

DIVISION X.

Deeds betwixt Husband and Wife during marriage.

SECT. I.

Pure Donation how far Revocable. Donation after Proclamation of Banns.

1591.

HEISLEID *against* LINDSAY.

No 300.

THE Laird of Heisleid pursued Robert Lindsay, spouse to the Lady Knockdolean, for payment of certain sums of money, as he who had obliged himself to his said wife by a ticket subscribed by him to her, to pay her and her former husband's debts. *Excepted*, That the pursuer could have no action on that obligation, *quia erat contractus inter virum et uxorem, et quasi alienatio que non tenet de jure*. *Replied*, That the obligation being conceived in favours of a third person, was good and lawful, and should take effect. THE LORDS found, that the obligation was sufficient to give action against the defender at any creditor's instance.

Spottiswood, (HUSBAND and WIFE) p. 155.

* * See Colville's report of this case, No 316. p. 6106.

1637. February 18.

MUNGALL *against* STEEL.

No 301.

JOHN STEEL being obliged by his bond to pay to umquhile Mungal, and one Steel his spouse, and to their heirs, 'a sum of money,' (this was the tenor of the bond) and it bore not, To be paid to the longest liver of them two, nor to the heirs gotten betwixt them, nor no word of the husband's heirs, nor no substitution contained in the bond, but only proverting payment as said is, to the husband and his said spouse, and their heirs; the husband dying without bairns, and his sisters being confirmed executors, and charging for payment of this sum, the relict compeared and *alleged*, that she ought to have her liferent of the whole sum, in respect of the tenor foresaid of the bond, appointing payment to be made to her husband and her, and their heirs, which words must work something, and cannot be thought to be unusefully adjected: Likeas, she behoved to have right to the equal half of the principal sum, to be dispen-

A sum was made payable to a husband, his spouse, and their heirs. In the same deed, a sum was gifted by the husband to the wife. Found, that the relict had no right to the liferent of the first, and that the second was revocable.

No 301. ed upon at her pleasure, in respect by the laws of the country, she being relict, and there being no bairns procreated betwixt her and her husband, as relict she has right to the half of that sum, the same being moveable; and the other parties contending, that seeing in the same bond the husband had appointed another sum, owing by the same debtor to him, to pertain after his decease to his said spouse, and which was acknowledged properly to pertain to her by her husband's said gift; therefore, that the same ought to be found to appertain to her, for satisfaction of any other of the sums belonging to her husband, and that should be found to agree with his intention: For the truth was, for the price of certain lands sold by umquhile Mungal the husband to John Steel, who became obliged to pay the said price, which extended to 2900 merks, the said Mungal took the said John Steel obliged to pay 900 merks thereof to his wife, who was sister to the said John, after his own decease, and other 900 merks he disposed to John Steel's self, after his own decease, and the rest of the whole sum, viz. 1100 merks, which was the sum now controverted, the said John Steel was by the said bond obliged to pay it to the husband and his wife, and their heirs; in respect of the which destination, the sisters of the defunct his executors alleged, that it appeared thereby that the husband's intention was, that his wife should have no more of the whole sum contained in the bond, but only the 900 merks, which he had disposed to her after his own decease: THE LORDS found, That by virtue of the clause foresaid, whereby the debtor was obliged to pay to the man and wife, and their heirs the foresaid sum, the relict could not claim right to her liferent of that sum; but found, that as relict, she had right to the half of that 1100 merks controverted, and that the said equal half properly pertained to her, there being no bairns procreated betwixt them; from the which half, the Lords found, the relict was not excluded by that donation to her by her husband of the 900 merks, contained in the same bond, seeing he had expressed no such intention in the bond, to exclude her therefrom, for there was no such clause therein, That he had given it in satisfaction of all which she might claim through his decease, nor any word which might seem to import that construction; so that seeing it was due to her in law, the Lords would not seclude her from the same, whatsoever the husband did to her beside, as that bond bore.—*Vide* 15th February 1637, Lawder, No 6. p. 1692.; 14th February 1637, Hume, *voce* Tack; and 11th March 1637, this decision was that day changed, and the relict was found to have no part of the 1100 merks questioned, seeing, by a prior bond of the husband's, he had shewn once that that was his will.

Act. Gilmour.

Alt. Craig.

Clerk, Hay.

Durie, p. 827.