

a Provision declaring a Right or Freed to have been null from the beginning, upon the Receiver's doing or failing to perform what is required or in some other Event. In Contracts already perfected, which may be dissolved by the Event of a Condition; all Things remain in the mean while in the same Condition they were in by the Contract; and the Effect of the Contract is in Suspence, till it happens. And when such Condition comes to pass the Contract is annulled. vid. infra pag.

A Condition must be possible, that is, such as may naturally and lawfully come to pass or is in the Creditor's Power. 'Tis either potestative, or casual, or mixt. A potestative Condition, is that which is in the Power of the Party of the Right to perform, or which depends on the Deed of the Person who breaks together. It consists either in doing or not doing. A casual Condition is that which is independent of the Will of the Contractors, or depends also, either upon some uncertain Event or Contingency, as if it rain to Morrow, or a Ship return from Asia, if there be no Children of a Marriage, or failing Children of a Marriage &c. A Clause in a Contract of Marriage providing that if there were no Issue of Children, the one Half of the Conquest of the Marriage should be disposed of as the Wife should think fit was found to take Place, albeit there was a Child born of the Marriage, which died the same Day he was born: Because the Condition if there be no Children took Place if at any Time of the Marriage there were none, whether by their simple Nonexistence or Deficiency. As that Formula, *si sine liberis decesserit*, or *deficientibus liberis*, which still respects the Dissolution of the Marriage, and imports if no Children survive the Marriage, cannot be excluded by the momentary or simple Existence of a Child 27 June 1676 E. Dünfermling contra E. Callender. But had the Condition been, if there were no Children born their Birth might have defeated the Condition which respects a peculiar Time viz their Procreation. As the Condition introduced by Law, if Marriage dissolve within Year and Day without Children, all Things return hinc inde, fails by the simple Existence of Children, where their Birth and Maturity by Weeping, determines the Time when the Condition is excluded. The learned Craig (Feud. Lib. 2. Tit. 5. §. 4. in fin.) says, *that conditio si sine liberis decesserit impletur si liberis tempore mortis habuit, et si postea decesserint; licet plerique in contrarium sint opinione.* A Clause in a Contract of Marriage, that a Part of the Foraker should return to the Bride's Father in case she died without Children lawfully procreated of the Marriage, was found to infer the Return, tho Children were born but died without Issue before their Mother 18 June 1680 Oswald contra Boyd. Because from the presumed Will of the Contracters it appeared, that a Part of the Foraker was

to return to the Father when the Interest in the Family rested by his Daughter having no Issue: And Children procreated were mentioned only to restrict the Provision to Children of the Marriage, it being provided to a Wife and the Part to be procreated between the said Wife and said and said Burns to be equally divided between their Heirs and Executors at the first of either of their Deaths &c. And the Wife having died leaving a Son procreated of the Marriage, and surviving her 10 Years and then died: the Condition of the Substitution was found to fail, there having been a Child of the Marriage existing at the Substitution thereof: For these Words failing Children could not in this case be interpreted to carry in their Succession, that is, in the said Wife's Heir, there should be Place for the Substitutes in respect the Clause appointing the Division to be at either of their Deaths, clearly it is the Intention of Contracters, that the Condition of the Existence of Children should be respected that Time, and could not be a Condition pending after their Deaths 2 Decemb. 1687 Hamilton contra Wilson. But had it not been for the specific Nature of this Provision, the Cause specificibus & generibus would have been otherwise interpreted, as in all Substitutions and Tailors: For it differs from the Clause liberis non existentibus. A mixt Condition is that which is partly potestative and partly casual: When depends partly on the Deed of the Contracters, and partly on Chance: a Condition which may naturally be performed, and whereof the Performance may be hindered by some Accident as of Robbery & the Death or Imprisonment of some other Person concerned.

If a Condition be not performed thro the Default of the Person in whose favour it is conceived, it is held to be unfulfilled, with Respect to him by whom the Event or Fulfilling of it was hindered. l. 161. ff. de reg. jur.

By the Roman Law, if Conditions is not happen till after the Decease of the Contracters, they have their Effect with Respect to their Heirs and Executors. A Creditor in a Conditional Right dying before the Condition existed both transmit upon obligations to his Heir, who may take the Advantage of it when the Condition is purified l. 57. ff. de verb. ob. §. 4. Inst. de inat. stip. l. 8. ff. de pecu. & com. rei vend. But it seems to be otherwise by the Law of Scotland. For a Sum payable by a Bond of Provision to a Tailor at a certain Age (which being dies incerta habetur pro conditione;) is not due to the Child's Representatives even after it might have attained to that Age if the Child died before 17 January 1685 Edgar contra Edgar 27 Feb. 1674 Bellshiel contra Bellshiel Hair Lib. 1. Tit. 3. §. 7. in fin. Stewart Answer to Inlet. Double Tit. Provision in Favour of Daughters. And the younger Children being provided to a certain Sum if there should be but one, and to a greater Sum if two to be paid at a certain Age or their Marriage; and there having been two Children whereof one died before the Term