right to the same, if they had not been given to the second wife, yet being given to her, and made use of by her, as her own, the first wife's children can have no right to the same, but they may have recourse against the father for the value thereof; and such gifts as these, by a husband to a wife, which are for her wearing and ornament, are not revocable by the husband, which is only competent in the case of donations of additional

provisions granted by a husband to his wife *stante matrimonio*, but not of the wife's paraphernalia, given to her by her husband; neither can the tokens of coined gold return to the husband, seeing they were gifted to the wife, that she might dispone on them at her pleasure, consequently must belong to her executors, as being a part of her paraphernalia.—THE LORDS repelled the defence in respect of the answer.

Thereafter the defender having craved allowance of his wife's funeral charges out of the forend of the said paraphernalia, in respect the executor is always liable to the funeral expences;—*answered*, That albeit ordinarily the executor is liable for the funeral charges, which is deducted off the hail head before there be any divisions, yet that does not hold in the case of the wife's wearing cloaths and her paraphernalia, seeing these do properly belong to herself; and the wife's funeral charges are not deducted out of those goods which properly belonged to herself, but only out of the hail goods that did fall under the communion during the standing of the marriage; and if the husband had no moveables, but only an heritable estate, he would be liable for the wife's funeral charges, albeit the wife had moveable lands bearing annualrent, which are heritable *quoad maritum*, much less can the wife's funeral charges be deducted out of the wife's wearing cloaths and paraphernalia, which properly belonged to herself, and did fall not under the communion of goods.

*Sir P. Home, MS. v. 1. No 559.*

*The rest of this case is not reported.*

1695. January 16.

DICKS against Mr ANDREW MASSIE.

MERSINGTON reported Dicks and Dr Crawford *contra* Mr Andrew Massie, for return of the 8000 merks of tocher, conform to a clause in the contract.—*Alleged*, He must have deduction of her funeral charges; for, though it be *officium humanitatis*, and a debt on a husband to bury his wife, on his own expences, where she hath no separate estate wherewith to do it; yet where her tocher returns to her nearest of kin, they ought to bear it.—*Answered*, He liferents it; and also had a jointure of L. 1000 per annum by her, which came by her first husband, and so he is *lucratus*.—*Replied*, All that was spent *ad sustinenda onera matrimonii*; and what if one should marry an heiress, should not her own estate bury her?—THE LORDS considered this was not a debt due *stante matrimonio*, but existed after the dissolution; and the executors were *in lucro captando*; therefore the funerals ought to be deducted out of the first end of the 8000 merks which return.—Yet every part of the husband's estate falling to a wife's nearest of kin, as the half or third of his moveables, would not be subject to her funeral expences. See 3d Feb. 1681, Gordon against Inglis, Div. 3. Sec. 6. *b. t.* Then they insisted on repetition of the paraphernalia; and the question arose, what fell under that name? THE LORDS thought her apparel and ornaments,

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What articles are accounted paraphernalia. See Synopsis.