

void, the marriage having dissolved within year and day without issue, and that the assignation by George Jack was therefore ineffectual and assoilzied.'

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But, upon the 7th November 1740, on advising petition and answers, they found, 'That the obligation, whereby James Jack the father was obliged to pay George Jack the son 2000 marks in his contract of marriage with Katharine Hood the pursuer, not being conceived in favour of the wife, or issue of the marriage, did not become void by the marriage dissolving within year and day.'

THE LORDS, who were for adhering to the former interlocutor, put their opinion upon this, That the father became bound to pay the said sum to the son *intuitu matrimonii*; and on the other part, the said James Jack obliges, &c. that it was therefore immaterial, whether he became bound directly to the wife and issue, or to his son to enable him to become bound to them, for still it was *intuitu matrimonii*.

The authority of this decision will be the less, when it is remembered, that it proceeded upon the narrowest majority, and when four of the Lords were absent.

Kilkerran, (HUSBAND AND WIFE.) No 5. p. 257.

S E C T. III.

Marriage presents. Expenses laid out during Marriage.

1679. January 14.

WAUGH against JAMIESON.

SMITH and Waugh having been married together, shortly after the marriage, some gifts were given, as pieces of plate and the like, which were delivered to the wife; but the marriage dissolving within year and day, the question arose, to whom the goods did belong? It was *alleged* they did belong to the wife, because they were delivered to her, and the husband had no right thereto, but *jure mariti*, which failing by the dissolution of the marriage, these gifts remained with the wife, at least such gifts as were given by the wife's friends, behoved to belong to her; for seeing the donatars being partly friends to the husband, and partly to the wife, did not express whether they gifted to the husband or to the wife, but simply delivered the gifts to the wife, it must be presumed, that the wife's friends did gift to the wife, and the husband's friends to the husband; and accordingly the marriage being dissolved, the gifts of the husband's friends would belong to him, and the wife's to her; which the LORDS, upon the first representation, sustained. But it was *answered*, That all dispositions to

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Marriage dissolving within year and day, some pieces of plate and other things gifted by relations immediately after the marriage delivered to the wife, were found to divide equally betwixt the husband and wife.

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man and wife, resolving in a fee to the man, and a liferent to the wife, seeing these gifts were given after the marriage, and for the use of a family, they were not thereby in the wife's possession, though in her custody, but in the man's possession, who thereby became proprietor, and by the dissolution of the marriage, these gifts continued with him as proprietor thereof; at least the gifts being bestowed after the marriage, ought to divide equally betwixt the man and the wife, because they were then in a conjugal society, and the gifts must be presumed given to them as in that society; so that by the dissolution of the conjugal society, the husband and wife had equal share; for the dissolution of the marriage doth restore either party to what was theirs before the marriage; but as to what was gifted to them during the marriage, it was possessed by them *in communione bonorum*, as all their moveables would have been, if the marriage had continued year and day; and therefore, by the dissolution of the conjugal society, though within year and day, what was gifted during the marriage, without expressing on whose account, must be understood to be gifted to both the spouses, and to divide equally by the dissolution of the marriage.

THE LORDS found, that these gifts did equally divide betwixt man and wife, unless they were *jocalia* proper for the wife, being gifted after the marriage, and delivered to the wife, without expressing on whose account.

Fol. Dic. v. 1. p. 414. Stair, v. 2. p. 670.

No 385.

In an action for repetition of tocher, the wife having died within the year, the Lords allowed the husband to deduct debts due by the defunct before the marriage, and paid by him; but refused deduction of aliment and other expenses bestowed during the marriage.

1681. *February 23.*GORDON *against* INGLIS.

A REPETITION of a tocher, because the marriage dissolved within year and day without bairns. The husband craved deduction of her marriage clothes and feast, and for her entertainment during the standing of the marriage, and the expenses of her funerals, seeing it was usual for women and their friends to furnish their own marriage clothes and feast, and the rest would have affected her though she had died without marriage, and why should he be a loser. THE LORDS refused to deduct any expenses, except for the bridal clothes, the price whereof was a debt preceding the marriage, and for the funeral charges.

Fol. Dic. v. 1. p. 414. Fountainball, MS.

* * See Stair's report of this case, No 126. p. 5924.

1710. *November 14.*

ROBERT DEWAR, eldest SON to GEORGE DEWAR, Wright in Edinburgh,
against MARGARET WRIGHT, his Father's Relict.

No 386.

IN a process at the instance of Robert Dewar, against Margaret Wright, his father's relict, the LORDS refused to ordain her to restore to the pursuer a silver