No 3.

ditioned to the father by the contract, prior to the legacy, yet the contract in that part was repute as of the nature of a testamentary cause, and so the last legacy done by the testament was preferred to that prior will specified in the contract, which was revocate by the said last legacy; neither was it respected, the expressing of this in a contract to make it to cease to be accounted as an act *sapiens naturam rei testamentariæ*; or that thereby the father was a creditor, who, if he had been one, could not be prejudged by any posterior will or legacy of the testatrix, except that the father could shew and qualify, that the defunct was his debtor, and that in law she was holden to him in this or the like sum, and that she might have been found legally astricted to him in any sum less or more, which not being shown, the legatar was preferred.

Act. *Craig*. Alt. *Primrose*. Clerk, *Hay*.

Fol. Dic. v. 1. *p.* 250. *Durie, p.* 805.

1637. *February* 15. LAUDER *against* GOODWIFE of WHITEKIRK.

No 4.

AN assignation being simply granted, and without any clog, but the assignee granting back-bond to count and pay to the cedent, at his home-coming from abroad, this was found to be no *donatio mortis causa*, nor revocable by a posterior assignation granted abroad, the cedent never having returned home.

Fol. Dic. v. 1. *p.* 250. *Durie.*

*** *See* This case No 6. p. 1692.

1662. *July* 25. NASMITH *against* JAFFRAY.

No 5.

A MISSIVE letter, written by a defunct to his spouse, bearing, that if he happen to die before his return, she should do with what he had as she pleased, was found to be only a *donatio mortis causa*, or legacy which could only affect dead's part.

Fol. Dic. v. 1. *p.* 149. *Stair.*

*** *See* This case *voce* HERITABLE and MOVEABLE.

1675. *December* 8. THOMSONS *against* The CREDITORS of ALICE THIN.

No 6.
A bond granted to a niece payable after the granter's death, in case he left no heirs of his

JAMES MASTERTON having given bond to his three nieces Thomsons, for 3000 merks payable after his own and his wife's death, 'only in case he had 'no heirs of his own body,' after the death of James Masterton and Alice Thin

No 6.
own body, being delivered in *liege poustie*, was found not revocable, not being *donatio mortis causa.*

his wife; they obtain a number of goods belonging to Alice Thin, to be sequestrate in the hands of Mr James Elleis. He hath now redacted the same into money, whereupon they obtain a decreet against Mr James; and, in like manner, Alice Thin granted a disposition of all her goods and gear in favours of Rachel Masterton, with the burden of the said Alice Thin her debts; whereupon Bailie Hall, and others of the Creditors, did also obtain decreet against Mr James Elleis, who suspends on double-poinding; wherein it was *alleged* for the Creditors of Alice Thin, That the foresaid bond of 3000 merks granted by James Masterton to his nieces, could have no effect, because it was but a legacy, or *donatio mortis causa*, taking only effect after his death, and therefore was revocable by him, and was *de facto* revoked, because they produce a disposition by James Masterton, 'of all lands, heritages, sums of money, goods and gear, 'he then had, or should have at his death, in favours of Alice Thin his wife, 'with the burden of his lawful debts, with power to him, at any time in his 'life, to affect or dispone the whole, or any part, at his pleasure,' which did revoke the bond granted to his nieces 'for love and favour,' and could not be understood as a lawful debt, but as a legacy, and could affect only his executry, which falls not in here, because of the disposition to his wife. 2*do*, Albeit this bond were not revocable by James Masterton as a legacy, yet it cannot extend to affect his whole executry or moveables, but only his own half; for there being by law a communion of moveable goods between man and wife during the marriage, which may be affected by either of their debts, and whereof the wife (there being no children) hath an equal and common right of property with the husband, albeit the husband may dispose on the moveables during the marriage without the wife's consent, yet that is but as administrator, and not as having *plenum dominium*, and therefore he can do no deed without a cause onerous, prejudicial to the wife's half; and all such deeds can but at most affect his own share of the moveables. 3*tio*, This debt having no effect during Masterton's life, and being conditional, 'failzieing heirs of his body,' the condition was pendent all his life, and so it was no debt till his death, at which time the law divides the moveables, and the wife hath the one half, there being no children, not *per successionem*, but *per divisionem;* so that a debt beginning to be due after the man's death, cannot affect the wife's half. 4*to*, This bond is not only without a cause onerous, but it is a fraudulent contrivance by James Masterton, to exclude his wife from all interest in his estate; for she hath no contract of marriage, neither can she have any terce, because he had no lands or heritage, so that this sum would exhaust all he had at the time the bond was granted, leaving nothing to his wife. It was *answered* for the saids Thomsons, Creditors of Masterton, That all these allegeances ought to be repelled; for it is clear this bond is no legacy or donation in contemplation of death, because it was subscribed and delivered in Masterton's *liege poustie*, and therefore he could not recal it, though he had done it directly; much less by a subse-

No 6.

-quent disposition to his wife. As to the second allegeance founded upon the communion of goods betwixt husband and wife, that the husband hath the sole, absolute, and unaccountable administration, whereby he may gift at his pleasure, not only to take effect in his life, but even after his death; for it is most evident by our custom, that the husband is not at all bound up by the wife's interest, which, if it were otherways sustained, would breed infinite pleas that were never dreamed of; that all deeds, done by husbands in relation to their moveables, might be reduced by their wives, or those representing them, as being without cause onerous, which was never attempted in Scotland, wherein our custom is wholly distinct from the Roman law, by which the *dos mulieris* was her proper patrimony, and the husband had no power of disposal, but only of administration, *nisi in dote æstimata*, nor was there any communion of moveable goods between man and wife; but our communion is limited and qualified, that the debts of either man or wife will receive execution against the moveables, *stante matrimonio*, and that what is free goods at the dissolution of the marriage, the wife, or her representatives, if there be no children, have the half, and if children, a third; but the wife hath no further interest, and the husband is not debtor, nor she creditor, but hath a limited right of property, subject to the husband's absolute and unlimited disposal; and, therefore there is nothing more ordinary than to grant bonds of provision to children, friends, or strangers, payable after the defunct's death, which were never quarrelled, nor to affect the wife's share, but came still off the whole head before division, unless there had been a contract of marriage, or any other bond or paction, providing the wife to such a share of the moveables; and on that account it was lately found betwixt Campbell and Campbell, that a husband having provided his wife to the half of his moveables, and having disponed the whole moveables that he should have at his death to his brother, it was found a fraudulent disposition, contrary his obligation, unless the brother instructed a cause onerous, but the law makes no *creditum* in favours of the wife, but a *communio bonorum*, which is a limited property; neither can fraud be alleged in this case, where there is no *creditum*. *See* Husband and Wife.

The Lords found the bond granted by Masterton to his nieces was not revocable by him, and was neither a legacy, nor *donatio mortis causa;* and found that the husband hath an absolute power of disposal of all the moveables, both to take effect in his life, and after his death, *sine dolo;* but found the circumstances of fraud here alleged, viz. 'That at the time of the bond, Masterton had not an 'estate sufficient to satisfy the bond, leaving any thing considerable to his wife, 'having neither contract nor terce,' the bond bearing a condition, 'of not hav'ing heirs of his body,' relevant to this effect, that the bond should not affect the wife's half; and as to the disposition made by Masterton to his wife, with the burden of the debts, and with a power to dispone, they found it not to be a legacy revocable, but only burdened with his debts, and a power to affect,

No 6.

and not with a power to alter or recal the disposition; and therefore found that the burden of the debts could not exceed the value of the whole moveables, and did not oblige the wife personally, but as intromitter with the moveables, *quoad valorem* of the whole moveables, and that the wife could not pretend her own right to a half, having accepted a disposition of the whole.

Fol. Dic. v. 1. *p.* 250. *Stair, v.* 2. *p.* 376.

1679. *January* 10. GRANT *against* GRANT.

No 7.
A person having disponed to his brother, the whole sums and goods he should have at his death, if he survive him, and the disponer have no children of his own; this was found not revocable, as a *donatio mortis causa*.

GRANT having no children, dispones 'the whole sums and goods he should 'have at his death, to his brother, if he survives him, and the disponer have no 'children of his own.' Thereafter he gives a disposition to his wife in the same terms, who craved preference, because the first disposition was *donatio mortis causa*, and so was ambulatory as a legacy, whereby the last disposition is preferable, at least it is but a tailzie for succession. It was *answered*, That the mention of death does not make a donation *mortis causa*, but when it appears that the donation is upon account of the imminency of death; but this disposition is *inter vivos*, though the effect is delayed to the disponer's death; it is true it did not restrain the disponer to transmit the property of his sums or goods, at any time of his life, the disposition not bearing to all sums and goods he then had, or should acquire till his death, but only dispones such sums and goods as then he should happen to have at his death; but the said disposition implying, and expressing a warrant from his own deed, he could not evacuate the same by a disposition to his wife in the same terms; and though the wife had first obtained possession, yet her husband being creditor by the prior disposition and clause of warrandice, he could not, without a cause onerous, dispone the same to any other, to take effect after his death.

THE LORDS found the first disposition preferable, as being *inter vivos*, and not *mortis causa*; but seeing the effect of it was not till his death, whereby communion of goods betwixt man and wife is dissolved, and the goods divided, they found it could not extend to the wife's half of the sums or moveable goods. *See* HUSBAND AND WIFE.

Fol. Dic. v. 1. *p.* 250. *Stair, v.* 2. *p.* 668.

1686. *February* 16. BLACKWOOD *against* CUNNOCHIE'S CREDITORS.

No 8.

THE debate between Robert Blackwood and the Creditors of Cunnochie was reported by Kemnay; and the liferent granted by Major Arnot to Margaret Wood his spouse was preferred; though it was objected, that it seemed to be