dren of the marriage being now all dead, the benefit would accresce to the husband's heirs. No 309.

THE LORDS reduced the substitution in favours of the husband's heirs and assignees, as being *donatio inter virum et uxorem*.

Fol. Dic. v. 1. *p.* 409. *Harcarse*, (STANTE MATRIMONIO.) *No* 883. *p.* 251.

1688. *February.*

CATHARINE GORDON *against* ELISABETH and ANNE GORDONS. No 310.

FOUND that a bond given by a man to his wife, after contract, and before marriage, was not revocable as done *stante matrimonio*.

Fol. Dic. v. 1. *p.* 412. *Harcarse*, (STANTE MATRIMONIO) *No* 888. *p.* 252.

1753. *February* 8.

JOHN BARBOUR and WILLIAM BLACKWOOD *against* AGNES HAIR.

No 311.
A husband on death-bed gave his wife in presence of witnesses, two bills blank indorsed, desiring her to keep them for her own use. Found that this was a donation *inter virum et uxorem*, and that the bills belonged to the relict.

HUMMPHRY BARBOUR, by his testament, left some part of his moveable estate to his relations, and the rest to his wife, the defender. After his death, she had an universal intromission with his writings; and, having been called before the sheriff, at the instance of her husband's executors, in an action of exhibition and delivery of them, she had acknowledged, upon oath, that she had lodged them all, at the desire of the executors, in the hands of a third party, excepting two bills, which her husband, some days before his death, (he being then ill, but not bed-rid,) took out from among his other writings, indorsed blank, and delivered to her, desiring her to keep them for her own use. The sheriff found that the bills belonged to the widow. The executors advocated the cause; and the defender having offered to prove the donation by witnesses, a proof before answer was granted.

At advising of the proof, it was *pleaded* in point of relevancy for the pursuer, That a legacy is not properly granted by a blank indorsation of a bill, and although it were, could not be proved by witnesses; for that, 1*mo*, It happens frequently, that persons in trade have bills indorsed blank, lying by them at the time of their death; now the consequences would be dangerous, were their widows, who may easily get possession of such bills, permitted also to acquire the property of them, merely upon proving by the testimony of two witnesses, a delivery and donation from the deceased. 2*do*, A legacy, as has been found, may not be constituted by bill; and this decision applies with no less force to an indorsation of a bill, which is a new draught upon the acceptor, in favour of the indorsee; and as bills, and the method of transmitting them by indorsation, were introduced for the conveniency of com-

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-