

No 48.

Answered for the defender ; That, at this way of arguing, the *paraphernalia* may be made very large ; and if wives be allowed to make moveables their own by laying clothes within drawers, cabinets, and chests, &c. a good part of the moveables of the husbands will in progress of time be made *paraphernalia*.

THE LORDS found, that a chest of drawers, appropriated for keeping a wife's clothes, is a part of the *paraphernalia*.

Act. *Bosewall.*Alt. *Hay.*Clerk, *Gibson.**Bruce, v. 2. No 34. p. 45.*

S E C T. IX.

Effect of *Jus Mariti*.

No 49.

By payment to the husband of a sum destined for ornaments to the wife, any claim by her executors is excluded.

1667. February 2. EXECUTORS of Lady PILTON *against* HAY of Balhousie.

MR FRANCIS HAY granted a bond to his wife's sister, the Lady Pilton, bearing, that for good considerations he obliged him to pay her 1000 merks yearly during her life, with this provision, that it should be leisome to her to employ the same for the abuliaments and ornaments of her body, or any other use she pleased ; and without any right and interest in her husband thereto *jure mariti*. Her executors do now pursue Balhousie, as heir, for payment, who *alleged* absolutor, because he had paid to Pilton her husband ; and albeit it was provided, that it might be leisome to his wife to dispose upon the sum, yet she had not done it, but the husband had provided her with all abuliaments necessary. It was *answered*, That the husband's *jus mariti* was excluded by Mr Francis himself ; and whatever might be alleged of what belongs to a wife *proprio jure*, that nothing more can remain with her but her necessary aliment, and all the rest being in the person of the wife, doth return to the husband *jure mariti*, albeit the *jus mariti* were renounced in her favours ; yet the right here is freely given by a third party, excluding the husband ; which third party might gift with what provisions he pleased, and his gift returns to himself, unless these provisions be observed, and this must be thought to be a gift, seeing it bears no cause onerous. It was *answered*, That it bears good considerations, and expresses not to be a gift, or done for love and favour. *2dly*, If the gifter were opposing the husband, or his creditors right, and making use of that provision, that his gift might return, seeing the provision was not kept, it might have weight ; but here the donatar's heir makes not use of the provision, but concurrerth with the husband and payeth him.

THE LORDS found the payment made by the donatar, or his heir, to the husband, relevant to exclude the executors of the wife.

Stair, v. 1. p. 434.

* * * Newbyth reports the same case :

UMQUHILE Mr Francis Hay of Balhousie, by his bond granted to Elspeth Halyburton, spouse for the time to umquhile Peter Rollo of Pilton, to pay to the said Elspeth yearly, during her lifetime, the sum of 1000 merks, at Whitsunday and Martinmas proportionally ; and Christian Rollo being executrix decerned to the said Elspeth Halyburton her mother, and having licence to pursue, and having assigned the said bond to George Cockburn, they pursue George Hay, now of Balhousie, as representing his father, for payment of the said sum alleged resting owing for the year preceding the said Elspeth Halyburton's decease. It was *alleged* for the defender, That he ought to be assoilzied, because the defender's father made payment of the said yearly duty to the deceased Peter Rollo of Pilton, who had right thereto *jure mariti*, and upon payment has recovered Peter Rollo's discharge. To which it was *replied* for the pursuer, That the allegiance ought to be repelled, in respect of the bond, which is not simply conceived, in which case the husband could have right to the sum *jure mariti*, but it is tailzied with a provision that it should be leisome to Elspeth Halyburton to use and dispose upon the said sum for the abuliaments and ornaments of her body, or otherways, at her pleasure, without any right to be acclaimed thereto by her husband, or his heirs, or executors, and creditors. So the husband, and his heirs and creditors, being secluded from the said sum by the bond, the husband could pretend no right thereto *jure mariti*, in respect of the foresaid qualification in the bond secluding him as said is. To which it was *duplied*, That albeit the bond be so qualified, that neither the husband nor his creditors could claim right to the same *stante matrimonio*, yet the bond being granted to the wife during the marriage, and the provision in the bond bearing, that it should be leisome to her to dispone upon the said sums yearly, to the effect foresaid, yet the wife never having made use of that power and liberty conceived in her favours in the bond, but the sum acclaimed, for the years libelled, being all resting owing unpaid the time of her decease, and the husband having furnished to her all abuliaments, and other necessaries, the same, after decease of the wife, fell to the husband *jure mariti*, and so had power to uplift and discharge the same, the husband bearing the whole of the burden, and furnishing of all necessaries for the time, the husband's *jus mariti* could not be taken from him by any private paction or provision betwixt the debtor and his wife, without consent of the husband ; but *eo ipso*, that the bond was made to her, either by way of donation, or for an onerous cause *stante matrimonio*, that belonged to the husband *jure mariti*, and albeit, during the marriage, he and his creditors might have been secluded, because it was a part of her aliment, and was to have diminished the burden of the marriage, and the marriage having been dissolved by her death, the same fell to her husband, who *de facto* did aliment her, so that none other can claim right to the said sums : Likeas, by the bond itself, it is clear, that the cause of granting the bond was for some

No 49. of the wife's estate being in Mr Francis's hand, which would belong to the husband *jure mariti*, in so far as, Mr Francis, by the bond, has retention of 200 merks yearly, of the said 1000 merks yearly, addebted by Peter Rollo to James Butler, and assigned by him to the said Mr Francis.—THE LORDS sustained the defences proponed for George Hay the defender; and found, that the husband *jure mariti* had right to the yearly annuity of 1000 merks, notwithstanding of the seclusion of him by the provision of the bond.

Newbyth, MS. p. 89.

No 50. 1667. February 9.

A husband may renounce his *jus mariti*, in so far as it relates to his interest in his wife's moveables; but he cannot renounce it in so far as it relates to his administration and government of the family.

Mr ALEXANDER FOULIS and LORD COLLINGTON *against* TENANTS of INNERTYLE and LADY COLLINGTON.

SIR JAMES FOULIS of Collington, being in treaty of marriage with Dame Margaret Erskine, Lady Tarbet, she did dispone 36 chalders of victual, of her jointure in the north, to a confident person, that she might make use thereof, for the benefit of her children; and disponed 36 chalders of her liferent of the lands of Innertyle, to Adam Cunninghame of Woodhall, who transferred the same to Mr Alexander Foulis of Ratho, who granted a back-bond, bearing, that his name was made use of for the use and behoof of Collington and his Lady, and that to this effect, that the profit of the liferent should be applied to the aliment of their families jointly; and therefore obliged himself to dispone in their favours, and *de presenti* did dispone. The next day after this disposition, there is a contract of marriage betwixt Collington and the Lady, wherein there is this clause, that Collington renounces his *jus mariti* to the lady's liferent, or any other right he might have thereto by the subsequent marriage, and takes his hazard for what he may have any other way. Mr Alexander pursues the tenants upon his disposition. Compearance is made for the Lady, who *alleges* he hath no interest, because he is denuded by the back-bond. Compearance is made for Collington, who *declared* he concurred with Ratho, and consented he should have the mails and duties, to the effect contained in the back-bond, and that he would not make further use of the re-disposition, contained therein. It was *answered* for the Lady, That Collington's concurrence could not sustain this process, because Ratho was already *de presenti* denuded in favours of Collington and her; likeas Collington was denuded by his contract of marriage whereby he renounces his *jus mariti*, and all other right he can have to the liferent lands, in favours of the lady, and so renounces the clause of the back-bond, in so far as it is in his favours. It was *answered*, That the contract of marriage could not derogate to the back-bond, unless the back-bond had been *per expressum* discharged or renounced therein, because albeit the contract of marriage be a day posterior to the back-bond, yet both are parts of one treaty of marriage, and so in the same condition, as if they were in one writ, so that a posterior clause in general terms cannot take away a prior special clause of this moment; yea though it were in a contract less favourable than a contract of marriage, which is *uberrimæ fidei*, general clauses are not extended