No 325.

it to Orbistoun, in whose hands it was. To the third, it was *answered*, that by the first contract of marriage, the defunct still continued fiar of his own fortune; and what he thereby got in tocher was still obnoxious to his lawful debts; as has been often found. As Creditors of Marjoribanks against Marjoribanks, *voce* PROVISION TO HEIRS AND CHILDREN. So that Elizabeth Blair, coming in but as an heir of a marriage, could not be preferred to the relict, who is a just and onerous creditor for her own portion, provisions to a wife being in the strictest sense onerous, but not so as to children of a marriage. And it is certain, that notwithstanding any provision in a prior contract of marriage, the husband still remains *dominus*, may contract debts, or enter into any onerous contract, which may eventually render the provisions ineffectual; and is of the nature of a tacit revocation, the prior children having only a destination of succession; and so can draw nothing till their father's debts and onerous deeds be satisfied.

THE LORDS found, that any deed in the relict's favour, is imputable in payment of the debt she adjudged for, unless she instruct a separate onerous cause; and repelled the allegeance against the adjudication, she instructing the tocher was uplifted by her husband. And found the first contract of marriage, though after the marriage, was not revocable, but that the husband being fiar, might do rational deeds; and that the liferent provision in the second contract of marriage, was a rational deed.

For Hamilton, *Boswel*. Alt. *Alexander*. Clerk, *Durie*.

Bruce, v. 1. No. 4. p. 5.

1716. *July* 31. JOHN STIRLING *against* MARY CRAWFURD.

No 326.
A general disposition betwixt a wife and her husband during the marriage, no contract having preceded, is not *donatio inter virum et uxorem*, even *quoad excessum*.

THE deceased Bethia Crawfurd, Lady Darleith, having been married to the said John Stirling, and no contract of marriage, she nevertheless having a jointure by her first husband, and he a post bearing some proportion thereto, they made a post-nuptial matrimonial settlement, whereby each of them made a testament, and thereafter mutual dispositions for the more security, whereby they dispone, each to the other who should survive, their whole goods and means that should belong to the predeceasing at the time of such decease, so that the longest liver was to bruik all; and, in the husband's disposition, mention is made of his cloaths, watch, sword, &c. as well as plenishing, goods, and sums; the wife also, in her's, expressly dispones the paraphernalia; and both dispositions are of the same date, and before the same witnesses: The wife doth nevertheless thereafter revoke, and grants disposition of the said subject in favour of the said Mary Crawford, her sister; and after the wife's decease, Stirling the husband, pursues the sister for certain sums

No 326. and goods which pertained to his wife, and were in the said defender's custody; and, beside the above titles, he libels his legal assignation *jure mariti*.

In this debate, *first*, with respect to the *paraphernalia*, it was *alleged* for the pursuer, That there can be no ground for distinguishing *paraphernalia* from other goods, except when they are not (as here they are), expressly enumerated in the disposition; and therefore, in such a case, the disposition of them is fully as irrevocable as of the others, especially seeing this was no donation, but a rational matrimonial settlement, onerous and therefore irrevocable. To enforce this, he *alleged*, That the defunct could have nothing else to dispone to him, except these *paraphernalia*, the rest being his *jure mariti*; whereas he had disponed in her favour his all, whereof nevertheless she could only have claimed the half, *jure relictæ*: Next, he *alleged*, That if she had, with his consent, for an onerous cause, assigned her *paraphernalia*; or if, after his decease, she had disponed them to any third party, such an assignation had been irrevocable: Why then shall an assignation of them to him, in a reciprocal marriage-settlement, be revocable?

Answered for the defender; 1*mo*, That, in the general, postnuptial agreements are much more suspect than those made fairly before the marriage, these after grants proceeding *ex reverentia maritali*; and therefore, wherever there is any extraordinary and exorbitant clause in them (as here surely there is, it being most unusual to dispone *paraphernalia*), it may justly be revoked; 2*do*, These postnuptial grants can only be supported, in so far as the subjects are disponed *nomine dotis*; but *paraphernalia* are not a subject that can be so given, it being a contradiction *in adjecto*; for *paraphernalia* or *parapherna*, are those things which belong to the wife *præter dotem*, as the Greek words, whence it is derived, do import; and, beside the sense of the words, the use also for which tochers are given clears this abundantly, viz. *ad sustinenda onera matrimonii*; to which use the *paraphernalia* are not designed, but are things that afford no use except putting them to sale. 3*tio*, Suppose such things could be disposed of in tocher, yet the abulziements of the husband's body, his sword, watch, &c. can be no equivalent to the wife's *paraphernalia*; and therefore, notwithstanding that, the disponing these by the wife is a donation betwixt man and wife; and thus the Lord Stair observes, Tit. Conjug. Oblig. § 22. That though a husband have no communion in the abulziement and ornaments of his wife, which cannot be affected for his debt, yet she hath her share of the abulziements of the husband, which fall in executry. 4*to*, As to his legal assignation *jure mariti*, *answered*, That the argument is the quite contrary; because, since the law by marriage would not have given the husband the *paraphernalia*, the conveyance of them by disposition being beyond what he would have right by law, was a plain donation. 5*to*, As to the comparison betwixt disponing to a third party and to the husband; *answered*, That no doubt the wife may dispone to the husband as well as to a creditor, but the disposition to the husband is still revocable, whereas the other's right is onerous.

No 326.

Next, as to other things (besides the *paraphernalia*) disponed to the husband and revoked, it was *alleged* for the defender, That there being bonds bearing annualrent, to which the husband had no other right but by the said disposition; besides the half of the husband's moveables, which truly were the moveables belonging to the wife, as being brought by her to her husband during the marriage; from these, and also from the bonds bearing annualrent, he had no other pretence to exclude the nearest of kin, but the foresaid gratuitous disposition, which is now revoked, and which the defenders alleged could not exclude them; because that right was of its nature revocable, as being a donation betwixt man and wife, and in its nature a testamentary deed.

Answered for the pursuer; That the deed behoved to be irrevocable, in respect there being no contract previous to the marriage betwixt the parties, the first deed after marriage must be understood to come in place of a contract, and irrevocable, and more especially in this case, where the settlement was equal, viz. a total provision to the wife of the husband's effects, in case of her surviving him, which, though not in the same writ wherein she dispones to him, yet is done by another of the same date.

Replied for the defender, That the dispositions being posterior to the testaments, it clearly appears that the parties intentions were, that, as to the disposal of what belonged to each of them, it should be alterable during their life, otherwise it is not to be thought that the parties would have conceived the securities in a testamentary strain; and as the testaments were the first settlement, they must be considered as the rule; and the disposition, which is posterior, making the right irrevocable, is *in tantum* a donation; for this is to be considered in the same way as if, in one and the same deed, a person had made a testament, and a general assignation *mortis causa*; which deed would have been wholly influenced by the testament, and so made revocable, though the disposition had not bore to be revocable; besides, that though the assignation could be by its nature interpreted irrevocable, yet it was certainly still revocable *quoad excessum*.

"THE LORDS found the disposition to the husband irrevocable not only *quoad* the wife's moveables, but also with respect to the *paraphernalia*."

Act. *Archibald Hamilton*. Alt. *Boswall*. Clerk, *Robertson*.

Fol. Dic. v. 1. *p.* 410. *Bruce, v.* 2. *No* 31. *p.* 41.

1750. *January* 3. M'PHERSONS *against* GRAHAMS.

No 327. Renunciation of the *jus mariti* in a postnuptial contract, not revocable as a donation.

ANN COLQUHOUN, widow of Duncan Graham, second son to Graham of Duchray, intermarried with Alexander M'Pherson, without any contract of marriage; and he having nothing to provide her in, did, upon that narrative, by a postnuptial deed, renounce in her favour, and in favour of the children of the marriage, his *jus mariti*, whereby he was entitled to the liferent of the annual-