No 2.
A gift of non-entry belonging to a woman, having *tractum futuri temporis*, falls not under her husband's *jus mariti*.

1582. *June.* PENNYCOOK *against* COCKBURN.

A WOMAN called Pennycook, and spouse to umquhile Mr John Spens, burgess of Edinburgh, pursued one Cockburn for the deliverance of the gift of non-entrie, alleging the same to appertain to her as lawful cessioner and assignee made to the same. It was *answered* by this Cockburn, That he ought not to be compelled to deliver the same, because her said umquhile spouse, Mr John Spens, during his lifetime, disponed the said gift to the defender, and so the said gift was his own proper evident, and ought not to be delivered. To this was *answered*, That the said umquhile Mr John Spens had no power to dispone the same without the consent of his wife, but for his own lifetime; but that she, after his decease, could not be prejudged, but ought to be put in her own place against the same, being done without her consent and advice. The matter being reasoned amongst the Lords, some were of opinion, that *maritus* being *dominus omnium bonorum, liberam disponendi habebat facultatem durante matrimonio, et quod illius dispositio, tam constante matrimonio, quam postea, cum effectu manebit.* Others were of the contrary opinion, and that it was daily practised before the Lords, that the husband's disposition of any thing appertaining to his wife, without her consent and advice, took no longer effect but during the time of the marriage, *et quod post mortem mariti revivescebat uxori quicquid quod consensum fuit prius a marito uxoris.*——THE LORDS, after long reasoning, voted for the most part, that the said gift and disposition, made by the husband during the time of the marriage, without consent of the wife, ought not to prejudge her after his decease. *Fol. Dic. v.* 1. *p.* 385. *Colvil, MS. p.* 333.

No 3.
It was found that the *jus mariti* did no more carry an obligation falling due after the dissolution of the marriage, than the *jus relictæ* would carry it, or the gift of single escheat, unless the condition did exist, and was purified before the denunciation or gift.

1693. *February* 7. FOTHERINGHAM of Pourie *against* The EARL of HOME.

THE LORDS repelled the first two dilators, that the bonds, which were the grounds of the confirmed testament, were registered, the one after the granter's death, and the other *a non suo judice* in the Bailie-court books of Dundee, where Ogilvy of Muiry, the granter, never dwelt, and so were no more but copies; in regard the confirmed testament itself was a sufficient active title, and though the fiscal had confirmed, he had a title. They also repelled the 3*d* dilator, that the assignation from the executor was but of the nature of a factory, and so *testamento non executo* it expired; because this was no part of the inventory of Muiry's testament, but only another way of conveyance from Yeoman to Duncan, for making up the title. They also repelled the 4*th* dilator, that they had confirmed a sum of Finlater's as executors-creditors; and found this to be *jus tertii* to the Earl of Home; but the Lords demurred on that defence, that the Laird of Ayton's bond to his mother, and Muiry her husband, was a conditional bond, and was never purified, nor existed in Muiry's lifetime, and so could not

be *in ejus bonis*, nor fall under his *jus mariti*; for the obligement ran, that Ayton should pay his mother and Muiry, her husband, seven bolls of victual, or the Sheriff prices for the same, from 1649 till her death, in case Ayton should decease without any heirs-male procreated of his own body; *ita est*, Ayton died without sons, but he outlived both his mother and Muiry, so that, at the time of their decease, the obligation was pendent, and the condition unpurified, so that there was a possibility of Ayton's having sons, and therefore the bond not having full effect in Muiry's lifetime, it was contended that it could not belong to him. Some argued, that a bond payable after one's decease would fall to his executors. It was *answered*, That case differed *toto cælo*; for there *dies obligationis venit, sed non cessit*; whereas here, in a conditional bond, *nec cessit nec venit dies*, for *non constat* if ever the condition shall exist, and then the obligation perishes. Though many of the Lords were clear, that this fell to Muiry's executors, yet it was appointed to be heard in presence; as also that point, how far the Earl of Home was liable for Ayton's debts; 1*mo*, Till his heirs of line were discussed; 2*do*, In regard he had forfeited that estate by accepting the titles of Earl of Home conform to the express quality and condition of the tailzie. No 3.

1694. *November* 18.—THE LORDS advised the debate between Fotheringham of Pourie and the Earl of Home. The *first* point was, if the *jus mariti* was sufficient to carry a conditional obligation granted to a wife, whereof the condition did not exist, nor was purified during the standing of the marriage. Some of the Lords thought the obligation retrotracted whenever the condition was fulfilled, and so belonged to the husband, or to his executors, by virtue of the legal assignation of the marriage. But the plurality carried it in the negative, that the simple *jus mariti* no more carried this, which fell after the dissolution of the marriage, than the *jus relictæ* would give her a share of such conditional bonds whenever they came to be purified; and no more than a gift of escheat would carry such a bond whereof the condition existed after the denunciation or gift. The 2*d* point was, if the bond granted by Ayton to Ogilvie of Muiry, bearing it should be payable, in the event of his want of heirs-male, to the Lady, and Muiry, and his heirs and executors, altered the case, and gave Muiry and his executors a right to it, especially seeing it was the rest of her jointure. THE LORDS found the bond imported more than the *jus mariti* did in this case, and gave him right. THE LORDS also repelled the other two defences, viz. that this debt had *tractum futuri temporis*, and so could not be moveable; 2*do*, That a conditional obligation was of the nature of a legacy, which fails if the legatar die before the existing of the condition, and does not transmit to his heir. But law has made a clear difference here, § 4. *Inst. V. O. et* § 25. *Inst. De inutil. stip.*

Fol. Dic. v. 1. *p.* 386. *Fountainhall, v.* 1. *p.* 554, & 651.