No 18.

The condition of the failure of heirs-male of the granter's body is made, not only to suspend the payment, but even the obligation itself. It is only upon their failure that he binds his heirs to pay this additional sum. Till that happens, there is no obligation; *dies nec cedit, nec venit.* The gift was merely personal to Jean; and as she died before the heirs-male, the additional provision falls to the ground. As it was never due to Jean herself, of consequence it cannot transmit to her representatives.

Pleaded for the defender, This additional provision was evidently intended to take place in the event that has happened. It was a *solatium* to the granter's daughter, in case the estate should go to a collateral heir-male to her prejudice. The intention of it is declared to be, to procure her a suitable marriage; and therefore she certainly had power to assign it in her contract of marriage; and consequently it must be due upon the existence of the condition. Though no mention is made of heirs in the bond, yet such provisions always go to heirs.

'The Lords sustained the reasons of reduction.'

Act. *Ferguson.* Alt. *Hamilton-Gordon.* Clerk, *Kirkpatrick.*

P. M. *Fol. Dic. v.* 3. *p.* 300. *Fac. Col. No* 263. *p.* 489.

SECT. IV.

Implied Conditions in Assignations *omnium bonorum.*

No 19.

A party granted an assignation *omnium bonorum* that should belong to her at the time of her death, reserving her liferent and power to alter *etiam in articulo mortis.* The Lords found this was a *donatio mortis causa,* and therefore void by the cedent surviving the

1707. *March* 7. Doctor Irvine *against* John Skeen of Halyards.

Elizabeth Ker, the pretended second wife of the deceased Doctor Christopher Irvine Doctor of physic, having disponed to John Irvine her son procreated betwixt the Doctor and her, all goods and gear belonging to her the time of her decease, reserving her own liferent, with a faculty to dispone otherways *etiam in articulo mortis*, and dispensing with the not delivery; this general disposition he transferred to Doctor Christopher Irvine his father's eldest son; who, having procured a gift of John's bastardy, and *ultimus hæres*, raised a process of declarator of bastardy and payment, against Elizabeth Ker's debtors. Compearance was made for John Skeen of Halyards, her executor *qua* nearest of kin, who claimed to be preferred to the said debts, in respect the assignation granted by Elizabeth Ker to her son was *donatio mortis causa*, and void by her surviving the donatar, and consequently the goods and gear disponed belonged to her executor.

No 19.
assignee; and found, that the subject belonged to the cedent's executors, though the deed was never revoked by her.

Alleged for Doctor Irvine; That Elizabeth Ker's assignation to her son could not be *donatio mortis causa*, seeing it was not conceived after a testamentary nature, but as a deed *inter vivos*; and *donatio mortis causa* is never presumed, unless it clearly appear from the testamentary conception of the writ, or be granted in contemplation of immediate death, or some eminent danger feared by the disponer.

Answered for Halyards; The disposition in question carries the plainest characters of *donatio mortis causa*, as described, *l.* 1. & *l.* 27. *D. De mortis causa donationibus*; for here Elizabeth Ker preferred herself to the assignee, and him to her representative. And as an irrevocable *donatio mortis causa* is reputed *donatio inter vivos*, so *e contrario*, a revocable *donatio omnium bonorum* belonging to the disponer the time of her decease, must be looked on as *donatio mortis causa*. Again, in the general opinion of lawyers, when a donation is expressly to take effect at the disponer's death, *in dubio mortis causa præsumitur*; because, *nemo præsumitur velle rem suam jactare*.

THE LORDS found the assignation granted by Elizabeth Ker to John Irvine her son, being *omnium bonorum* which should belong to her the time of her decease, was *donatio mortis causa*, and so void by the cedent's surviving the assignee. And the subject was found to belong to the cedent's executor, though the faculty to alter was never exerced by the defunct.

Thereafter it was *alleged* for Halyards; That the foresaid assignation granted by Elizabeth Ker to John Irvine her son, is null by the common law, *Authent. L.* 6. *Cod. De incest. nupitis*; and our law, July 20. 1622, Weir of Blackwood *contra* Durham, *voce* PACTUM ILLICITUM; and act 119. Parl. 12. James VI. as being granted by an adulteress to her adulterous child. And the adultery is proved by the declarator of bastardy in process, obtained by the Doctor before the Commissaries of Edinburgh, finding the marriage betwixt the deceased Doctor Irvine his father and Elizabeth Ker to have been unlawful, and the children spurious and adulterous, and incapable to succeed to their parents.

Answered for Doctor Irvine; Restrictions in the common law of the natural faculty of alienating and disposing of property take little place with us, who walk therein by our own statutes and customs. Besides, the *Authentic L.* 6. speaks of children born in incest. Nor does the cited decision meet the case, for there the LORDS refused to sustain a bond granted to the mother of an adulterous child, because given as a *præmium adulterii et turpitudinis*, which cannot be pretended here where the mother received no premium from the adulterer, either to herself or her son, but disponed after the adulterer's death her own effects, in which there could be no *turpitudo*, either *ex parte dantis*, or *accipientis*. And the act of Parliament 119. annuls only dispositions made by a woman who (divorced from her lawful husband for her own fault of adultery) marries the adulterer, or keeps company with him at bed and board; which cannot be said of Elizabeth Ker, who was never married. Besides, the said

No 19. act prohibits only the alienation of lands, heritages, tacks, rooms, or possessions, which can never be extended to moveable sums, the present subject of debate.

THE LORDS repelled this nullity. See PACTUM ILLICITUM.

Fol. Dic. v. 1. *p.* 425. *Forbes, p.* 139.

1730. *November.* GALLOWAYS *against* HUNTER.

No 20.

A DONATION *mortis causa* being granted by a man to his niece, of his whole moveable effects to her, and the heirs of her body; which failing, to her other heirs and assignees whatsoever, with the burden of his just and lawful debts; found this disposition not vacated by her predeceasing the disponer, but that the succession was open to her other nearest of kin, she having died without heirs of her body. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 425.

SECT. V.

Whether implied conditions have effect in onerous deeds.

1688. *February* 15.

CUSHNEY *against* SMITON, or DUNCAN *against* SMITON.

No 21.
It was provided in a contract of marriage, that if the wife died without children, the half of the tocher should return to her father, his heirs and assignees. The event having existed, found that this not being in the case of a legacy, but

THOMAS CUSHNEY, merchant in Aberdeen, pursues William Smiton in Kinghorn, on a clause of his contract of marriage with Bailie Duncan's daughter, that if his wife die without children, he shall restore the half of the tocher; and subsumes, that the condition existed. *Alleged*, It was provided to return to Duncan, her father, and he died before her, and so *ante conditionis eventum*, and he could not transmit to Cushney his executor what he had not right to himself; and that such conditional provisions *evanescunt*, if the legatary decease before the purification of the condition, *l. unic.* § 3. *C. De caduc. toll. Answered*, He has a right and disposition from Duncan's nearest of kin. THE LORDS at first demurred if this gave him a sufficient title to claim the debt; but at last they found, that the wife having died without children, the half of the tocher does return, with the interest, after the wife's death; and therefore decerned the defender to repay the half of the said tocher to the pursuer, he, before