THE LORDS found, that in this case the charger's cedent had no right to the sum given him by the disponer. No 17.

Reporter, *Elchies.* Act. *Lockhart.* Alt. *Haldane.* Clerk, *Gibson.*
Fol. Dic. v. 3. p. 300. D. Falconer, v. 2. No 19. p. 21.

*** Kilkerran reports the same case:

ONE of six tutors, to whom a legacy of 6000 merks was left, not having accepted the office, was found not entitled to the legacy, and his answer repelled, that the other tutors had chosen one of their number factor, without taking a cautioner for him; and that he had offered to join with them, if they would call him to account, and establish a factor who would find caution. It appeared that this offer was made merely in the view to save his legacy, a short time before he raised his process; that, along with the offer, he had protested not to be prejudged in his legacy, and that he had not taken any measures to secure the pupil against the hazard he suggested, which he might have done by a process for having the other tutors removed as suspected.

Kilkerran, (TUTOR AND CURATOR.) *No* 13. *p.* 589.

1760. *December* 18. MACCULLOCH of Mulderg *against* Ross of Pitcalny.

No 18.
Additional provision to a daughter, failing heirs-male of the granter's body, does not take place if the daughter dies before the heirs-male fail.

IN the year 1702, James Macculloch, then of Mulderg, having at that time two sons, granted a bond of provision in favour of his daughter Jean, for 7000 merks, payable the first term after her marriage; and further, an additional provision in the following words: 'And failing of heirs-male lawfully begotten 'of my body, I hereby bind and oblige me and my foresaids, to content and 'pay to the said Jean my daughter, the sum of other 7000 merks, at the se-'cond Whitsunday or Martinmas after failing of my said heirs-male,' &c.

James Macculloch was succeeded by his son David, who lived till the 1755; and in him the heirs-male of the body of James Macculloch failed. Jean died before the year 1720. Ross of Pitcalny, her son, adjudged the estate of Mulderg, for payment of this additional provision of 7000 merks, the heirs-male of the granter having now failed. John Macculloch of Mulderg brought a reduction of this adjudication.

Pleaded for the pursuer, From the general tenor of this bond, it is evident, that the provision was intended by the granter to be paid to his daughter, only in the event of her living till the existence of the condition at which it is declared to take place. The provision of the first 7000 merks was only to take place in the event of her marriage; so that if she died unmarried, it could not be a burden upon the family. The same is the case with regard to this additional provision.

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.