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

extract, producing his right from the nearest of kin of the father, at the time of the wife's decease. Then Smiton, as having right by disposition from his wife, claimed her part, she being one of the nearest of kin.

No 21. of an onerous contract, the half was payable *quandocunque* the condition existed, and therefore was due to the father's heir, himself being dead before his daughter.

ANNA DUNCAN, as executrix to John Duncan her father, pursues William Smiton, Bailie of Kinghorn, for payment of 2,000 or 3,000 merks due in this manner, that, by his contract of marriage with Elizabeth Duncan her sister, it is provided, if the said Elizabeth happen to die without children of her body, the half of the tocher shall return to the said John Duncan her father, his heirs and assignees; *ita est*, that case existed, the marriage dissolving by the said Elizabeth's death without heirs, and Andrew Smeton, his brother, was cautioner in the contract. It was *alleged*, 1*mo*, This debt was never *in bonis* of John Duncan, he having deceased many years before his daughter Elizabeth, and so *pendente conditione;* and where a legatary dies *ante conditionis eventum, evanescit legatum, l. unic.* § 2. 3, and 4. *C. De caduc. toll.* And therefore the debt never existing in his time, it cannot be confirmed in his testament as due to him. *Answered*, This is no legacy, but an obligation, and made payable to the said Mr Duncan, or his heirs *quandocunque* it should exist, and none can have either the legal or natural title, but his nearest of kin, which is this pursuer; and the Lords found so in this case, upon the Lord Forret's report, 15th February 1688; to which interlocutor the Lords now inclined to adhere. 2*do*, It was *alleged* for Smiton, *Esto*, your title were good, and that the half of the tocher must return, yet the time of his wife's death, (which was in 1684,) is not the period at which it must fall due, but only after his own decease, in regard by another clause in the contract, the tocher is to be employed to the affidate spouses in liferent and conjunct fee, and *posteriora derogant prioribus*, which clearly imports he must liferent it; and though *obligationis dies cessit* at his wife's death, yet the *terminus solutionis* is not till his own, the wife's deceasing without bairns being the condition on which it was to return, but not the term. *Answered*, Wherever a term of payment is not expressed, law presumes it is due *die præsenti*, and the obligation here is plain, that, on the wife's death, without heirs of her body, the half shall return, so he falls debtor from the moment of her decease with annualrent thereafter; and in such cases, the husband has no courtesy nor liferent as in heritages. See 29th Jan. 1639, Graham *contra* Park, No 23. p. 4226. It was likewise *urged* for Anna Duncan, That the words 'then, and in that case,' imported a present return immediately on his death, as is clear *per l.* 4. *D. De condit. et dem.* with Bruneman and Besoldus, explaining the particle *tum*. THE LORDS, by a plurality, (several being *non liquet*) found, he ought to liferent the sum which was to return. 3*tio*, *Alleged* for the cautioner, That he is not mentioned as one of the obligants and parties-contractors in the beginning, which would make him liable for all the contents, but is only bound in the obligement to employ and lay out the money on secu-

No 21.

rity to the spouses in liferent, and the heirs of the marriage in fee, and not in the clause of refunding the half of the tocher. *Answered*, Though his obligement be only for his brother's employing the tocher on sufficient security, yet it bears likewise these words, 'upon the provisions and conditions above mentioned,' whereof the return of the half of the tocher is one; neither was it ever secured and employed in the terms of the contract. The Lords found the cautioner liable even for implement of that clause of the tocher's return, as well as for securing it, seeing it is burdened with the antecedent conditions, whereof that of refunding the tocher is one.

Fol. Dic. v. 1. p. 425. *Fountainhall*, v. 1. p. 497. & v. 2. p. 36.

*** Dalrymple reports the same case:

1699. *January* 20.—By contract of marriage betwixt Elizabeth Duncan and William Smiton, the said Elizabeth's father is bound to pay a portion of 4000 merks, and dispones a tenement of land valued at 2000 merks; and the contract provides, That, if it happen the wife to live year and day after the marriage, and thereafter to decease not having bairns on life, the just and equal half of the tocher, both heritage and money, should return to the father and his heirs. For the which causes, William, as principal, and his brother Andrew as cautioner, oblige them to add 6000 merks to the tocher, and to employ the whole on land or annualrent, to the future spouses in conjunct fee and liferent, and to the heirs of the marriage; which failing, to the husband's heirs (upon the provisions and conditions always above mentioned) and how oft the sum should be uplifted to re-employ, &c.

Elizabeth Duncan dying after year and day, without heirs of the marriage, Anna Duncan, her sister, as having right to the clause of return of the tocher, pursues William and Andrew Smitons for payment.

It was *alleged*; By the contract, the defenders were bound to employ the portion upon land or annualrent, in favours of the longest liver, whereby the husband had right to the liferent.

It was *answered*; The contract provides, that failing of the wife without bairns, the half of the tocher should return; and no time being prefixed to the returning, the existence of the condition, is, in law, understood the term of payment, 2*do*, Though the liferent be provided to the husband, yet that clause is qualified (under the provisions and conditions above specified) which provision above specified is, That the tocher should return, in case of the wife's death without bairns, and still is to be understood, that, *eo casu*, the return is upon the existence of the condition.

It was *replied*; That, albeit the existence of the condition be understood to be the term of payment of a conditional obligation, and generally where no

No 21.

day is expressed, the term of payment is presently, the term of payment being in favour of the debtor; yet the whole tenor of the obligation is to be considered complexly; and then it will appear, from the subsequent obligement, that the tocher was to be employed to the husband and wife, and longest liver in liferent, which clears the term of re-payment of the portion to be after the husband's decease; though without the foresaid clause, providing the liferent to the husband, it would have been due upon the wife's death.

2do, As to the allegeance, That the clause providing the liferent to the husband is qualified with the provisions and conditions above specified, that is the return of the tocher, failing the wife without heirs; the foresaid last clause is also to be considered complexly, and it will appear, that the provisions above specified relate to the return of the portion, but not to the time of returning; for the obligement is to employ the tocher to the husband and wife in liferent, and to the heirs of the marriage, which failing, to the husband's heirs and assignees; then follow these words, (under the provisions and conditions above specified); which quality was adjected, to clear the import of the destination in favour of the husband's heirs and assignees, that the same should not take place, if the wife died without bairns; but the husband's liferent, and the return of the tocher, being consistent, and nothing appearing from the contract that the husband's liferent was to cease in any case, the contract is to be so interpreted, that all the clauses may have their effects, according to the most usual and reasonable destination.

"THE LORDS found the husband had right to liferent the tocher." *See* PROVISION to HEIRS and CHILDREN.

Dalrymple, *No* 11. *p*. 14.

*** See Harcarse's report of this case, No 14. p. 2954.

SECT. VI.

Effect of failure of the end in view in granting a deed.

1629. *March* 25. LO. COUPER *against* DR STRANG.

No 22.
A pension for *future* services, found due, the services not being the *final*, but only the impulsive cause of the pension.

DR STRANG having charged the Lo. Couper to pay a pension of L. 40, given to him yearly during his lifetime, he being their minister at Errol, the words of the pension bearing, 'That the Lo. Couper understanding the pains taken, and 'to be taken by the Doctor, upon his vassals in that parish, and for love and 'favour, he gives the said pension to the Doctor during his lifetime;' and the