No 311.

merce, therefore, when they are used, either as to their constitution or indorsation, for purposes not commercial, they cannot be probative. *3tio*, A bill must necessarily specify the name of the person in whose favour it is drawn, which a blank indorsation does not; there is therefore more danger in permitting a legacy to be constituted by the blank indorsation of a bill, than by a bill itself; the intention of the party being evident in the first case, but not in the latter. To supply by witnesses this defect in the conveyance, or to prove by their testimony that words expressive of a legacy were uttered by the deceased, would be contrary to the rules of our law, at least when the legacy exceeds L. 100 Scots, as it does in the present case.

The defender *answered*, That none of these arguments could have any influence in the determination of the present question; for that the two bills were indorsed blank, and delivered to her, not as a legacy, but as a *donatio inter virum et uxorem*. Had her husband meant them as a legacy, he would have provided them to her in his will, which he had just then executed. Neither can it be said that a legacy was here intended, because the donation was made on death-bed, and might also have been revoked. A donation made on death-bed, is not necessarily a donation *mortis causa;* for if it be absolute, it will be deemed to be *inter vivos*, according to the rule in the civil law, *L.* 42. § 1. *D. mort. caus. donat. Eum qui absolute donat, non tam mortis causa, quam morientem donare.* The husband, it is true, had in this case a power of revocation; but that proceeded not from the nature of the thing, as in a donation *mortis causa*, but from the condition of the parties, the donation being *inter virum et uxorem.*

From the evidence of the witnesses produced, it appeared, that Humphry Barbour meant to vest the property of the bills in his wife: and this circumstance had perhaps some weight with the Court.

"The Lords found the bills in question were properly conveyed to the defender; and therefore sustained the defence against the delivery."

Act. *Miller*. Alt. *Sir David Dalrymple*. Clerk *Justice*.

Fol. Dic. v. 3. *p.* 286. *Fac. Col. No* 62. *p.* 95.

1758. *December* 22.

No 312.

A wife having succeeded to a debt secured by adjudication, discharged the debtor upon his paying part in cash to her husband, and

Margaret Maclellan, Relict of Hugh Hathorn, *against* The Children and Executors of Hugh Hathorn.

Upon the 4th July 1720, Margaret Maclellan, by contract of marriage, conveyed to her husband, Hugh Hathorn, in conjunct fee and liferent, and to their children in fee, her portion, amounting to about L. 1000 Scots.

Some years after the marriage, Margaret Maclellan succeeded, as heir to her brother, to a debt of L. 3129 : 8s. Scots, secured by adjudication, with in-

terest from 1727; to which she made up titles by granting a trust-bond; upon which adjudication being led, the trustee reconveyed it to her, and her husband, for her interest.

No 312. granting bond to him for the remainder. Upon her husband's death, she revoked these deeds; and it was found, that she was a creditor for the sum paid to her husband, and that the bond was her property.

Upon the 31st December 1754, with consent of her husband, she executed a discharge and assignation of this debt in favour of the debtors, who made payment of L. 2644 : 8s. Scots to the husband, and granted bond to him for L. 4800 Scots, which was the balance, though the bond was expressed simply for borrowed money.

After her husband's death, she executed a revocation of these deeds, so far as they might be construed to have conveyed any right in favour of her husband, and brought an action against his children and executors, for payment of the L. 2644 : 8s. he had received, with interest from the time of his death; and also to have it declared, that the bond for L. 4800, with the interest from the same time, belonged to her. A proof was allowed, and several witnesses deposed, that the husband actually received the L. 2644 : 8s., and that the bond for L. 4800 was granted for the balance of the heritable debt, to which the wife had succeeded as heir to her brother.

Pleaded in defence, 1*mo*, That where an heritable bond is discharged by a wife, and converted into cash, not with a view of being again lent out and preserved from the husband's *jus mariti*, it becomes the immediate property of the husband, in virtue of the legal assignation implied in marriage; and is not to be considered in the same light as a donation, revocable by the wife. This distinction was established by a decision observed by Lord Fountainhall, 12th February 1686, Lady Garvall, No. 35. p. 5795.

2*do*, As the debt to which the wife succeeded as heir to her brother, consisted of L. 3129 : 8s. of principal, contained in an adjudication, upon which interest was due from the year 1727 to the 31st December 1754, when it was discharged by the wife; supposing the wife entitled to revoke, yet her revocation could have no effect with regard to the interest due for these years, which, at any rate, belonged to the husband by his *jus mariti*.

Answered, There is no reason for a distinction between the case of a donation directly made by the wife, and the giving of a sum of money to her husband indirectly, as happened in this case. Nor was any such imaginary distinction established by the decision referred to; for, in that case, the wife had brought no other portion, except the heritable debt.

2*do*, The annualrents due upon a sum adjudged for, are considered as equally heritable with the principal debt; because an adjudication is considered as a sale under reversion, redeemable by payment of the principal sum and annualrents. And accordingly it was found, in the case of Ramsay *contra* Brownlee, 1ts December, No 6. p. 211, that no part of the growing annualrents of a sum adjudged for was moveable, or did belong to an executor.

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"The Lords adhered to the Lord Auchinleck's interlocutor, finding, That the bond for L. 4800 was a *surrogatum* in place of part of the wife's heritable subject, and did therefore belong to her; and that she was also a lawful creditor for the L. 2644 : 8s. received by her husband, with interest upon both sums from the time of her husband's death; and decerned."

Act. *Johnstone*. Alt. *Montgomery*.

Fol. Dic. v. 3. p. 286. Fac. Col. No 153. p. 273.

1769. *November 22.*

Robert Stewart, *against* Janet Mitchel, Relict of William M'Kinlay Merchant in Campbelton.

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Donatio inter virum et uxorem, though a consideration given, which in some measure gave it the appearance of a transaction, yet being very much to the wife's prejudice, held to be revocable.

By marriage-contract, in the year 1729, betwixt Janet Mitchel and her husband, she was provided, *1mo*, In an annuity of 200 merks out of a tenement in Campbelton; *2do*, In the liferent of one half of all the heritable subjects which her husband should acquire during the marriage; and, *3tio*, In case there were no children alive at the husband's death, in the fee of one half of the whole free moveable goods and gear that should then be in communion. Of these provisions the wife accepted, in full of all she could ask by her husband's death or otherwise.

No issue existed of the marriage; and on the 28th January 1760, after the parties had acquired considerable wealth, Janet Mitchel executed a deed, bearing to be for love and favour, and other causes; whereby she conveyed to her husband 'Her whole right in all corns, cattle, household furniture, lying money, ships, 'stock in trade, debts, or sums of money resting by bond, bill, or any other 'manner of way; with all other effects, heritable and moveable, pertaining, or 'which should pertain to him, or be in communion between them at the dis-'solution of the marriage, and to which her heirs or nearest of kin could 'claim right, in virtue of her contract of marriage, or on any other account 'whatever preceding that date;' reserving only her annuity out of the tenement in Campbelton. By this deed the husband became bound to pay her L. 250 Sterling at his decease; or in the event of her predeceasing him, to her two nieces; failing of them, to her heirs and assignees; and with this proviso, that if either of her nieces should marry during her and her husband's lifetime, each should receive L. 50, to be imputed in part of the said L. 250. The husband thereafter granted an obligation in these terms; and farther provided her in the fee of one half, and liferent of the whole of his household furniture.

In the year 1761 M'Kinlay executed a testament, nominating Robert Stewart the pursuer to be one of his executors; and in this deed he ratified the deeds above mentioned, and bequeathed to his wife whatever ready money or