

1769. *March 10.* MARION RUSSEL *against* JAMES RUSSEL of Ashiesteel.

IMPLIED CONDITION.

Bond of Provision, containing heirs and assignees, falls by predecease of the Grantee.

[*Fac. Coll. IV. 177 ; Dictionary, 6372.*]

AUCHINLECK. There is no direct evidence of the death of David Russel ; but there are circumstances which show that he was reported and believed to have been lost soon after 1729, and he has never been heard of since that time. We must take the cause as it stands : Were the question with a child of David's, there might be a *conjectura pietatis* in favour of the child ; but, in the common case, bonds of provision granted to children, who die before the granter, are thenceforth considered as of no consequence ; and hence are often left uncanceled. The provision to heirs and assignees only relates to the heirs and assignees of the child.

PRESIDENT. It is admitted on both sides that David died. The plea of the pursuer and of the defender also is founded on this ; so that the presumption of law, in favour of life, is out of the question.

PITFOUR. If the father knew of the death of David, and did not destroy the bond destined to heirs and assignees, it may be presumed that he meant to let it go to heirs. He quoted a decision, *Galloway, November 1730.*

[This opinion was not relished, as being adverse to the sentiments and intention of every man in his settlements *intra familiam.*]

KAIMES. If David had left children, there might have been a difficulty ; but there is none in the case which exists.

On the 10th March 1769, "the Lords sustained the defences, and assoilyied." *Act. R. M'Queen. Alt. A. Lockhart. Reporter, Pitfour.*

1769. *March 10.* JAMES BRUCE *against* ROBERT STEIN and OTHERS.

THIRLAGE—PRESCRIPTION.

Thirlage acquired by Prescription, upon a grant of the Mill and Pertinents.

[*Faculty Collection, IV. 178 ; Dictionary, 16,061.*]

AUCHINLECK. Here is a proper title ; but, in order to make a thirlage, it is necessary to say more than that there is a proper title and payment of