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 uncancelled. 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

out-town multures. There must be a proof of such payment of multures as to show that the coming to the mill was *necessitatis*, not *voluntatis*: and so it was found in the case of *Bathgate*. It is necessary to establish that the multure paid was higher than what the malt could have been grinded for at another mill, with equal conveniency in point of distance.

HAILES. I doubt of the thirlage being established in this case, except as to those feuars who are expressly astricted by their charters: out-town and in-town multures are relative terms. It is admitted that every one who goes to this mill, pays the precise same multure. How then can any argument thence arise? or, how can there be any in-town multure more than out-town? I lay no great stress on the acts of court: they are not formal: the latest is in 1702. It does not appear that execution ever passed upon them: they are but four in number, and two of them relate to wheat, not malt. As to the steel mills, they are but a late invention at Alloa; and, consequently, the prohibiting the use of them, or exacting multure from the users of them, must also be a late practice. The first steel mill at Alloa appears to have belonged to the proprietor of the mill; and, when he allowed any one to use it, it was natural for him to require some consideration to be paid to his miller, who would otherwise have had reason to complain that his master withdrew customers from the mill.

KENNET. There is no mill so convenient for the people of the barony as this mill. It can have no custom from without; for all the neighbouring estates have mills of their own.

KAIMES. If the mill is more ancient than the feus, (which is admitted to be the case,) this would afford a great circumstance of presumption in favour of the thirlage.

On the 10th March 1769, "the Lords found the defenders astricted."

5th July 1769, adhered.

15th February 1770, "found defenders liable in abstracted multure for three years preceding citation;" altering Lord Monboddo's interlocutor.

Act. R. M'Queen. *Alt.* A. Lockhart.

Rep. Monboddo.

Diss. Monboddo, Hailes, President.

1769. *March* 10. ARCHIBALD DUFF of Drummuir *against* JAMES DAY.

TACK.

Power of Subsetting implied in a Lease of Nineteen Years.

THE defender possessed a farm belonging to the pursuer, on a lease for nineteen years, in which no mention was made of a power of assigning or subsetting. The defender having subset a part of the lands, an action of removing was raised by the pursuer against him and his subtenant. In defence, it was stated that, as the lease did not debar subtenants, the power of subsetting was implied; and it was so found by Lord Strichen, Ordinary. In a petition, it was—

PLEADED by the Pursuer,—That the doctrine of the defender was opposed to