

only *donatio mortis causa*, because it mentioned in the narrative that he was going abroad and might die before his return, and so was *contemplatione mortis* and null, because he returned; which the LORDS repelled.

No 8.

March 25.

THE case of Margaret Wood, relict of Major Arnot, and her Creditors, against Lovel of Cunnochie's and her Husband's Creditors, mentioned 16th February 1686, was reported by Kemnay. THE LORDS find that Margaret Wood the liferentrix, by her infestment, proceeding upon an heritable bond prior to the Creditors' adjudication, did carry all right which the granter of the bond had, though it be not *specific* named; and therefore prefer her assignees *quoad* her right, to the Creditors of her husband the granter:—To which they adhered on the 27th February 1687.

Fel. Dic. v. 1. p. 249. Fountainball, v. 1. p. 403. 410.

1699. February 17.

LESLEY against LESLEY.

THE Lord Pollock, Justice Clerk, as probationer, reported the following cause in order to his trial, and after the same he was admitted. Mr John Lesly going to Holland in 1691, to study the laws, he makes a disposition and tailzie of his estate, both heritable and moveable, to Mr John Lesly of Tulloch, his cousin, and failing of him to George Lesly his brother, bearing in the narrative, that he desired to avoid differences in case of his not return, therefore he disposed, &c. reserving a power to alter, and dispensing with the not delivery. Before his return, Mr John, the first substitute in the tailzie, was deceased, and he dies himself in 1695, whereupon George, the second member of the tailzie, enters by the foresaid disposition. Margaret Lesly, being likewise his cousin, she and Walter Grant of Artindilly, her husband, raise a reduction and declarator, that the said disposition being conceived in conditional terms in the narrative, only to take effect in case of his dying abroad, and he having returned, it became utterly void and null, as effectually as if he revoked it, and was truly *donatio mortis causa* in view and contemplation of the eminent hazard, he having shipped at Leith that same day, and the sea being infested with Dunkirk pirates, &c. *per l. 29. D. de mortis causa donat.* Likeas it bore no provision of his own children, in case he should marry, and therefore has been only a temporary settlement during his absence; and if the words be transposed from the narrative to the dispositive part thus: 'Therefore in case of my not return, I dis-
'pone my estate to Tulloch,' there would have been no dubiety in the case; and therefore such an omission ought not in subtilty to carry away his fortune. *Answered*, That the mentioning mortality in a writ, does not always make it a donation *mortis causa*; neither do narratives affect and influence dispositions, unless they be insert and repeated in the dispositive clause, which is not in this.

No 9.

A gentleman going abroad, tailzied his estate to a cousin, and failing him, to his brother, narrating, that he desired to avoid differences in case of his not return, therefore he disposed, &c. reserving a power to alter, and dispensing with the not delivery. The first substitute died, and thereafter the tailzier returned, and died; the second member of the tailzie entered heir on the disposition. It was found, that notwithstanding the granter's return, the tailzie was still obligatory.

No 9.

case; for if he had designed this tailzie only to stand in case he should die abroad and never return, what need was there of so anxious a care to make both an institution and substitution; he could not imagine, in the short time of his stay abroad, there was need to provide against that failure; and Stair, 14th November 1667, Henderson, *voce* PRESUMPTION, (which Dirleton has recorded in Latin,) shews a disposition of this kind was sustained valid; and his *perseverantia animi* appears, that when Mr Lesly returned to Scotland, he neither cancelled nor revoked this disposition, which he easily might, if he had designed the alteration of his succession; neither did he, in this disposition, or at any time, shew any regard to his cousin, Artindilly's Lady, who now competes. THE LORDS considered this was *quæstio voluntatis*, and a case of divination *de conjecturata mente defuncti*, where the presumptions were pregnant on both sides; but the plurality found the tailzie yet obligatory, and did not become void by his return; and there was no weight in that topic, that he had made no provision for children of his own body, for all such deeds are *per supervenientiam liberorum* sufficiently revoked in law, *l. 8. C. revoc. donat.* and Mr Lesly had a power to alter at his pleasure, if he had thought fit.

Fol. Dic. v. 1. p. 250. Fountainball, v. 2. p. 45.

1709. January 22.

MUIR against BERTRAM.

No 10.

ALEXANDER BERTRAM of Nisbet having got considerable means with Grizei Muir, his wife, at her desire he grants a bond to Rabina Muir, her sister, and some other of her relations, for 900 merks, payable at her death. Rabina pursues Bertram for her share of the legacy. He *alleges*, That the bond had a power and faculty to his wife to revoke, in case she met with any ingratitude, disobligement, or incivility; and *ita est*, she revoked and recalled Rabina's part; and, by a writ under her hand, bestowed it upon others. *Answered, Non relevat*, unless she had expressed the causes of ingratitude moving her to that alteration, which she neither has nor could do, but was imposed upon. *Replied*, She was the absolute best judge of that herself; and though remuneratory on the husband's part, yet it was *donatio mortis causa quoad* the wife, and so revokable at pleasure.—THE LORDS being equally divided, found, by the President's vote, they behoved to condescend upon and prove some cause of ingratitude or provocation, otherwise they could not sustain her revocation. Yea, a parent's exheredation of a child in some cases must be done *cum elogio, ut justa et legitima exheredationis causa nominatim exprimatur*.

Fol. Dic. v. 1. p. 250. Fountainball, v. 2. p. 483.