No 46.

1792. *June* 22. GRAHAM *against* DENNISTON and Others.

WILLIAM GRAHAM, by a clause in his testament, leaves 'to his brother, sisters, uncle, cousins, a free discharge of every thing they may owe him at his 'death.' By letter found in the repositories of the defunct, Walter Colquhoun his cousin, then in the West Indies, acknowledges to have received payment of certain bills belonging to the testator, for which he holds himself accountable, and desires the testator to draw on him for the amount. The question occurred Whether this was a debt which fell under the *legatum liberationis* in the testament? The argument against this plea was, That the property of these bills was in the testator, and that Walter Colquhoun held them only as trustee for his account. On the other hand, the bequest seemed to include every claim, from whatever contract it arose. The Court thought the case extremely doubtful, but inclined to the former of these opinions, and found that the amount of the bills did not fall under the *legatum liberationis*.

*Fol. Dic. v.* 3. *p.* 398.

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1792. *November* 15.

JANET and JOHANNA SEMPILLS *against* HUGH LORD SEMPILL.

No 47.
A legacy payable at the majority of the legatee lapses by his death before that period. This found to hold even where the executors of the testator were empowered to pay it sooner, if they should think fit.

HUGH DUNLOP conveyed to Hugh now Lord Sempill, his heirs and substitutes, the lands of Bishoptoun and others, by a settlement, burdening him and the lands conveyed with payment of L. 1000 to George Sempill his second son, and L. 500 to Patrick his third brother, &c.; 'and these at and against the next 'legal term after their attaining to their respective ages of 21 years complete.'

George and Patrick survived the testator, but died in minority.

Janet and Johanna Sempills, two of their nearest of kin, brought an action against Lord Sempill, concluding for payment of two fourths of the sums above mentioned, and

*Pleaded*; That legacies vest *a morte testatoris*, is a general presumption of law, which there is nothing in the present case to overturn. The legacies are not made payable, if the legatees arrive at the age of 21, nor are there any other words employed which shew the testator's intention that they should be conditional. They are simply and unconditionally constituted as burdens on the heir; and the reference to the age of the legatees which is annexed to the term of payment, and in a posterior clause of the sentence, can only have the effect *morandæ solutionis*. The testator thus separated the constitution of the obligation, from the time at which the heir should be obliged to perform it; two circumstances quite independent of each other, and which he may have had good reasons for distinguishing, l. 213. *De verb. sign.* Had he, without making this distinction, merely said, 'I leave to George and Patrick Sempills

'at and against the next term after their arriving at the age of 21 years, to the 'former a thousand, to the latter five hundred pounds,' he would then have shewn it to be his intention that the legacies should vest and be exigible at the same time. No 47.

The maxim of the Roman law, *Dies incertus pro conditione habetur*, applies only when it is uncertain, if the day will ever arrive, *e. g.* the marriage of the legatee. But there is no such uncertainty in the present case. If the day on which the legatees would in fact have reached the age of majority had been specified as the term of payment, but without referring to that circumstance, the legacies would have vested. And it is not easy to see why that reference should make any difference. The legatees may indeed die before the term of payment, but still a definite point of time is established, the existence of which is certain; 9th December 1783, Burnets against Sir William Forbes, No 44. p. 8105.; *l.* 5. *C. Quando dies leg.*; *l.* 26. § 1. *D. ad eund. tit.*; *l.* 46. *D. ad Sen. Cont. Treb.* Voet, b. 36. tit. 2. § 2. *et seq.*; *Mantica de conject. ultim. volunt.* lib. 11. tit. 23. p. 27. *et seq.*; Blackstone, b. 2. c. 32. § 6.; Burrow's Reports, v. 1. p. 226.; Bankton, b. 3. tit. 8. § 42.

*Answered*; The interpretation of testaments must be regulated by the will of the testator, and not by critical discussions upon the meaning of the words employed.

In the present case, it is not disputed, that had the legacies been payable if the legatees should arrive at the age of 21, or if they had been thus expressed; I leave to George and Patrick Sempills, at the next term after they arrive at the age of 21, to the former L. 1000, to the latter L. 500, the legacies would have lapsed by their death before that period; and the expression used in this case is surely too similar to warrant an opposite judgment.

Besides the general rule of law is, *Dies incertus pro conditione habetur.* A legacy, payable at the marriage of the legatee, will not vest, if the legatee die unmarried; because then the existence of the only event upon which it was declared payable, becomes impossible. For the same reason, a legacy payable when the legatee attains a certain age, should fall by his predecease.

The case of Burnets *contra* Sir William Forbes, stands single in support of the pursuer's doctrine, and its authority is much weakened by the decision 19th November 1788, Omey against Maclarty, No 9. p. 6340.

The Roman law cannot prevail, in opposition to sound principle. At the same time, it is by no means clear that it supports the pursuers doctrine, as the passages quoted seem rather to apply to certain exceptions from the general rule, which our law would likewise admit. Thus, as in the case, l. 26. § 1. *D. Quando dies legati*, &c. if the legatee were to draw interest before the term of payment, it might reasonably be supposed that an immediate right was vested in him, though even this circumstance was disregarded in the case of Omey. Or if, as in l. 46. *D. ad Sen. Cons. Treb.* the legacy were vested in a trustee, for behoof of the legatee, (the *hæres fiduciarius* may be so considered), as the

No 47. subject is then taken out of the hands of the heir, it may be presumed that the testator meant to prefer the heirs of the legatee to the trustee, who was not at all connected with him.

The LORD ORDINARY reported the cause on informations.

A great majority of the Court thought the defence well founded. It was observed, that all subtleties ought to be laid aside, in order to get at the real intention of the testator; that legacies and bonds of provision are precisely in the same situation. In both there is a material distinction between the case where the term of payment is fixed to a day which must certainly arrive, and where it is fixed to one which may never occur; between a legacy payable twenty year's hence, and one payable on the legatee's arriving at the age corresponding to that period. The former vests *a morte testatoris*, the latter according to the maxim, *dies incertus*, &c. lapses by the death of the legatee before the term of payment.

But that even this distinction must be disregarded, wherever there is reason to believe that it is contrary to the will of the testator; and that the cases adduced from the civil law, except l. 5. *C. Quando dies leg.* which is too shortly stated to admit of an accurate judgment being formed with regard to it, seem to have been determined on this principle.

The COURT assoilzied the defender.

A reclaiming petition was refused without answers, on the 4th December 1792.

Upon another conclusion of the summons, besides the same general question, a specialty occurred, on the effect of which the Court were much divided. It was brought by the pursuers, as nearest of kin to their brother George, against Lord Sempill, as residuary legatee of his uncle Colonel Sempill, in whose will, after legacies of L. 1000 each had been left to the pursuers and Lady Forbes their sister, payable on the day of their marriage, or attaining twenty-one years of age, it is immediately added, '*Item*, I give and bequeath to my nephew 'George Sempill L. 1000, to be paid him at any time my executors think pro-'per, before his marriage, or attaining to twenty-one years.'

George, as already mentioned, died in minority. He was never married, and the executors had paid him no part of the money.

A majority of the Court were of opinion, from comparing the terms of the bequest to George Sempill, with those of the legacies to the pursuers, that the testator intended the former should be conditional only, and therefore that it lapsed by his death. Colonel Sempill (it was observed) thought his neices could have no occasion for their legacies till their majority or marriage. That, however, as the command of money might be beneficial to his nephew at an earlier period, for instance, to buy him a commission in the army, a discretionary power was given to his executors. But he had no intention that his nephew should have it in his power to squander it, or dispose of it by testament.

Other Judges thought that this was stretching the maxim, *dies incertus, &c.* beyond its proper limits. There was here no condition annexed, and therefore *quod sine die debetur presenti die debetur.* The legacy vested *a morte testatoris*, but the executors might withhold payment till the majority or marriage of the legatee; that the testator meant to leave it to his executors to determine, whether the legacy should vest or not, or, in other words, to transfer to them his power of making a will, was surely not to be presumed. No 47.

The COURT 'assoilzied the defender.'

A reclaiming petition was followed, with answers; but the LORDS 'adhered.'*

Lord Reporter, *Monboddo.* Act. *Dean of Faculty, John Burnet.* Alt. *Wight.*
Clerk, *Home.*

*D. D.* *Fol. Dic. v. 3. p. 377. Fac. Col. No 2. p. 5.*

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1798. *June 6.* DAVID FLEMING *against* CHRISTIAN MARTIN.

No 48.
A woman having executed a testament, with dispositive words, by which she conveyed the whole effects which should belong to her at her death to a sister, without mentioning her heirs, altho' she had children at the time; and their mother having died before the testatrix, a surviving sister was found entitled to exclude them from the succession.

MARGARET MARTIN executed 'a latter will and testament,' by which she 'gives and dispones, leaves and bequeaths,' the 'whole goods and gear,' &c. which should belong to her at her death, to her sister Helen, without mentioning her heirs, though she was a widow, with children grown up at the time. Helen, by the deed, was nominated executrix, and burdened with payment of Margaret's debts, and an annuity to Christian, an unmarried sister. It also contained a power of revocation.

Helen died a few days before Margaret, who left no heritable property.

Christian was confirmed executrix to Margaret; upon which David Fleming, one of two children left by Helen, founding on the will, brought an action against Christian, for half of his aunt's succession; and

*Pleaded;* As the deed contained dispositive words, which would have been sufficient to convey heritage; 17th June 1785, Robertson against Robertson, *voce* TESTAMENT.; 21st November 1759, Mitchell against Wright, No 32. p. 8082.; the right under it was transmissible to heirs.

And although the deed were considered to be strictly testamentary, as it must have been Margaret's intention that Helen's children should succeed to her, the omission of the term 'heirs,' must be held as a mere inaccuracy, and the claim supported on the same principle, that children dying before their father, transmit the provision made by him on them to their children, although heirs be not mentioned; 26th June 1789, Wood against Aitchison, *voce* PROVISION to HEIRS and CHILDREN; 21st January 1767, Binning against Binning, IBIDEM.; and even where the grandfather has substituted others to his immediate descendants; Home, 21st November 1738, Magistrates of Montrose against Robert-

* The second judgment of the Court upon this last point was pronounced on the 29th January 1793; it is stated here for the sake of connection.