

1630. December 9. WHITE against BICKERTON.

A BOND, binding a debtor to pay a sum to a man and his spouse, the longest liver of them two, and to their heirs, no bairns being betwixt them two, after the decease of husband, the wife claims right to the sum, as pertaining to her by the bond, and her heirs.—THE LORDS found her heirs could claim no part of the sum, but the whole sum, after her decease, to pertain to the heirs of her husband; except the bond had been expressly, that failing of heirs gotten, or to be gotten betwixt them, the sum to be divided betwixt the heirs of the husband and the wife.

Fol. Dic. v. 1. p. 297. Auchinleck, MS. p. 7.

No 4.
Found as above.

1667. June 19. JOHNSTON against CUNNINGHAM.

A BOND being granted to a husband and his wife, and the heirs of the marriage, which failing, their heirs, was found to pertain to the husband after the death of the wife *in solidum*; and that these words (their heirs) ought to be understood *civiliter* of the heirs of the husband, as being *persona dignior*.

Fol. Dic. v. 1. p. 297. Dirleton, No 85. p. 35.

No 5.

* * * Stair reports the same case :

JAMES JOHNSTON, as assignee by William Johnston, to a bond granted by James Cunninghame, charges him thereon. He suspends upon this reason, That the bond bears the sum borrowed from William Johnston and his spouse, and payable to them, the longest liver of them two, and their heirs; there being no children betwixt them, the one half must belong to the heirs of the wife, to whom the suspender is curator, and which he ought to retain for their use; and albeit in such clauses in rights of land or heritage, *potior est conditio masculi*; yet it is not so in rights moveable; and this bond is moveable, being after the act of Parl. 1641; which was so found in a practique produced, observed by Durie, (No 20. p. 4222.) where the wife, by her contract of marriage, disposing her goods and debts to her husband, herself, and their heirs, the same was found to divide betwixt the husband's and the wife's heirs.—It was answered, That here the bond bore annualrent, and so was heritable, *quoad fiscum et relictam*; and there being nothing to evidence that the sum was the wife's own means, the same is presumed to be the husband's; and the taking of a bond of this tenor, if it did import to give her the half, is a donation by a husband to his wife, revocable, and now revoked.

THE LORDS found, that the wife's heirs had no interest in the sums.

Stair, v. 1. p. 462.