1683. *February* 27. EARL of LEVEN *against* MONTGOMERY.

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A WOMAN gifting away her paraphernalia upon deathbed, and the same being quarrelled by her heir, as in his prejudice, by laying the burden of the moveable debts upon him, the LORDS sustained the donation, seeing paraphernalia are not subject to the heir's relief of moveable debts as other moveables are.

Fol. Dic. v. 1. *p.* 388. *P. Falconer.*

*** See this case, No 41. p. 3217.

*** Fountainhall reports the same case:

1683. *January* 17.—IN the debate between the Earl of Leven, second son to my Lord Melvill, and Mr Francis Montgomery, for reducing the contract matrimonial between Mr Francis and the late Countess of Leven, to whom the Earl is now heir, upon minority and lesion, it containing most exorbitant provisions, of 10,000 merks of a free annuity during his lifetime, out of a crazy and burdened estate, though his own patrimony of 50,000 merks returns back to him; so that he brought nothing in to defray debt, or to compense so vast a donation. 2*do*, It was notourly known to physicians and others, that the poor young lady, by infirmities, and universal distempers, was altogether improper and incapable of marriage, or conception of children, and was compelled and forced thereto by her uncle the Duke of Rothes, then Chancellor.——What things do hinder or incapacitate a woman from conceiving, or make her impotent, see *Paul. Zach. Quæst. medico-legal. tom.* 1. *p.* 142, *&c.* They cited in behalf of the Earl, that she being minor, and wronged by her curators, he, as heir, might reduce the contract, *l.* 9. § 1. *et l.* 48. *D. De minor. et l.* 44. *D. De jur. dotium.* And for Mr Francis were cited, *l.* 11. § 3, 4, 5. *l.* 24. § 1. *et l.* 44. *D. De minor. Authentic. Cod. Unde vir et uxor. Vinnius, ad* § 2. *Instit. De curator.* and *Duarenus, qui tria ponit*, to infer restitution: 1*mo*, *Minorem esse*, 2*do*, *Læsum.* 3*tio*, *Lubrico ætatis captum esse.* See also 4th July 1632, Davidson against Hamilton, *voce* MINOR.

In this debate it was granted, that tutors and curators could not transact their minors concerns, where there was not *lis pendens*, or a seen hazard, and that in such dubious cases they were allowed; and it would be chargeable on them as negligence, if they did it not; and that the Viscount of Oxenford's curators transacted with Lauderdale, and gave him a composition to redeem the plea anent the teinds of Cousland; and Sir James Anstruther's son's tutors agreeing with the Clerk-register in December last, anent the nature of his gift of being clerk to the bills, and if he might substitute, were rational and allowable transactions in law.—But what tutors and curators do, must be rational, necessary,

No 43. and profitable deeds to the minor.——That tutors *nonnunquam possunt transigere* is clear from the Doctors; and it were hard to leave a husband *sordescere in egestate*, after the dissolution of his marriage with a rich heretrix, with whom he expected the *jus curialitatis*, but there being no children procreated betwixt them heard brayant and giving *signum vitale*, that then he should have nothing. But the King's Advocate affirmed our law had provided him nothing in such a case; and if he should crave an aliment out of her estate after her death, it would not be granted, because for his encouragement and recompense, he had the present possession during her life, and he had his hope, hazard, and expectation of the curiality. 'THE LORDS, on the 18th January, before answer, ordained both parties to adduce, before the Lord Drumcairn, a mutual probation what was the condition and rental of the estate of Leven at the time of the late Countess's marriage to Mr Francis in 1674, and what were the debts and burdens then affecting it, to the intent they might consider if her curators had committed any devastation, dilapidation, or dissipation, by granting irrational, high, and exorbitant unequal provisions, in favours of Mr Francis, beyond what the estate could bear; that they might modify, lessen, or rectify the matrimonial provisions, if they saw cause.' For, though our law does not require a precise equality *inter dotem et donationem propter nuptias*, as the Roman law did; yet if there be any disproportion amounting to a lesion *in re*, our law both has, and doth repair, such debording advantages taken of minors in their contracts of marriage.

1683. *February* 21.—Between the Earl of Leven and Mr Francis Montgomery, who craved all the bygone rents and moveables of the Countess of Leven, as falling under his *jus mariti*, and that without being liable for the debt which was not established against him, nor the security renewed during the standing of the marriage, and therefore ought to carry away these whole moveables free of any debt heritable or moveable whatsoever, the *jus mariti* being a legal assignation, and making him *ipso momento nuptiarum dominus omnium mobilium uxoris*; that *quoad* these he had not a naked administration and curatory, but *plenum et absolutum dominium* to dispose *pro libito, etiam prodigere et dissipare*; an uncontroulable and unaccountable power, which seems justly to be given him by law, 1*mo*, *Ad sustinenda onera matrimonii*; 2*do*, In compensation of the risk and hazard he runs in being made liable for all her debts *pro interesse*, if they be made real or personal against him *stante matrimonio*, by poinding, apprising, denunciation to the horn, or by an innovated renewed security; but if it come not to ultimate diligence before the dissolution of the marriage, the husband is absolutely free, as appears from many decisions. *Vid.* 23d January 1678, Wilkie, Div. 2. Sec. 2. *h. t.*——And further it was *argued*, That the *jus mariti* is wronguously, and by a mistake, compared to a *societas* or *communio bonorum*; for if that analogy were exact and just, then the husband could not, to the prejudice of the wife, give any of the goods away during the

standing of the society, without the other copartner's consent; which yet he may do; and therefore Bertrandus Argentreus *ad consuetud. Britan.* tells us this *communio consuetudinaria* (which we have borrowed from the French lawyers) is only *communio usus et fruitionis, et non dominii*; and by the parallel of the other rights resulting from the dissolution of the marriage, viz. the terce and courtesy, as they are free from paying debts, so ought this interest of the *jus mariti* to be; and it is no argument that the *jus relictæ* is only considered after the deduction of debts, *ergo* the *jus mariti* should be the same, because *quod obtinet in uno correspectivorum tenere debet et in altero relato*, as if the brocard *id tantum nostrum est quod deducto ære alieno superest* held here. For was there ever a testament in Scotland, where allowance was either sought or granted by the commissaries, out of the inventory of the free gear, of the debts owing by the wife, but only of the husband's debts? No 43.

On the other hand, it was *alleged* for the Earl of Leven; That Mr Francis's *jus mariti* stood still affected with his Lady's moveable debts, which, by the act of Parl. 1503, must be paid *primo loco* out of the executry, ere the heir can be reached; at least the heir has his relief *quoad* these debts: That the husband's power is but a *curatela*, and the division at the dissolution of the society must be with respect to debts, as *Gudelinus de jure noviss. lib.* 1. *cap.* 7. and all are clear, that it is *omnium mobilium et æris alieni communio*, else *jus creditoris sine facto suo ab eo auferri posset* by her marriage; and by the sudden dissolution of it by her death after a year's standing, ere the creditors could do diligence, *contra leg.* 11. *D. De regulis juris*; and that the LORDS, on the 1st of February 1662, Cunningham and Dalmahoy, Div. 2. Sec. 3. *h. t.* found the wife's debt exhausted, and absorbed the *jus mariti*; and, in 1675, Thin and Masterton, *voce* PRIVILIGED DEBT, a disposition *omnium bonorum* was found fraudulent in prejudice of the wife's third, and her creditors; *ergo*, the *jus mariti* is not a title whereon to make absolute and gratuitous dispositions at his pleasure; and Abraham a Vesel, in his Tractat. *de societati conjugali*, is of the same mind. Then for the jewels it was *alleged* by Leven, They fell not under the *jus mariti*, but that each of them being a separate species or kind, they fell as heirship to him as heir. 2*do*, For the great jewel, called the jewel of the family, gifted to Alexander Lesly, first Earl of Leven, when a General in Germany, by Gustavus Adolphus King of Sweden, it was not only heirship, but by his testament he had prohibited to alienate it *extra familiam*, but to remain as a jewel of the house. *Answered* for Mr Francis, That in all the rolls of the commissariots of heirship moveable goods, none of them mentioned jewels; and the reason was this, because the relict got them always as her *jocalia* and *paraphernalia*. 2*do*, This is but a *nudum præceptum de non alienando*, which does not impede transmission, without there were a penalty, or an irritant clause in case of contravention adjected, which is not here. This subtilty, which I am sure Earl Alexander never dreamed of, is founded in l. 38. § 4. and l. 39. *D. De legatis* 3.—This great cause was advised on the 27th February 1683. And the LORDS found, that the contract of mar-

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riage between Mr Francis and his Lady could not be quarrelled on that pretence, that the Lady was then minor, and her curators had transacted for the hazard of the courtesy, and given him, for that uncertainty, 7000 merks by year out of the estate, besides the annualrent of his own portion, making in all 10,000 merks *per annum* during his lifetime; and found the said provision not exorbitant; reserving action to the Earl, as the Lady's heir, against the curators *pro damno et interesse*, if they have malversed, with their defences, as accords of law.——But in effect the Lords found the curators' transaction no malversation; and found her bond for L. 10,000 Scots could not affect the heir's estate, Mr Francis getting the plenishing bought therewith; and found the whole arrears due by the tenants, the time of Mr Francis's marriage, fell under his *jus mariti*; and that he has right to them, and all the moveables *jure mariti*, without being liable to the debt, except *subsidiarie et secundo loco per remedium extraordinarium*, the heirs and executors of the late Countess his Lady being first discussed; and if it could not be so recovered from them, then Mr Francis's *jus mariti* would be liable to the creditors in the next place: As also found the disposition made by her on death-bed could not prejudge the relief due to the heir out of the defunct's executry, (though relief is a personal obligement,) even though it was confirmed by oath, which oath being on death-bed, could only bind herself, but not her heir; and, last of all, found the Crown of Sweden's jewel unalienable; but found all the rest of the jewels *bona parapherna*, and so disposable by the Lady; and that he had not lost his liferent provision by not changing his name, and assuming the name and arms of Lesly, that irritant clause in Leven's tailzie not extending to liferenters, but to fiars, viz. his children with the Lady, if he had had any.——Leven and his father *iniqua* at least *multa petebant, ut aliquid æquum auferrent.* For it had been more equal in them only to have craved a rectification and mitigation, and not a total reduction and annulment of the provision of the contract matrimonial. But the Lords abated nothing of it. Mr Francis declined Collinton, on the act of Parliament 1681, cap. 13. against uncles in affinity to be judges, as well as in consanguinity; for my Lord Melvill's mother was the present Lady Collinton's sister, and so he is husband to Leven's grand-aunt But Tarbet, clerk-register sat, because he is only cousin-german. The words of this interlocutor, as it was dictated to the clerk, were: 'THE LORDS find, that the great jewel gifted by the King of Sweden must belong to the family, and that this jewel is the heirship jewel; and that the rest of the jewels are not heirship moveables; and that the Countess might dispose of these jewels, as being *paraphernalia* on death-bed, in prejudice of the heir's relief against these jewels: And find, that the heir cannot be prejudged of his relief, by the discharge and disposition given by her on death bed; and that the Countess her oath ratifying the same, is personal, and cannot prejudge the Earl of Leven her heir of his relief against the same: And find, that the *jus mariti* is not burdenable with the wife's debts, but only *subsidiarie* as a *remedium extraordinarium*, after discussion of the wife's

heritable and moveable estate, introduced in favours of creditors, that they may not be losers: And find, that Mr Francis Montgomery must have the moveables purchased with the L. 10,000 not to be accounted in the executry; and that the Earl of Leven ought to be free of the L. 10,000 appointed and allowed by the said contract, for buying of moveables and furniture: And find, that the Countess, albeit a minor, might give a competent provision to her husband for his liferent use, and might transact the courtesy: And also find the provision in favours of Mr Francis, in the contract of marriage, was not exorbitant; and therefore sustained the same. See TAILZIE. No 43.

Fountainhall, v. 1. *p.* 206. & 220.

*** Harcarse reports the same case:

1683. *March.*—By contract betwixt the Countess of Leven, heretrix, and Mr Francis Montgomery, it was provided, among other things, That Mr Francis should be restricted to the barony of Inchleslie during his life, the portion of 50,000 merks, brought by him to the family, should return, in case of a dissolution of the marriage without children, he paying in the annualrent thereof to the estate during his life, and that the Countess should furnish L. 10,000 for the buying of plenishing; besides these provisions by way of contract, he had right *jure mariti* to the rests of two or three years lying in the tenants' hands; and the Countess, on death bed, disponed to him her share of plenishing, goods and gear, and others falling to the heirs by her decease, and ratified the said disposition, together with the contract, judicially and upon oath at the same time.

Of this contract reduction was raised upon minority and lesion, in so far as the provisions contained in the contract were exorbitant, considering the great advantages he had by the *jus mariti*, and the great burden upon the estate. 2*do*, The curators were *in dolo* to give way to the marriage, seeing the Lady was a valetudinary and sickly woman. 3*tio*, They were *in dolo* to grant a certain settlement of lands in lieu of the contingent yea scarcely possible casualty of courtesy, it being improbable that the Lady would have any children, in respect of some natural defects; and were such a power indulged to curators, to transact upon doubtful events, they might easily ruin their minors. 4*to*, The disposition on death-bed cannot prejudge the heir, as to his relief of moveable debts, and is as much contrary to the law of death-bed, as if the defunct had granted bonds *in lecto* to affect his heritage; nor can the oath and *authent. sacramenta puberum* hinder the defunct's heir to quarrel the obligements in the contract *inter vivos*, the oath being no tie upon heirs, but only a personal bond upon the defunct's conscience not to alter; nor yet can it bind the heir more, as to the death-bed deed against a public law for securing of heritage, than if the defunct had *in lecto ægritudinis* disponed lands, and sworn not to revoke the deed. 5*to*, The heir has heirship out of each sort of the jewels, which could

No 43. not be disponed on death bed. 6*to*, The *jus mariti* cannot defend against the wife's creditors, *in quantum* the husband is *locupletior factus*, especially *quoad* the unuplifted rents; and in Cunningham *contra* Dalmahoy, Div. 2. Sec. 3. *h. t.*, a husband was found liable to his deceased wife's debts *in quantum lucratus*, though diligence had not been done against the husband during the marriage; and, as the wife's *jus relictæ* is reckoned *deductis mariti debitis*, so the husband's *jus mariti* should be with deduction of her debts.

It was *alleged* for the defender; That marriage being onerous, and seeing the minor might have solemnized it without consent of her curators, the legal provisions of *jus mariti* and courtesy cannot be called exorbitant; and albeit, in the present case, there may seem to be some circumstances disadvantageous to the Lady, yet, in general, the legal provisions in favours of husbands are but rational, especially in relation to heiresses; wives' legal provision of terces and thirds being great privileges, and the husband being made liable to all his wife's debts, though never so great, and though he had not a sixpence with her, if established against her during the marriage; and law considers the interest of husbands and wives in general; and though lesion may be sometimes considered with respect to the wife's creditors *ab ante*, it can never be considered with respect to her, her heirs, or executors, in respect of whom the marriage is onerous, though it were for a hundred million. 2*do*, Women, though unfit to bear children, may marry without consent of their curators; and so it was to no purpose for the curators to have opposed the marriage. 3*tio*, Curators may transact rationally, as in this case, though eventually the transaction prove prejudicial. 4*to*, The disponing of heritable rights *in lecto*, whereby executors might be prejudged of their relief of the heritable debts, hath not been quarrelled; so neither, *e contra*, is the death-bed disposition of moveable rights quarrellable, upon pretence that the heir cannot be prejudged of his relief of moveable debts; and the law of death-bed respects only heritage, and not the alienation of moveables, which, by the common opinion of lawyers, the heir cannot revoke, and so *contristari animam defuncti*. 5*to*, All jewels, though of different figures, *viz.* rings, ear-rings, pendents, bracelets, &c. are to be considered but as one species; and so the heir has but his choice of any of them for all. 6*to*, A husband cannot, after dissolution of the marriage, when his interest ceases, be liable to pay his wife's debts, either out of his own estate, or out of the subject of his *jus mariti*, which is then confounded with his own estate, unless it were really affected by apprising or decreet of forthcoming; and though a husband has been found liable to his wife's creditors, *in quantum lucratus*, that is only *remedium extraordinarium*, that creditors might not be disappointed; and here they are in no hazard, there being a sufficient heritable estate. Again, if the wife might have assigned gratuitously at the time of the contract of marriage, without being quarrelled upon the act of Parliament 1621, she not being then bankrupt; the legal and onerous assignation by marriage is far less quarrellable.

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THE LORDS found, "That the contract was not quarrellable by the minor's heir, upon the head of lesion." Here the curators were not called as defenders; and, if they had been called, the Lords inclined to find the transaction rational *consilio*, though eventually prejudicial; they found, "That the wife's obligement to advance and pay L. 10,000 for furniture was an exorbitant clause, seeing the husband was liable *ad onera matrimonii*; but allowed him the whole furniture bought with that sum. They found also, That the death-bed disposition, though confirmed by oath judicially, when the granter was *in lecto*, could not prejudge the heir's relief of the moveable debt, (as was found in Mr George Blair's case, see APPENDIX;) but that jewels, which are paraphernalia, might be disponed on death-bed in prejudice of the heir's relief of debt;" which seems irregular, seeing the jewels are liable for her debt in her life, and confirmable as a part of her estate.

The Lords did not determine whether a minor's heir might revoke, notwithstanding his predecessor's oath to the contrary; but they found, "That the best jewel only of the whole belonged to the heir as heirship, and that husbands, after the marriage, are only liable for their wife's debt *in quantum locupletiores*, as a *remedium extraordinarium*, competent only to her creditors where she has no other real or personal estate, and not to heirs and executors." And Sir James Cunningham's case was special; for he had an assignation to the mails and duties, which were claimed to fall under the *jus mariti*, and then the Duchess had no other estate but what was in the person of Mr Dalmahoy.

Harcarse, (CONTRACTS of MARRIAGE.) *No* 356. *p.* 89.

*** Sir P. Home also reports this case:

BY contract of marriage betwixt Mr Francis Montgomery and the Countess of Leven, with consent of her curator, Mr Francis being provided to the liferent of the hail estate of Leven if there should be children of the marriage; and in case of failing of children, he was only provided to the half of the rent of the barony of Inchlesly, worth 10,000 merks a-year; and Mr Francis was obliged to pay the current annualrent of the debts of the family, both during the marriage, and in case his liferent of the hail estate did take place; and it was also provided, that if by decease of the Lady Wemyss, the lands liferented by her husband fall into the family of Leven, Mr Francis should not have right to the mails and duties thereof, but they should be applied for payment of the the principal sums; and contains a tailzie of the estate in favour of the heirs of the marriage in the first place, and that Mr Francis and his heirs should assume and carry the name and arms of Lesly and family of Leven; and in case they should do the contrary, *ipso facto*, to amit and tyne the benefit of the said tailzie; as also bears this provision, that Mr Francis's liferent of the barony of Inchlesly, should be in satisfaction to him of the right of courtesy, if the same

No 43. did exist; and on the other part, Mr Francis was obliged to advance and furnish, out of his own proper estate, the sum of 50,000 merks, at the first term after my Lord Kenmuir's decease, for payment of the debts of the family, and which was to be repaid to Mr Francis's heirs, in case there were no children who should happen to survive the Countess their mother; and Mr Francis being infeft under the Great Seal in the foresaid liferent, pursues a declarator against the Earl of Leven, the Lady Melvill's second son, (to whom the estate was tailzied failing of the Countess,) and the Lord Melvill his father, of the right of liferent and barony of Inchlesly, and that he is preferable to any adjudication led of the said lands, at the instance of the Master of Melville or the creditors of the estate of Leven, Mr Francis's infeftment being prior to any adjudication or diligence used against the said lands; and that it may be found and declared, that the sum of L. 10,000 which was advanced and furnished by Lauchlan Lesly the Chamberlane, for buying of furniture for the house of Balgonie belonging to the Countess, and for which there was a bond granted by the Countess, with consent of Mr Francis, her husband; which debt must affect the estate, conform to a provision in the contract of marriage allowing L. 10 000 to be expended in buying of the furniture, and declaring the same should be a burden upon the estate; and the Earl of Leven, as heir of tailzie, having raised a reduction of the contract of marriage upon these reasons, which he repeated by way of defence, that the contract of marriage was entered into by the Countess when she was minor, to her enorm hurt, and lesion, in so far as the debts of the family being so great, did nearly exhaust the whole rents of the estate; yet there were great exorbitant provisions made in favour of Mr Francis, he being provided to the liferent of the whole estate, if there were children of the marriage, without being obliged to aliment the children; and albeit there were a quorum of the curators consenting to the contract, yet they were picked and overawed by the Duke of Rothes, one of the curators, who designed to gratify Mr Francis his nephew; and it is clear by the common law, *leg.* 7. § 8. *D. De minor.* that minors should be restored 'si evidens gratia tutorum sive curatorum doceatur;' and the rest of the curators did dissent, and the Countess was infirm and valetudinary, being consumptive, and having a rupture from her birth, that she was not fit for marriage, and the Lady Wemyss her grandmother was altogether against the marriage upon that account; and the granting Mr Francis any liferent out of the estate for redeeming of the hazard of the courtesy, was an unwarrantable transaction; seeing the courtesy might have been prevented by granting infeftments of annualrent out of the estate, which would have burdened the courtesy; and tutors, and curators, who have only the administration of the pupil's and minor's affairs, so neither can they enter into such transactions where there may be hazard and damage *in eventu*; and by the common law, if minors be lesed in granting of a large tocher or liferent provision, they have the benefit of restitution *in integrum*, and they are said to be lesed whenever they give their whole estate in tocher, or shall give a larger tocher or liferent provi-

sion than the estate can bear, or if that which is given in tocher be esteemed less worth than it is, or shall any ways by paction relating to the tocher or liferent provision, make the condition the worse, and make such a paction that they would not have done if they had been majors, *l.* 9. § 1. *D. De minoribus viginti quinque annis.* 'In dotis quoque modo mulieri subvenitur, si ultra vires patrimonii, vel totum patrimonium circumscripta in dotem dedit;' and *l.* 48. § 2. *D. eod.* 'Mulier minor viginti quinque annis, si pactione dotis deterior conditio ejus fiat, et tale pactum inierit, quod nunquam majoris ætatis constitutæ pacis-cerentur, atque ideo revocare velit, audienda est.' And in this case not only the Countess was lesed by granting too large a provision to Mr Francis, considering the great debts and burdens that were upon the estate, but also in respect there was no probability, and scarcely a possibility, that the courtesy should exist, the Countess not being in condition to have children, which is offered to be proved by her grand-mother and the physicians, who declared that it was their opinion that she would never have children, and would be in imminent hazard of her life by her marriage; and therefore, unless this contract had been entered into by the authority of a judge competent, and that cognition had been taken in the cause, and that it had been found for the Countess's utility and profit, it cannot be sustained; it being clear from the common law, that as minors cannot sell or dispose of their estates, so neither can they give the same in tocher or in liferent provision, unless there be a sentence of a judge competent interponed thereto, finding it to be the minor's utility and profit, *leg.* 8. *Cod. De prædiis et aliis rebus minorum, sine decreto non alienand.* and Perez. *in tit.* 34, *lib.* 2. *Cod. Si adversus dotem,* and *in tit.* 71. *Cod. De prædiis, and aliis rebus minorum, num.* 4; and other lawyers upon these titles; at least when such provisions are exorbitant, they ought to be ratified and restricted to a competent provision, *l.* 61. *D. De jure dotium.* 'Sive generalis curator, sive dotis dandæ causa constitutus sit, et amplius doti promissum est quam facultates mulieris valent, ipso jure promissio non valet; quia lege rata non habetur auctoritas dolo malo facta. Quærendum tamen est, utrum tota obligatio, an quod amplius promissum est quam promitti opportuit, infirmetur? Et utilius est dicere, id, quod superfluum est, tantummodo infirmare.' As also Mr Francis was obliged to have advanced 5,000 merks for payment of the debts of the family, which was not done; and likewise, he has contravened the clause irritant in the tailzie, in so far as he did not use the name and arms of Lesly, and family of Leven, but continued to use his own sirname of Montgomery after the marriage; and as to the bond of L. 10,000 for buying of furniture, it was a malversation in the curators to insert such a clause in the contract, and there being three year's bygone rents resting in the tenants' hands, these rents might have been employed for buying any furniture that was necessary, and it is evident this has been done by collusion betwixt Mr Francis and the chamberlain, and only designed for Mr Francis' advantage, seeing he now pretends right to the same, after the Countess's decease, as belonging to him *jure mariti;* and the expense of alimenting the family during the marriage, upon

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No 43. that same reason, might have been declared a burden upon the estate, Mr Francis being as much obliged to provide household furniture as to aliment the family; and albeit the Countess did thereafter grant a bond for the same, which she ratified by an oath, yet it being evident that it was granted for Mr Francis' behoof, it was *ipso jure* null, seeing he could not authorise his lady in *rem suam*; *et juramentum interpositum actui invalido*, and which is null in law, doth not oblige; and *hoc ipso*, that the act of Parliament discharges all such oaths in time coming under the pain of infamy, it must make them unlawful preceding the act, *nam juramentum non potest esse vinculum iniquitatis*; and albeit the oath would have excluded the Countess herself, yet all oaths being but personal, cannot oblige the heirs, but notwithstanding thereof, the heirs may always quarrel the right upon any ground of nullity competent in law; as for instance, if a right should be extended *per vim et metum* and should be confirmed by the party's oath that granted the same, whatever might be pretended that the granter of the right could not quarrel it, in respect he had confirmed it by an oath, yet notwithstanding his heirs may reduce it upon that ground, as is clear from Grotius de jure belli, lib. 2. cap. 13. par. 17. 'verum illud notandum est, 'quoties non personæ jus nascitur ex tali aliquo defectu, qualem diximus, sed 'Deo obstringitur fides, hæredem ejus qui jurabat non teneri. Quia ad hæredem 'sicut bona transeunt, id est quæ in hominem sunt commercio, ita bonorum onera: 'non item alia quæ quis ex officio puræ pietatis, gratiæ, fidei debuit.' As also the bond being granted upon death-bed cannot affect the estate of Leven in prejudice of the heir. *Answered*, That the provision in favours of Mr Francis was very moderate, seeing it appears by the condescendence of the debts, and rental of the estate given in by him, that there is above 14,000 merks of free rent yearly, and albeit the lands provided to him be esteemed 10,000 merks of yearly rent, yet he being countable for 3000 merks, as the annualrent of 50,000 merks that he was obliged to make furthcoming for payment of the debts upon the estate, which is only provided to be repaid his heirs, failing children of the marriage, so that upon the matter he liferents only 7000 merks, and by that account, there will be other 7000 merks of liferent besides the Countess of Wemyss' liferent, which was to fall into the estate after her decease; and whatever might have been pretended, if the Countess had provided the estate to Mr Francis and his heirs, failing of children of the marriage, in prejudice of the Countess's own heirs, in that case there might have been some ground for rectifying of the contract, but where the provision was only of a liferent, the contract cannot be reduced or rectified in that case, albeit the liferent had been of the whole estate, whatever was the condition of the estate as to debts: And as this is clear in the general, so much more in the case of liferents of husbands of heretrixes of noble families, whose honour and interest is concerned, that the husbands, after their decease, should enjoy their liferents, and live in that condition as was suitable to the families they did once represent,

which is clear from the common law; *l.* 60. *D. De jure dotium.* 'Quæro 'quantæ pecunæ dotem promittenti adultæ mulieri curator consensum acomo- 'dare debeat? Respondit; Modus ex facultatibus et dignitate mulieris maritique 'statuendus est, quousque ratio patitur.' And novella 97. And it being ordinary to grant large provisions in such cases, *qui jure communi utitur captus non videtur:* And Mr Francis, by the contract was not obliged to aliment the children out of the rents of the estate, yet that nesessarily follows, and he would always have been obliged to do it without any express provision; and if the Countess had been partial in favours of Mr Francis, then they would have granted him a larger tocher in place of a liferent provision, which is usual when any man marries an heretrix, and which, if it had been granted in this case, would have been a far greater burden upon the estate than Mr Francis's liferent, which was but a temporary right, and it was a hazard that it ever existed, seeing he might have died before the lady; and the contract was rather unequal upon Mr Francis's part, seeing he was obliged to pay all the annualrents during the subsistence of the marriage, notwithstanding he had right to the same *jure mariti*, and was not to have right to the lands liferented by the Lady Wemyss; and considering there were considerable debts upon the estate, if the creditors had done diligence against him he was in hazard to have been absolutely ruined. And it was calumnious that the Countess was not fit for marriage, she being known to be a proper young lady, and, in all probability, might have brought forth children; and if there had been a child of the marriage, then Mr Francis would have had the benefit of the courtesy if he had not been excluded by a liferent provision, there being no more required by our law to give the benefit of the courtesy than that there be a living child born, and heard cry, though both the mother and child had in the same instant died; and as the courtesy was both a possible and probable case, so if it had existed, and if Mr Francis had not been excluded by the liferent provision, he, by virtue of the courtesy, would have liferented the whole estate free of the burden of the debts, which would certainly have ruined the estate, and it had been unreasonable for the curators to have granted infeftments of annualrent out of the estate for eviting of the courtesy; for the debts being considerable, it would have been a ready way to have ruined the estate and the lady's credit; and no man would willingly give infeftments of annualrent out of his estate if he can shun it, for as such rights do more immediately burden the estate, so they do exceedingly impair the debtor's credit; and albeit minors, with consent of tutors and curators, cannot alienate their lands and estate, unless there be a sentence of the judge competent adhibited thereto, finding that the alienation is to the utility and profit of the minor, yet they may enter into just and rational transactions for eviting of hazards, if they do not, under pretence of such transactions, *remittere jus liquidum*, and dissipate the minor's estate: Even if after such transactions *ex eventu* lesion should fall out, *l.* 11. § 4. *D. De minoribus*, 'Non restituetur minor, qui 'sobrie rem suam administrans, occasione damni non inconsulte accidentis, sed

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'fato, velit restitui; nec enim eventus damni restitutionem indulget, sed 'inconsulta facilitas;' and it is clear from these titles in the law *De in rem verso*, and the lawyers thereupon, that eventual hazard is not considered as a lesion, that being equally incident to majors as minors; but all that is required, is that such transactions were in themselves just and rational the time when they were entered into, albeit by the event it should prove prejudicial, seeing actions are not to be judged by the event; and albeit tutors and curators may not venture upon extrinsic projects for improvement, and encreasing of minors estates where they are attended with hazard, yet where transactions are entered into in order to the preservation of a minor's estate from probable and contingent hazard, which if it did occur, might ruin the estate, such transactions, as being just and rational, ought to be sustained; and the foresaid laws that are cited for annulling of the contract can only be understood when the alienation and transaction is made to the minor's enorm hurt and lesion, but not of such transactions that are just and rational, when the same are entered into by the minor, albeit, *ex eventu*, it prove to his prejudice. And albeit Mr Francis did not assume the name and arms of Lesly, yet that can be no ground for annulling of the contract, because the marriage having only subsisted for the space of a year, or thereby, and if it had been dissolved within year and day, the contract of marriage would have been null as to all effects, so that there was no necessity, during the time, that Mr Francis should have assumed the name and arms: And the main import and intention of that provision was only that the heirs of the marriage should assume the name of Lesly, for Mr Francis's name, is only exprest *designative*, which appears by the conception of the clause irritant, which is 'that the contraveners should amit and tyne the benefit of succession,' which properly can relate to the heirs of the marriage, and not to Mr Francis; and if the irritant clause could take place in this case, as it cannot, for the reasons foresaid, yet this clause being only of the nature of other irritancies, it is always purgeable before declarator; and the marriage being now dissolved, there is no place for that clause. And as to the bond of 10,000 merks, seeing the Countess did confirm it by an oath, it ought to be sustained, according to the common law, 'authent. sacramenta puberum.' *Cod. Si adversus venditionem;* and the canon law, *cap. cum contingat de jure jurand.* 'Omne juramentum servandum est, quod 'non est in prejudicium æternæ salutis. Andreas Gail. lib. 2. observat. 40, et '41;' and other lawyers by him there cited, and the daily practice, as is clear by many decisions before the late act of Parliament discharging minors to grant any such oaths, and declaring the same null and void, which clears that before that act of Parliament, such rights granted by minors, and confirmed by an oath, were valid and effectual; and albeit an oath be personal, and does not oblige the heir *quoad vinculum perjurii*, yet it obliges the heir *quoad efficaciam contractus*, so that the heirs must be compelled to perform their predecessors' obligation by virtue of the oaths adhibited thereto, albeit it were otherwise null in law, *Philmus in cap. Cum sit de foro competent. num.* 9, *quid decis.* 3, *num.* 75, *Gail. lib* 1.

observat. 27. And albeit the bond had been granted by the Countess upon death-bed, yet it ought to be sustained against the heir, seeing it depended upon a preceding cause, there being an express provision in the contract of marriage allowing L. 10,000 to be employed for buying furniture for the house. THE LORDS sustained the declarator, at Mr Francis's instance, of his right of liferent of the lands of Inchlesly, and repelled the reasons of reduction founded upon minority and lesion; and found, that the Countess and her curators might provide Mr Francis, her husband, to a competent liferent, and might transact in relation to the courtesy; and that the liferent provision in his favours was not exorbitant; and sustained the reason of reduction against the L. 10,000 bond, notwithstanding of the Lady's ratification upon oath, which they found was only personal, and did not oblige her successors, nor hinder them to quarrel the bond, and ordained Mr Francis to discharge the same; but found that he ought to bruick the moveables that were bought with that sum, and declared, that these moveables should not fall under division, so as the heir could claim any part thereof, as falling under the Lady's executry, for relief of her moveable debts. No 43.

Mr Francis having likewise inserted in that conclusion of the declarator, that it might be declared he has right to all the Countess's moveable estate, such as the mails and duties of the lands that was in tenant's and chamberlain's hands, and others that belonged to him *jure mariti*; and has right to the Countess's share of the half of the moveables and to the jewels, of which she had granted him a disposition, and that free of the burden of any of the Countess's debts; *alleged* for the defender, That marriage being *individua vitæ consuetudo* it induces a communion of goods betwixt the husband and wife, so the husband's *jus mariti* makes him liable for the wife's debt, not only during the marriage, but after the dissolution of the marriage; 'Guidelinus de jure noviss. 'lib. 1. cap. 7. pag. 12. ipso jure inri nuptiis tantam inter conjuges socie-'tatem, ut omnis pecuniæ omnisque supellectilis omnium denique mobilium, 'nec non totius æris alieni sit inter eos communio: ac hujus communionus 'vim cerni ex eo, quod soluto matrimonio hæc bona atque debita divi-'dantur equaliter inter superstitem et defuncti hæredes;' and it is naturally inherent in all societies, that upon dissolution thereof, before the goods can be divided the debts must be deducted, and as the *jus relictæ* can take no place in favours of the wife, but *deductis debitis*, so neither can the *jus mariti* take place in favours of the husband, but with the burden of the wife's debts; and if it were to be sustained, a wife's creditors may be easily defrauded, who living at a distance could not do diligence during the marriage; and, as a wife cannot make a disposition *omnium bonorum* in favours of the husband, in prejudice of her anterior creditors, so neither can the husband's *jus mariti* prejudge them; and the husband, during the marriage, has no property in the wife's moveables, but only a right of administration, which, though it carry a power to use and consume, or dispose, or to forfeit and amit the same by delinquency, yet in so far as the subject of the communion is ex-

No 43. tant the time of the dissolution of the marriage, both the husband and wife's moveable debts should be deduced, and then the division as to the free goods takes place; but the husband ought to be liable for the wife's debts in *quantum lucratus*, as was decided, Cunningham against Dalmahoy, Div. 2. Sec. 3. *h. t.* And the declarator could not be sustained as to the right of the Countess's her share of the half of the moveables, nor the jewels disponed, because the disposition was granted on death-bed, and so can only have the effect of a legacy; and the Lady, as she could not burden her heir upon death-bed, so neither could she prejudge him of his relief of the moveable debts competent to him by the law; as also the jewels, as heirship moveables, could not be disponed upon death-bed; and, as to the jewel, which was gifted by the King of Sweden to the Earl of Leven, the Lady's father, he, by his testament, did prohibit the same to be annalzied, but ordained it to remain with the family. *Answered*, That, by our law, the *jus mariti* competent to the husband does not only import an authority, and tutillary power, and right of administration, but the husband has thereby a right of dominion and property of the wife's moveables, and it is a legal assignation, so that the husband may make use, and dispose of these moveables at his pleasure, and they will fall under his single escheat; and as the husband's *jus mariti* does carry the full right, dominion, and property of the wife's moveables during the marriage, so it has the same effect after the dissolution of the marriage, and all these moveables are *in bonis mariti*, and fall under his testament, and subject to his debts which must be first deducted, and then are the subject of division in the same way and manner as his other moveable estate, all being confounded in the husband's person, *tanquam unum et individuum patrimonium;* and as a consequent of this, the husband's *jus mariti* is so strongly founded by our law, that the husband cannot renounce it in favours of the wife; but the same will still recur again and belong to him *jure mariti*, which the law has introduced and established in favours of husbands, upon most just and onerous accounts, in respect the husband is liable not only *ad sustinenda onera matrimonii*, though he had no benefit by his *jus mariti*, but also is liable to all his wife's debts heritable and moveable, due by her before the marriage, upon which execution may be used against the husband's person, and his proper estate during the marriage; and if diligence were done thereupon by comprising of his proper lands, or poinding of his moveables, or that he were forced to undertake the debt and grant security, it would remain as the husband's proper debt after the dissolution of the marriage; and, by the constant practice of all the commissary courts, all these moveables are confirmed as belonging to the husband, and his debts are only deducted, and not the wife's; and it was never the practice, that a creditor of the wife's should be confirmed executrix creditrix to the husband; and our law differs vastly from the common law, and the laws of other nations in this particular; for, by the common law, there was no communion of goods betwixt the husband and the wife by the marriage, but the husband had only the keeping and the administration of

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the wife's goods, *leg.* 9. *par.* 3. *D. De jure dotium*, and was liable to count for his administration, *leg. penult. D. Ad legem falcidiam*, and he could not dispose nor meddle with them without the wife's consent, *leg.* 8. *Cod. Lib.* 5. *Tit.* 14.; and many times the wife made use of her goods herself, and disposed of them at her pleasure, and did manage her own affairs distinct from her husband's, *leg.* 31. *D. Lib.* 24. *Tit.* 1.; and albeit they be but one house and one family, and their living together gives the one an interest to make use of the other's goods, the other not opposing the same, yet notwithstanding their society and communion was not so far extended, but that both of them retain the dominion and property of the goods, that they had before the marriage, and were not given in tocher or as donations *propter nuptias*, and if any thing was acquired during the marriage, the property thereof belonged either to the wife or to the husband, who acquired the same, *leg.* 1. *Sec.* 15. *D. Lib.* 29. *Tit.* 5.; *leg.* 12. *Cod. Lib.* 5. *Tit.* 12.; except the husband and the wife had entered into a society as extraneous persons, *leg.* 16. *Sec.* 3. *D. Lib.* 34. *Tit.* 1.; and as the husband had no interest in the wife's goods, so by the common law, he was not liable for her debts, whereas, by our law, the husband, as he has right to the wife's moveables *jure mariti*, so he is liable for her debts so long as the marriage subsists, and there is no exact society and communion of goods betwixt the husband and wife, but only *analogice improprie* and *abusive*, there being no communion at all as to the property, but only during the marriage there is a resemblance of a communion, *quoad usum*; and albeit there be a division of the goods after the dissolution of the marriage, yet that is not consequent of the wife's right during the marriage, but only the state of the family being altered, either by the husband's or wife's decease, the law, in *honorem prioris matrimonii*, has allowed the wife a share of the free gear, and upon the same account, has allowed the children a legitim, which demonstrates that it was not the consequent of right that was existing during the marriage, seeing the children had no right to any part of the moveables during the marriage; and that, upon the dissolution and alteration of the state of the family, the children are called to their legitim, as well as the wife to her share, but still with the burden and deduction of the husband's debts, whose goods they were, as being the head of the family, and no other debts can be considered either the wife's debts or the children's debts, there being the same reason to deduct the children's debts as the wife's, they being equally interested in the division upon the dissolution of the marriage; and even in the strictest and most exact societies, no other debts can be considered, but the debts contracted during the time that the society subsists, which evinces that the wife's anterior debts can never be considered to affect the moveables, though the marriage did induce an absolute communion and society in the point of right, as it does not; and albeit it be an inconvenience that the wife's anterior creditors should be prejudged by the marriage, yet *incommodum non solvit argumentum*, and the incon-

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venience is far greater upon the husband's part. seeing his own proper estate may be affected during the marriage for the wife's debts, for which he is liable *jure mariti*, albeit he reap no benefit by the marriage, *et nihil est tam naturale quam quem sequitur incommodum sequi etiam debet commodum*, and any prejudice the wife's anterior creditor can sustain by giving the husband a right to the wife's moveables *jure mariti*, is far more than compensed by making the husband liable for her anterior debts *jure mariti* seeing his estate is merely laid open to the wife's creditors, and may be affected with their debts if diligence be done against him, and the estate affected before the dissolution of the marriage; and as the wife's debts will not affect the husband's right of courtesy, unless the same be constituted by infeftment, or affect the lands by real diligence, so neither can they affect the wife's moveables, whereunto the husband has right *jure mariti*; and albeit the wife's *jus relicti* is liable to the husband's debts, she having only right to the third of the free gear *jure relicti*, yet the parallel does not hold, that therefore the husband's *jus mariti* should be liable for debts, because it does not flow from the same principal, nor is built upon the same foundation; seeing the wife has no right of dominion or property of the goods during the marriage, but only law allows her a terce of the free goods, *ob honorem prioris matrimonii*, and for her maintainance and subsistence; upon the same ground, the law allows children their legitim; and as to the decision Cunningham against Dalmahoy, what is now alleged was not then debated, as will appear by considering the decision; and the contrary was thereafter expressly decided in the case of Morison against Stewart, (*See* APPENDIX), where the Lords found the husband was not liable *jure mariti* to the wife's anterior creditors, after the dissolution of the marriage, so long as the wife had any estate to discuss; whereas there is here a considerable estate, which may be affected by the wife's creditors. And as to the half of the Lady's moveables, and the jewels disponed, albeit the disposition had been upon death-bed, yet it being of a moveable subject, it is valid in law to exclude an executry on the interest of the nearest of kin; and albeit it should be considered to have the effect of a legacy, as not to prejudge creditors, yet if the creditors question the same, they ought to assign their debts to Mr Francis, to the effect that he, by virtue of the creditors' rights, may have recourse against the heirs; seeing the disposition granted to him contains absolute warrandice, and the jewels are not moveable heirship, but being *ornamenta muliebria*, might be disposed of by the Lady at her pleasure; and albeit the Earl of Leven did, by his testament, prohibit the jewel gifted to him by the King of Sweden to be anailzied, yet that being *medium præceptum*, it could not hinder the Lady, who was fiar thereof, to dispone thereupon at her pleasure, *leg.* 93. *par.* 4. *D. Lib.* 32. ——THE LORDS found, That the wife's moveables that fell under the husband's *jus mariti*, could not be burdened with the wife's debts, but only *subsidiarie*, the heritable estate and executry being first discussed and exhausted; and found the husband not liable after the wife's death for her debts, so long as there was

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. No 43.

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

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

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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.

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.

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 morganetica* 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