

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 aliment 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-

ment him till he was sixteen, and then to settle six hundred merks upon him, provided the father would settle 400 merks. The offer was accepted, and a contract was executed betwixt the parties, April 1733; which, being the subject of the present question, must be particularly set furth. It is introduced with a narrative of the 400 merks and household plenishing given to John Young, and of the dissolution of the marriage within year and day, leaving a male child. It subsumes upon George Mason's willingness to provide his said infant grandchild; and therefore he becomes bound to aliment and maintain the infant in his own family, as one of his children; to furnish him with clothes and other necessaries, and to educate him as becomes, until he attain the age of sixteen years complete, which was calculated to happen upon the 7th May 1747: 'Further, he, the said George Mason, binds and obliges him, and his 'foresaid, to pay to the said George Young, at the term of Whitsunday 1747, 'which will be the first term after his attaining the age aforesaid, the sum of 'six hundred merks, with penalty and annualrent after the term of payment.' On the other hand, John Young became bound to pay to George Young, his son, the sum of 400 merks, at the said term of Whitsunday 1747, with penalty and annualrent after the term of payment.

In pursuance of this contract, George Mason took the child home, who died before he was three years of age. John Young, the father, who had thus got free of his own engagement, willing to consider the obligation granted by George Mason to the child, as a pure debt, made up titles by confirmation, and conveyed the same to George Bell in security of a debt due by him to Bell; and Bell's executors, after his death, insisted in a process against George Mason for payment of the said sum of six hundred merks, provided by him in the said contract to the infant, the term of payment being now come. The defence was, that this being a gratuity settled by the defender upon his infant grandchild, as a provision when he should arrive at the age of sixteen, the term of payment is that very day when the child has completed the age of sixteen; but that this term never did exist, and cannot now exist; and therefore, as a sum cannot be demanded before the term of payment, the sum in question can never be demanded.

The Lord Elchies Ordinary repelled the defence; for this reason, that the sum was made payable at a day certain, viz. the term of Whitsunday 1747; and his Lordship took the maxim strictly, that *dies incertus pro conditione habetur, non dies certus*.

The defender, in stating his case to the Court, observed, that it resolves into the following question. When a gratuitous provision is made to an infant, payable at the age of sixteen, which is agreed to infer the condition of the child's arriving at that age, whether the addition of the time when the child will be sixteen, does alter the nature of the legacy or donation, so as, instead of a conditional, to make it a pure obligation; or whether by this addition any more be intended than to ascertain the child's age, and consequently the term of pay-

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ment, in case the child should be existing at that term, without any purpose or view to alter the nature and legal import of the legacy or donation?

In examining this question, it was observed, that the application of a general rule to a particular case, is often the source of error, by omitting to consider whether the reason of the general rule be applicable to the particular case. And, however well founded this maxim may be in general, it suffers many exceptions. The following case is an example of a *dies certus* being conditional. If a sum be settled upon an infant without any valuable consideration, and be made payable to the infant himself, without interest, and without mentioning heirs or executors, twenty years after the date of the obligation, at which time, by calculation, the obligee will be major; there seems to be little doubt, that this must infer the condition of the obligee's arriving at majority; for here every circumstance concurs to make it be understood a provision for behoof of the obligee solely, without any other view or purpose. And it is a rule in law, as well as in common sense, that if a deed cannot attain the end for which it was granted, a judge cannot interpose to make it effectual. The next example shall be where a *dies incertus* is not held conditional: Pomponius, after laying down, l. 22. *D. Quando dies legat.* that an uncertain day makes a condition; and that a legacy to Titius, when he shall arrive at fourteen, is therefore void if he die before that time. Papinian, l. 26. § 1. *ead.* states the case, that a testator places out a sum in the hands of a third party, taking the debtor bound to pay the interest to an infant, and the principal itself when the infant should arrive at the age of twenty-five; and puts the question, whether, in this case, *dies incertus habetur pro conditione*? His answer is in the negative; and justly, because the testator's intention was certainly that the heirs of the infant should have it, rather than that it should remain for ever with the debtor.

These particulars are mentioned, to show, that a question of this nature is not so much to be determined by critical words, as by the circumstances of the case, from which chiefly may be gathered the intention of parties. The defender is a plain countryman, who never read a word of the law of Scotland, not to talk of the Roman law, and never heard, till this process was commenced, of the maxim *quod dies incertus pro conditione habetur, non dies certus*. But without distinguishing him by any singularity of character, let us examine what probably was the view of a man of plain sense in making such a settlement upon an infant grandson, his name-sake. He was anxious to have a provision made for this child; and, to that end, he was willing to settle 600 merks of his own means, provided the father would settle 400 merks. He could not but know, what every one knows, that this child had not an equal chance to arrive at the age of sixteen, when he might have use for the money as an apprentice-fee. Sooner he could not have use for it; because the defender in the interim was obliged, by the contract, to give him his aliment and education. Now, supposing the question had been put, what if this child die in infancy? Is there any thing in the circumstances of the case, to make any mortal presume, that

the defender would have consented, in that event, to pay the sum to the father, or perhaps to people who were utter strangers to him, which happens to be the present case?

Considering the matter in this view, it would make no difference, though the term of Whitsunday 1747 had been fixed for the performance of this obligation, without mentioning the age of sixteen; for the reason of fixing such a distant term of payment would be obvious, viz. that the child, if it lived, would be at that time sixteen years of age, at which time there might be use for the money. If so, why should the fixing a certain term of payment render the obligation pure; when, from the circumstances, it must appear, that the money was set aside to answer a certain purpose and event, and that, by the predecease of the child, the event did not happen, and the purpose did not answer? But the defender has no occasion to make good a more difficult case than what he is engaged in. It is sufficient for him to say, that there are both an uncertain and a certain day named in the contract, which is a singular case, upon which our doctors have given no response, and to which the rule above laid down is not applicable. How are we to judge of this singular case, otherways than by considering the concomitant circumstances, and the views of the parties, all of which speak in favour of the defender?

In general, the naming a term for payment must either be with a view to the obligee to qualify the obligation, or with a view to the obliger to give him time to prepare the money. The circumstances of the present case will not admit the latter construction, for one year was as good for that end as sixteen. Nor could it be with the view to save interest that the payment was deferred to a distant time, for the aliment, clothing, and education of the child, must have far exceeded the interest. Now, if it was not to give time for preparing the money, that the payment was deferred to so distant a term, it could not be done with any other view than to qualify the obligation, so as that it should only be payable in case the child, arriving at the age of sixteen, might have use for the money.

The same conclusion may be drawn from a different medium in law. Lord Stair, lib. 3. tit. 1. § 2. lays down the following doctrine: 'Personal rights and obligations are sometimes incommunicable, and not assignable or transmissible, either by reason of the matter, such as most conjugal and parental obligations; or where there is a singular consideration of the persons, as in commissions, trusts, &c. Yea, generally, all obligations are intransmissible upon either part directly without consent of the other party, which is clear upon the part of the debtor, who cannot, without consent of the creditor, liberate himself and delegate his obligation upon another: neither can a creditor force his debtor to become debtor to another, unless he consent, as when he becomes obliged to pay to the creditor, or to his assignees.' And our author goes on with observing, that to make obligations more useful, custom has introduced an indirect manner of transmission by a procuratory *in rem suam*. In

No 6. England, to this day, a debtor is not bound to pay to an assignee. In our later practice, an assignation, with respect to deeds for a valuable consideration, has obtained the force and effect of *cessio in jure*; and if such a deed be so completely assignable, there can be no doubt of its descending to heirs. But still there are many obligations so personal, as not to transmit either to heirs or assignees. In the present case, the sum in question is made payable to George Young the infant, at the first term after he shall arrive at the age of sixteen, being Whitsunday 1747, without the least mention either of heirs or assignees. The question then is, what entitles either an heir, or an assignee to claim, since the obligant has not consented to pay to either? It is very true, that if the obligee had survived the term of payment, the obligation must have transmitted, because the obliger ought to pay at that term, and the heir must not suffer by his delay; but when he has been guilty of no delay, upon what medium is he liable to the pursuers, when he only promised to pay personally to his grandson? His obligation was gratuitous, and he had the power of giving it upon any condition, and in any terms he thought fit.

Obligations for a valuable consideration, it is true, are always transmissible to heirs and assignees; it is the creditor, in that case, who purchases the obligation, and, for that reason, it ought to be regulated by his will and intention. But wherever an obligation proceeds from the free-will of the debtor, it ought never to be extended beyond the letter of the deed, unless strong circumstances can be specified to support the extension; none such can be specified in the present case; on the contrary, every circumstance speaks aloud that there should be no extension beyond the letter of the deed.

Upon the foundation of the interlocutor complained of, the obligation must have been created the moment the deed was signed, for otherways it could not go to heirs. Upon this supposition the infant, had he lived till fourteen, might have tested upon it, and might have assigned it gratuitously. It is hard to suppose that this could be done; it is still harder to suppose, that an inhibition might have been raised upon the contract the moment it was signed; and yet, there is no evading this consequence, supposing a pure obligation to have been created transmissible to heirs and assignees.

THE LORDS unanimously altered, sustained the defence, and assolizied.

Rem. Dec. v. 2. No 102. p. 188.

No 7.
A father left his whole effects to his only son, which he estimated at a certain sum, burdened with portions to his daughters,

1749. December 8.

CARNEY of Lour against GRAHAMS.

JOHN GRAHAM, merchant in Dundee, having, by his first wife, three daughters, Elizabeth, Margaret, and Grizel, and by his second wife a son, David, and daughter Marjory, settled his affairs, by disposing his whole effects to David; providing that he should be bound to pay his debts, and to each of his sisters 5000 merks Scots: 'And failing any of the said children by death, that,