

S E C T. II.

Whether deeds betwixt Husband and Wife, where there are clauses favour of third parties are revocable, although gratuitous.

No 316. 1591. December. LAIRD OF HISLEID *against* LINDSAY.

THE Laird of H. pursued Robert Lindsay of _____, spouse to Elizabeth Semple, Lady Knockdol, for payment of a certain sum of money, *alleging*, That the said Robert had obliged him to his said spouse to pay the said sums and debts, which were owing by her and her former husband to sundry and diverse persons, as a ticket of the same, subscribed by the said Robert, bears. *Answered*, That the pursuer could have no action by virtue of the said obligation to pursue; because *fuit contractus inter maritum et uxorem, et quasi alienatio, quæ non tenent de jure*; and therefore the defender could not be obliged, by virtue of the said contract that was null of itself, to pay a thing to a third person. It was *answered*, That in so far as the said obligation was made in favours of the third person, to pay the debts contracted by the wife, and that the husband was to receive great sums of money by the marriage of the wife, the obligation was lawful, and ought to take effect. THE LORDS found the obligation was sufficient to give a title to the creditor to pursue the defender.

Fol. Dic. v. I. p. 409. Colvil, MS. p. 464.

* * See Spottiswood's report of this case, No 300. p. 6087.

No 317. 1634. March 22. GLASFORD *against* DAWLING.

A bond taken by a man to himself and his wife in liferent, and to her heirs in fee, found revocable *quoad* the wife's heirs, as well as herself.

ONE Glasford, Clerk of Leith, married upon one Dawling, gives out 1000 merks upon an heritable obligation, 'To himself and to his wife, and to the longest liver of them two in liferent, and to the heirs of the wife after her decease.' The wife being deceased, and the debtor suspending upon double pointing, against the husband on the one part, and Robert Dawling, brother's son and heir to the wife on the other part; and they being both heard anent their right to the said sum; the LORDS found, That the husband had the only right to the said sum, and that the same pertained to him heritably, and not to the heir of the wife; because the LORDS respected the bond of the tenor fore-said, as *donatio facta a viro uxori*, and so that it was revocable, likeas he had revoked the same; and therefore, the destination of payment appointed to the wife's heirs by the bond, could not take effect against the husband's will, revoking the same; neither was it respected what the heir of the wife alleged,

that the revocation was made after the wife's decease, and so was not done *debite tempore post jus acquisitum heredi*, who could not be prejudged of that benefit of the obligation, by that revocation done after the wife's decease, and after the heir became clothed with the right, whereof he could not be prejudged but by a deed done by himself; for the wife and the husband once agreeing upon the choice of an heir, to whom they had provided by consent the fee of that money; neither could they, far less one of them alone without the other, alter that choice which they had made, and much less could the alteration be made against the will of the heir, after the decease of the wife, who died in that will; which allegiance was repelled.

No 317.

Act. —.

Alt. *Nielson*.Clerk, *Scot*.*Fol. Dic. v. 1. p. 410. Durie, p. 717.*

1663. February 19. BESSIE MUIR against JEAN STIRLING.

THE said Bessie Muir pursues her mother, as executrix to her father, for payment of a legacy of 8000 merks left in his testament, subscribed by the defender, and confirmed by her after her husband's death.—The defender *alleged* absolutor, because she, by the contract of marriage, was provided to the liferent of all sums to be conquest; and albeit she consented to the legacy, it was *donatio inter virum et uxorem*; and for her confirmation, it cannot import a passing from her own right, but only her purpose to execute the defunct's will according to law, especially she being an illiterate person.—The pursuer *answered*, That this donation was not by the wife, to, or in favour of the husband, but of their children, which is not revocable; and also the confirmation homologates the same, seeing the wife might have confirmed, and protested to be without prejudice of her own right.

No 318.

A donation by a wife, directly in favour of her husband's children, *et contra*, is not revocable.

THE LORDS repelled the defence, in respect of the reply.

Fol. Dic. v. 1. p. 409. Stair, v. 1. p. 183.

1669. January 15. HAMILTON against BAIN.

UMQUHILE AGNES ANDERSON having disposed all her goods and moveables to ——— Bain's bairns of the first marriage, and made delivery thereof, conform to an instrument produced; and having thereafter married John Hamilton, he ratified the former deed done by his wife in favour of her bairns. She being now dead, both parties give in supplications, desiring possession of these goods disposed to the bairns: They alleged upon the mother's disposition, ratified by her second husband. And the husband *alleging*, That it being but a fictitious possession by an instrument, he, as husband, being *dominus bonorum*, is in the

No 319.

Found in conformity with the above.