

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,

No 44.

No 45.

What articles are accounted paraphernalia. See Synopsis.

No 45. and the *mundus muliebris* was comprehended under it, as in Lady Boghall's process against the Dutchess of Lauderdale. See APPENDIX.

February 14.—IN the action of repetition of 8000 merks pursued by Dicks against Mr Andrew Massie Regent, the LORDS, on the 16th of Jan. 1695, having found, that he ought to have allowance of his wife's funeral expense out of the fore-end of that sum; and he, under that name, craving the medicaments and fees to doctors, with the mournings, the LORDS found, that a husband *regulariter* being obliged *jure humanitatis* to bury his wife, the funeral expenses here could extend neither to drugs nor mournings, but allennarly to the charge expended on the likewake and burial, as bread, wine, dead-linens, coffin, grave-making, the bell-man, the poor, &c. Yet in the title, *D. De religiosis*, it is taken more largely in several of the texts there.

December 4.—MERSINGTON reported Dicks *contra* Mr Andrew Massie, mentioned 16th January 1695, for restoring to them, as his wife's executors, her *bona paraphernalia*. THE LORDS found he could have no allowance for the L. 20 Sterling he paid out for her wedding-cloaths, because, being a moveable debt, it fell *sub communionem bonorum*, and so was extinct and ceased to be a debt; but it would have been otherwise if it had been heritable *quoad maritum*, as bearing annualrent. Then the next question was, What were to be reputed paraphernalia? A list and condescendence was given in, containing articles which cannot fall under the *mundus muliebris*, which are only for ornament of the wife's body, such as bracelets, necklaces, breast-jewels, ear-rings, which use only to be worn by women; but watches, rings, &c. which are *epicæni generis*, and of promiscuous use, as well worn by men as women, are not so clearly paraphernalia, unless it be proved they were given to her by her husband, and in her custody and possession the time of his life, and so worn and used by her. As for webs of cloth, &c. the LORDS rejected them; and for cabinets, found them not paraphernalia, unless they were made expressly *et destinatione matris-familias* to that particular use of holding her rings and jewels; neither were medals any part of them; but would not restrict her to one of each sort, (as done in heirship moveables), but a wife may have more of one kind, though it defraud creditors to multiply these too much, and encourage wives to cause their husbands furnish them with such toys. The Spanish and Italian doctors are very narrow to wives on this head, and allow them only the use, (*ut ornatiores appareant*) but not the property of them: And where they are extravagant, they are like donations *inter virum et uxorem*, and so revocable.—In the case of the Dutchess of Lauderdale, and Lady Boghall, the LORDS inclined to restrict their paraphernalia as much as could be; and, in this present cause, they resolved to hear the lawyers in their own presence, to establish a rule what should be reputed paraphernalia at some coming. But the quality of persons will make a distinction; besides, a merchant or jeweller's wife having many watches or rings, &c. in her possession, ought not to make them her's or her executors, because they are in such cases designed for sale.

1697. *January 15.*—THE LORDS advised the debate between the Executors of Elisabeth Dick and Mr Andrew Massie, her late husband, mentioned 4th Dec. 1696, and resolving to fix a rule for determining what wives, or their executors might claim as paraphernalia or *jocalia*, they did lay down several positions and heads, under which they might bring all the species and kinds of such gifts, with an equal regard to the dignity of the wives, and also for curbing and restraining exorbitancies therein, for the interest of the husbands, and their children or creditors; and accordingly the LORDS found, that under the paraphernalia peculiarly belonging to the wife, and no ways entering into the communion of goods betwixt the husband and her, are comprehended, the *mundus* or *vestitus muliebris*, viz. all the body-cloaths belonging to the wife, acquired by her at any time, whether in this or any prior marriage, or in virginity or viduity; and whatever other ornaments or other things were peculiar to her person, and not proper for men's use or wearing, as necklaces, ear-rings, breast-jewels, gold-chains, bracelets, &c. And that under child-bed linens, as paraphernal and proper to the wife, are to be understood only the linen on the wife's person in child-bed, but not the linens on the child itself, nor on the bed or room, which are to be reckoned as moveables; and therefore found the child's spoon, porringer and whistle, contained in the condescendence are not paraphernal, but fall under the communion of goods; but that ribbons, cut or uncut, are paraphernal and belong to the wife, unless the husband were a merchant; and found, that all the other articles are of their own nature of promiscuous and common use, either to men or women, are not paraphernal, but fall under the communion of goods, unless they become peculiar and paraphernal by the gift and appropriation of the husband to her, such as a marriage-watch, rings, jewels and medals, &c. But found, that a purse of gold, or other moveables, that by the gift of a former husband became properly the wife's goods and paraphernal, exclusive of the husband, are only to be reckoned as common moveables *quoad* a second husband, unless they be of new gifted and appropriated by him to the wife again: And found, that such gifts and presents as one gives to his bride before or on the day of the marriage are paraphernal and irrevocable by the husband during that marriage, and belong only to the wife and her executors; but found, any gifts given by the husband to the wife after the marriage-day are revocable, either by the husband's making use of them himself, or taking them back during the marriage; but if the wife be in possession of them during the marriage, or at her death, the same are not revocable by the husband thereafter: And found cabinets, coffers, and other alleged accessories, for holding the paraphernalia, are not paraphernal, but fall under the communion of goods. Some of the Lords were for making any thing given the next morning after the marriage paraphernal, called the morning-gift in our law; but the Lords esteemed them man and wife then, and so revocable.

*Fol. Dic. v. 1. p. 388. Fountainball, v. 1. p. 659, 711, 739, & 756.*