

1741. December 1. AGNES FORREST and Her HUSBAND; *contra*  
ARCHIBALD FORREST.

THE deceased Archibald Forrest disposed his estate, being about 500 or 600 merks yearly, to Archibald, his eldest son, burdening him with 500 to Agnes Forrest, his eldest daughter, payable at her marriage or majority, whichever should first happen, who, after her father's death, brought a process against her brother for payment thereof, and she insisted for the annualrent from her majority. The defence was, that annualrent did not become payable till the death of Archibald the father, and so the sum could not begin to bear annualrent till decret was obtained therefor, and horning used against the defender, in respect that the disposition was only dated in the 1735, whereas the pursuer was major in the 1732: And as the provision is only to the pursuer at her majority, whenever the same should happen, the condition under which the provision was payable, at the time of the deed, was absolutely impossible, since thereafter she could not become major. Besides, it is a rule in law, that wherever an impossible condition is annexed to a deed of a testamentary nature, the condition does not annul the legacy, but the same is pure, and the condition is considered as if it had not been adjected, according to § 1. *Instit. De inutil. stipul.* which must hold more particularly in this case, as it would seem to have been the father's intention that the provision should not be payable till after his own death, he obliging his son, in an after clause of the deed, to aliment and maintain the pursuer at bed, board, and clothes, till such time as her portion should become payable.

*Answered* for the pursuer, That these words, *which shall first happen*, cannot be at all understood to imply that the payment of her provision was suspended by a future condition. The only use of these words was, to point out, that either of the two periods, majority or marriage, which first happened, was the term from which her provision should bear annualrent, but not that he considered either of these events as a term or period yet to come; and if these words, *which shall first happen*, had been left out, there could be no doubt the pursuer's demand would be beyond dispute. See November 25. 1686, Kelso, No 4. p. 6330. But granting it were to resolve in a *quæstio voluntatis*, which should always determine cases of this nature, it is evident that the father intended the provision should bear annualrent from one of these two periods, whichever should first happen. The pursuer was married before the date of the deed; and, as the husband took the burden of maintaining the pursuer off her father, was it not reasonable he should have interest in return upon the provision? *2dly*, The pursuer's younger sister's provision was payable to her by the same clause at marriage or majority, which should first happen; so that the testator's presumed will is evident, and ought not to be got the better of, by a catch at a word inaccurately thrown in by the writer of the deed, especially as the testator was a countryman of little education, unacquainted with the stile of writs.

No 5.

A father granted a provision to his daughter, payable at her marriage or majority. She was major three years before the date of the deed. In an action against her father's heir, it was found that interest was due, not from the date of her majority, but from the first term after her father's death.

No 5. THE LORDS found, That annualrent became only due at the first term after the father's decease.

*Fol. Dic. v. 3. p. 299. C. Home, No 184. p. 306.*

No 6.

A provision to a child payable at a term, when he would be sixteen years of age, not due to the child predeceasing.

1749. February 1. BELLS against MASON.

By contract betwixt John Young, chirurgeon in Coldstream, and George Mason of Clerklees, in regard there had no contract of marriage been executed betwixt the said John and Jean his wife, daughter to the said George, and that she died within year and day, leaving George Young, a male child, and that the said George Mason, beside some household plenishing. had advanced to John Young, in name of tocher, 400 merks Scots; therefore he further bound himself to alimint George Young in his own family, 'until he should attain to the age of sixteen years compleat, which would happen upon the 7th day of May in the year of our Lord 1747, and to pay to him at the term of Whitsunday 1747 years, which would be the first term after his attaining to the age foresaid, the sum of 600 merks Scots money,' As also, he discharged John Young of the 400 merks, and plenishing received by him; and John Young discharged him of any additional claim to tocher with his wife deceast; and 'likewise obliged himself to pay to the said George Young, his son, the sum of 400 merks Scots, at the said term of Whitsunday, in the year 1747.'

George Young died without attaining the age of sixteen, and his father confirmed himself executor to him, and assigned the contract to John Bell of Rutchester-rig, whose children pursued George Mason for payment of the 600 merks.

The defence was, that the provision never became due, which the Lord Ordinary, 6th July 1748, repelled,

On bill and answers.

THE LORDS found the provision not due.

*Act. Scrymgeour.*

*Alt. H. Home.*

*Clerk, Gibson.*

*Fol. Dic. v. 3. p. 299. D. Falconer, v. 2. No 52. p. 51.*

\* \* \* Lord Kames reports the same case:

JOHN YOUNG, surgeon-apothecary in Coldstream, having married Jean Mason, without a contract of marriage, her father, George Mason of Clerklees, besides some household furniture, gave to the husband the sum of 400 merks, as part of the tocher which he had intended for his daughter. The wife predeceased within the year, leaving a male child, named George after his grandfather, who was altogether unprovided. George Mason, being anxious to have a provision made for his grandchild, made offer to take the child home to his house, to ali-