No 113.

The Lords, 20th June, found, 'That there being moveable subjects, which 'the defunct was at liberty to have disposed of as he pleased, far above the 'value of the adjudication referred to in the debate, as conveyed in the disposition to the heir, that the disposition was not in prejudice of the heir, and 'that therefore she could not quarrel the same on the head of death-bed.'

Pleaded in a reclaiming bill, That this interpretation would elude the law annulling deeds on death-bed, which infer no warrandice, and therefore are not to be made good; and there is no difference betwixt the case of a person burthening his heir by a deed on death-bed, to whom he lets his moveables fall *ab intestato*, as being also his next of kin, and this, where they are disponed; since it is in the power of an executor next of kin to neglect the disposition in his favours, and take up the effects *ab intestato*.

Answered, There is a manifest difference betwixt these cases, as the executor named, could not, by neglecting the disposition and setting up another title, free himself of the burthens therein L. 29. t. 4. D. *Si quis omissa causa testati:* And the burden on death-bed is at worst *legatum rei alienæ*; which though ignorantly done, behoved to be made good to a wife *L.* 10. *Cod. de legatis*, 2d December 1674, Cranston against Brown, *voce* Quoad Potuit non fecit.

The Lords adhered.

Act. *H. Home & Wallace.* Alt. *A. Hamilton & W. Grant.* Clerk, *Gibson.*

D. Falconer, v. 1. *p.* 123.

SECT. XV.

How the Sixty Days are to be computed.

1793. *December* 10.

Sir John Ogilvie, and Others *against* Catharine Mercer, and Others.

No 114.
A deed reduced as made on death-bed, where the granted survived its execution fifty-nine days and three hours.

Robert Mercer, on 22d February 1791, at eight o'clock in the evening, executed a deed of entail of his lands of Lethindy, in favour of Catharine Mercer his niece, and various substitutes. He died on the 22d April thereafter, betwixt ten and eleven o'clock at night.

Mr Mercer, when he executed the entail, had contracted the disease of which he died, and he did not afterwards go either to kirk or market.

Sir John Ogilvy and others, his heirs at law, (as representing deceased sisters,) brought action against Miss Mercer, and the other substitutes in the entail, for setting it aside, because Mr Mercer had not survived its execution for the space of sixty days, in terms of the act 1696, c. 4. In defence, Miss Mercer *first Pleaded;* The law of deathbed, as being a restraint on that freedom of disposal which is the essence of the right of property, must be strictly interpreted; Tailziour, No 95. p. 3317. And whatever may have been the case at a former period of society, when perhaps, had it not been for this law, the clergy would have employed their influence with dying persons, in prevailing on them to leave their fortunes to pious uses, to the prejudice of their near relations, and when it was the object of the law to prevent as much as possible the vassal from alienating his benefice without the consent of his superior, Craig, b. 1. d. 12. § 36.; Stair, b. 4. tit. 20. § 38.; No 113. p. 3333.; in the present age, no plea of expediency can be urged in its favour. The act 1696, therefore, though correctory in its nature, yet being highly expedient in itself, ought to receive that interpretation which is most consonant to its spirit, and most favourable to the granter of the deed, for whose benefit it was intended; Mackenzie's Observations, p. 410.; 22d Nov. 1748, Sutherland against his Father's Creditors, *voce* HEIR APPARENT. No 114.

Now, reckoning from the 22d February, the date of the entail, to the 22d April, the day of Mr Mercer's death, he lived sixty days after its execution. It is true, the sixtieth day was not complete; but *dies inceptus in favorabilibus pro completo habetur.* This maxim is strongly founded in reason, and clearly established in our law; Stair, b. 2. tit. 8. § 34.; February 25. 1680, and 7th June 1681, Weddel, *voce* DIES INCEPTUS; Lady Bangour against Hamilton, No 22. p. 248.; Wilson against Haddo, No 46. p. 647.; Elliot against Ferguson, *voce* MEMBER OF PARLIAMENT; Telfers against Ferrier, IBIDEM; mentioned in Wight's Treatise of Election Law, p. 221.; in the civil law, *Voet, lib.* 44. *tit.* 3. § 1.; *Vinn. ad. Inst. lib.* 1. *tit.* 23. *p.* 100.; *lib.* 41. *t.* 3. *l.* 6. *et* 7. *ff. de usurp. et usucap.; lib.* 44. *t.* 3. *l.* 15. *ff. princip. de divers. temp. prescrip.;* Grotius Comment. on Matthew, c. 12. v. 40. *lib.* 40. *t.* 1. *l.* 1, *ff. de manumissionibus;* and likewise in the law of England, Viner, vol. 20. p. 269. *voce* TIME.

It is seldom possible to ascertain with perfect accuracy the precise moment at which any given event or transaction took place; and when, in order to make it effectual, it is necessary that it should have happened at a particular period, the cast of the balance is *in dubio* to be given where the favour lies. Accordingly, Ulpian, *lib.* 28. *t.* 1. *l.* 5. *ff. qui test. fac. post.* lays it down, that if one born on the 1st January make his will on the 31st December of his fourteenth year, at any time after midnight, the deed will be valid, which is, in other words, saying, that the day of the birth and that of executing the deed were both to be reckoned in making up the period of fourteen years, the age which the law required in a male before he could make a testament.

No 114. Indeed, it is a general rule in all cases where the period is measured by days, and favourably computed, to avoid fractions, and to hold the parts of the beginning and ending days as whole days, by referring the act from which the period commenced to the first moment of the day, without enquiring at what hour it really happened; and the act, which is the *terminus ad quem*, in like manner, to the last moment; Viner, vol. 2. p. 268.

The 'year and day,' so often required in our law, was established from the known effect of the maxim *dies inceptus*, &c. as it is universally agreed, that the day is added solely in order to secure the full completion of the year. But this would have been unnecessary, had it not been understood, that otherwise the commencement of the last day of the year would, in many cases, have been sufficient. The act 1696, however, does by no means declare, that in order to have the benefit of it, a person should live part of the sixty-first day; and as the Legislature could not suppose that a man would just survive to a moment sixty *full* days, the currency of the sixtieth, which happened in the case in question, must be all that is required.

Answered; There is no occasion to resort either to the influence of the Romish clergy, or to feudal customs, to discover the foundation of the law of death-bed. From the most ancient authority in our law, it appears to have been introduced as a protection to dying persons against the artifices of those around them; *Reg. Maj. lib.* 2. c. 18. § 7. Both on this account, therefore, and as preserving the succession to the natural heir, it has been approved of by our most eminent writers; Dirl. *voce* LEGITIMA LIBERORUM; Craig, *lib.* 1. *d.* 12. § 36.; *lib.* 2. *d.* 1. §§ 18. 28.; Stair, b. 4. tit. 20. §§ 38. 41. and 44.; Macdowall, vol. 2. p. 412. § 17.; p. 301. § 32.; Erskine, b. 3. tit. 8. § 95.; and in judging of defences stated against the plea of the heir, a strict interpretation has uniformly been adopted; Shaw, No 32. p. 3208; Lord Cranston Riddell against Richardson, No 35. p. 3212.; Spottiswood, *voce* HEIRS, p. 143. 30th July 1635, Heir of Pencaitland against Sinclair, (in the Appendix to this title).

Hence acts equipollent to going to kirk and market unsupported, are not admitted as equally probative of convalescence; Lawrie against Drummond, No 96. p. 3319.; Creditors of Balmerino against Lady Coupar, No 77. p. 3292.; Keirie against Craigengelt, No 100. p. 3321.; Clelands against Cleland, No 87. p. 3305.; Stair, b. 3. tit. 4. § 28.

And, for the same reason, the COURT have given a rigorous interpretation of what shall be held as going to kirk and market, so as to avoid the objection of death-bed; Durie, 7th July 1629, Maxwell against Fairlie, No 84. p. 3303.; Laird of Luss against Carden, No 89. p. 3310.; Nicol against Johnston, No 88. p. 3309.; A. S. 29th February 1692. *See* APPENDIX.

The act 1696, c. 4. being correctory in its nature, and more particularly as limiting the right of the heir, the exceptions against which, even at common law, are strictly interpreted, must not be extended beyond the strict letter; Blair against the Magistrates of Edinburgh, *voce* DIES INCEPTUS. The de-

fender therefore, as she pleads upon it, must shew that its condition has strictly and literally taken place, by proving that Mr Mercer 'lived for the space of three score days' after making the entail. But this she cannot do; for whether the time he survived, be computed *de momento in momentum*, or *de die in diem*, it amounts only to fifty-nine days and three hours. No 114.

Neither can the maxim *dies inceptus*, &c. aid the plea of the defender, as it applies only *in favorabilibus;* and, in this case, it is not the disponee, but the disponer and his heir at law, who are the *personæ prædilectæ*. Indeed, the maxim itself seems rather to be an exception, than a general rule. It does not apply to obligations, for there the granter may perform during any part of the last day mentioned in his stipulation, § 2. *Inst. de verb. oblig.; lib.* 3. *t.* 16.; *l.* 42. *ff. de verb. oblig.* Nor to prescription; *Voet.* § 1. *ad tit. de diversis temporal. præscript.; l.* 6. *ff. de oblig. et action. lib.* 45. *t.* 1.; *Voet. lib.* 4. *t.* 4. § 1. *ad. tit. de minor.* 25. *annis.;* to which the limitation of the act 1696 is extremely similar, as, in both, a right is lost by the lapse of a definite period.

The cases too in which the rule *dies inceptus*, chiefly applies, are those where some act is to be performed within a year and day; in which case, the day is added *in majorem evidentiam*, that the year itself is completed, and therefore the running of any part of the day is sufficient; Mackenzie Obs. on 1661, chap. 62. 1st Parl. Charles II. sess. 1.; Erskine, b. 1. tit. 6. § 42. And in all other instances where the maxim takes place, there are reasons for it which do not apply to the present question. Thus, if a landlord survive any part of the day on which his rents fall due, his right to them is as complete as if he had outlived the whole; because it was lawful for his tenants to have paid him at any hour of that day; 21st February 1609, Lord Merchiston against his Brothers *voce* TERM LEGAL AND CONVENTIONAL; 8th December 1704, Paterson against Smith, IBID; see also 22d February 1740, Executors of Mrs Leith, *voce* DIES INCEPTUS.

Indeed, the statute itself, by declaring that the granter must live for threescore days after granting the deed, excludes any interpretation which is to shorten the *tempus lege præfinitum*. If the Legislature had declared it sufficient that the granter should live for the space of one day after making the deed, the maxim of *dies inceptus* could not surely have applied; because, if it did, the deed would be valid the moment it was executed; and, it is equally contrary to the words and spirit of the statute, to render a deed effectual, where the granter has only survived fifty-nine, the law requiring that he should live for sixty days after its execution.

THE LORDS, after a hearing in presence, ordered memorials. When they were advised,

TWO of the Judges were of opinion, That in the present state of manners, the plea of favour lay for the *facultas testandi;* and that, therefore, the defender was entitled to plead the maxim, *dies inceptus*, &c.; and that, as the Legisla-

No 114. lature had not adjected a day to the sixty *in majorem evidentiam*, it was sufficient to validate the entail, that Mr Mercer had lived till the commencement of the sixtieth day.

A majority of the Court, however, thought that the deed ought to be reduced. It was *observed*, That in this case it would not be necessary to enter upon the question, Whether the plea of favour was on the side of the heir, or of the disponee? There being no instance in our law, of the maxim *dies inceptus* taking place where time is computed by *days*. Its operation is strictly confined to cases where time is measured by *years*, and even then it has place only *in favorabilibus*. Thus, in the *inducia* of summonses, where time is computed by *days*, it is established, that either the day of citation or the day of appearance must be free. If the statute had indeed declared the granter's living *to the sixtieth* day sufficient, the defence might have been good; but it requires, that the granter shall live for the space of sixty days; and, even counting the day Mr Mercer executed the deed, as one day, he only survived fifty-eight more. So far, therefore, from its being obvious to a plain understanding, that Mr Mercer lived sixty days, there is no way to make that out, but by having recourse to violent fictions, contrary to acknowledged facts, viz. by holding the deed to have been executed before it was executed, and Mr Mercer to have survived his own death.

The Court, 30th May 1793, 'sustained the objection to the deed of tailzie, dated the 22d February 1791, That the said Robert Mercer did not live sixty days after the execution of that deed.'

And, on advising a reclaiming petition, with answers, they adhered.

Miss Mercer, in the *next* place, founded on a deed executed by Mr Mercer, on the 21st day of February; and so confessedly not falling under the law of death-bed.

By this deed, Mr Mercer, in the *first* place, gives the liferent of part of the estate of Lethindy to a natural son; and, in order to make the grant effectual, he 'binds and obliges himself, and *his heirs of tailzie and provision*, &c. to subscribe and deliver all writs and deeds requisite,' &c. He then grants certain annuities, with which he burdens his heirs of entail in the following terms: 'And I hereby bind and oblige me, and *my said heirs* succeeding to me in my said lands, to pay the following persons the free yearly annuities after mentioned,' &c.

Then follows this clause: 'And I do hereby recommend to *Miss Catherine Mercer, who is the first heir appointed to succeed me*, to pay to Charles Mercer, residing at Meikleour-house, the sum of L. 100 Sterling, and that at the first term of Whitsunday or Martinmas that shall happen next after my death: And further, as James Miller, writer at East Hatton, has been for this considerable time past employed in the management of my affairs, and in carrying on my business, I do hereby recommend to the said *Miss Catherine Mer-*

'*cer*, and the other heirs *upon which my lands and estate may devolve*, still to 'continue him in the management and transacting of the business of my said 'lands and estate.' No 114.

It appeared from the evidence of the writer, that both this deed and the entail had been prepared in consequence of final instructions received by him from Mr Mercer, on the 19th February; and that the drawing and executing them had been his sole business from that day till their execution.

Miss Mercer *contended*, That this deed afforded her a twofold defence against this reduction, and,

Pleaded; 1st, The entail of the 22d February, and this deed are parts of the same family-settlement, just as much as if the contents of both had been engrossed in one paper. Now, in questions like the present, the date of *commencing* the execution of one general settlement, whether contained in one or in separate papers, is to be considered as the date of the whole.

But, *2dly*, The deed of the 21st February, taken by itself, is sufficient to exclude the reduction; because the defender is there expressly declared Mr Mercer's heir, and any solemn written declaration of the proprietor's intention, though it may not operate as a direct conveyance, is sufficient to create an obligation upon his heirs at law, to give effect to it by an after formal deed; 13th July 1722, Kennedy against Arbuthnot, *voce* VIRTUAL; 31st January 1667, Henderson against Henderson, *voce* TESTAMENT. Mr Mercer, however, in place of leaving his intention to be fulfilled in this manner, carried it into effect himself, by his entail of the 22d February; and, as these repeated acts show a more deliberate intention than could appear from any one deed, they must greatly strengthen that legal favour which is always due to the deeds of a person rationally disposing of his property, *l.* 15. *Cod. de test.* (*lib.* 6. *t.* 23.)

Answered; The deed of the 21st of February speaks of the defender as already appointed to succeed, and of settlements then made; it therefore cannot apply to a deed to be afterwards executed. But even if it did refer to the entail, the two deeds cannot be considered as *partes ejusdem negotii;* as the one is a conveyance of a landed estate, and the other merely a settlement of moveables. And if the alleged *institutio hæredis* in this last were good for any thing, Miss Mercer would take the estate in fee simple, while, by the deed of the 22d, it was conveyed to her under the fetters of a strict entail.

Granting, however, that the two deeds were to be viewed as *partes ejusdem negotii*, that of the 21st February cannot give validity to the entail. It is only in questions of interpretation, in order to discover the true import of a deed, that it is either necessary or legal to consider other deeds relative to the same matter. But the point at issue is not respecting Mr Mercer's *intention*, but respecting his *power*, and therefore the entail cannot be affected by any relative deed.

No 114.

Besides, were the two deeds to be held as the same settlement, it could not be regarded as complete, till the date of the last deed, and thus, both would fall under the law of death-bed.

2*dly*, Heritage cannot be alienated, unless by a deed *inter vivos*, and containing dispositive words. The deed of the 21st February was granted by Mr Mercer *mortis causa*, and the signification of all which it is supposed to contain in favour of Miss Mercer, being of a testamentary nature, is altogether ineffectual for that purpose; 18th January 1764, Burgess against Stantin, *voce* Foreign. Besides, the clause in which the defender is mentioned as his heir, was introduced merely historically, and by no means *eo intuitu* of vesting her with that character, and a reference of this sort was never held in our law to be a sufficient *institutio hæredis*.

Replied; Although the entail was made on death-bed, yet the defender, as a *hæres facta*, is not entitled to challenge it on that ground. Besides, the entail is to be considered as a restriction of the deed of the 21st February; and although Mr Mercer does not there reserve any power of making such limitations, yet he was entitled to do so in the last hour of his life, for the same reason that a person on death-bed, making a deed, without a clause dispensing with the delivery more than sixty days previous to his death, may deliver it validly, or make a codicil, dispensing with the delivery at any time before he dies.

After hearing counsel on this branch of the cause, it was

Observed on the Bench; The two deeds are no doubt so far *partes ejusdem negotii*, that both were intended to regulate Mr Mercer's succession; and if they contained any doubtful clause, recourse might be had from the one to the other, to get at his intention. But this is a question not of *will*, but of *power*. The deed of the 21st February, therefore, if considered as referring to the subsequent entail, cannot possibly support it; because, in that view, it would form a part of it, and so must stand or fall along with it, being a mere relative deed, according to the maxim, *Nihil intelligitur actum dum quid superesset agendum*.

The Court were unanimous in this opinion; and a majority also thought that the clause of the deed 21st February was of itself insufficient to convey the estate, both because it was evidently not inserted *eo intuitu* of making a settlement upon Miss Mercer, and because, even supposing it had, the words, 'who 'is the heir first appointed,' &c. would not have been sufficient for that purpose, the principles of our law rendering dispositive words essential, unless in the exercise of reserved faculties.

The Court found, That the deed 'executed by the deceased Robert Mercer, of date 21st February 1791, is not effectual to convey the lands and other heritable subjects which belonged to Mr Mercer, in favour of the defenders, or any of them, nor to support the deed of entail executed by him on the 22d of said month of February.'

Lord Ordinary, *Alva*. Act. *Lord Advocate Dundas, Rolland, W. Robertson, Arch. Campbell*, junior. Alt. *Solicitor-General Blair, M. Ross, Tait, Hagart*. Clerk, *Mitchelson*.

R. D. *Fac. Col. No* 84. *p.* 181.

*** This cause was appealed : No 114.

The House of Lords, March 1. 1796, 'ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors therein complained of, be affirmed.'

*** The ground of the decision of the House of Lords, relative to the computation of the time, it is believed, was this: The *terminus a quo*, mentioned in the act, is descriptive of a period of time, viz. the date or day of the death, which is indivisible; and 60 days after, is descriptive of another, and subsequent period, which begins when the first period is completed. The day of making the deed must, therefore, be excluded; so the maker lived only 59 days of the period required. Had he seen the morning of the subsequent day, the rule of law would have applied, *Dies inceptus pro completo habetur*, which makes it unnecessary to reckon by hours.

*** This rule was applied in the case of Mitchell against Watson, decided in February 1801, (in the Appendix to this title,) in which it was found, that, in computing the 60 days, the day on which the deed was executed not being included, it was sufficient for supporting the deed, that the granter lived till the morning of the 60th day.

No recourse upon a death-bed deed, against the dead's part. *See* QUOD POTUIT NON FECIT.

The Heir's personal creditor, whether entitled to insist in a reduction upon the head of death-bed. *See* PERSONAL AND TRANSMISSIBLE.

Deeds on death-bed, how far probative. *See* PROOF.

See HOMOLOGATION. *See* TITLE TO PURSUE. *See* COMPETENT.

Observe the following cases, connected with the title DEATH-BED.

Calderwood against Shaw, 14th November 1668, Stair, v. 1. p. 562., *voce* PROOF.

Heir of Geo. Heriot against his Creditors, 23d February 1676, Stair, v. 2. p. 420., *voce* TITLE TO PURSUE.

Trotter against M'Kello, 18th February 1676, Stair, v. 2. p. 418, *voce* PERSONAL AND TRANSMISSIBLE.

Gray against Gray, 25th July 1672, Stair, v. 2. p. 109, *voce* FIAR.

Heir of Pencaitland against Sinclair, 30th July 1635, Spottiswood, p. 143, in the Appendix to this title.

Paton against Paton, 26th November 1674, Stair, v. 2. p. 284, *voce* PROOF.

Home against Bryson, *voce* BANKRUPT, No 4. p. 881.

Beattie against Roxburgh, *voce* CONQUEST, No 21. p. 3067.

Nicolson against Burnet, Durie, p. 810. 7th July 1636, *voce* GROUNDS AND WARRANTS.

Donaldson against Donaldson, 24th Feb. 1624, Durie, p. 113. *voce* HERITABLE AND MOVEABLE.

Creditors of Balmerino and Couper against Couper, 16th February 1669, Stair, v. 1. p. 605, *voce* PROOF.

Carmichael against Dempster, 28th November 1676, Stair, v. 2. p. 469, *voce* MUTUAL CONTRACT.

Colvil against Colvil, 14th Dec. 1664, Stair, v. 1. p. 241, *voce* TESTAMENT.

Ker against Kers, 25th January 1677, Dirleton, p. 216, *voce* PRESUMPTION.

—— against Tait, 6th February 1677, Dirleton, p. 219, *voce* LEGACY.

Elies against Watson, 5th February 1712, Forbes, p. 583, *voce* WRIT.

Campbell against Campbell and Stewart, 17th January 1749, D. Falconer, v. 2. p. 40, *voce* HUSBAND AND WIFE.

Courtie against Cunninghame, 16th Jan. 1627, Durie, p. 256, *voce* PROCESS.

French against E. of Wemyss, 25th July 1677, Stair, v. 2. p. 549, *voce* PROOF.

Paton against Stirling, 20th Dec. 1671, Dirleton, p. 63, & 75. *voce* PROOF.

Haliburton against Haliburton, 31st July 1666, Dirleton, p. 16, *voce* HOMOLOGATION.

Yeoman against Yeoman, 7th June 1676, Stair, v. 2. p. 423, *voce* FACULTY.

Keith against Seton, mentioned p. 1675.

See APPENDIX.