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younger children were entitled, exclusive of the eldest son and heir. On the other hand, the defenders (respondents) maintained, 1st, That through the lapse of time, the allegation was inadmissible; 2d, That the evidence referred to by the pursuer (appellant), so far from establishing the facts which were to be proved, tended to show that Carnbaddie, after his debts were paid, had no personal estate to which his younger children were entitled; and these were the two grounds on which the judgment of the Court rested. 2. The objection on the ground of taciturnity is not taken away by the circumstances of the case. On the contrary, it is peculiarly applicable to questions with regard to the distribution of personal estate; and cases have occurred where the silence of the party for any considerable length of time, was fatal to the claim. Thus, a widow's claim for the legal share of the moveable effects of her deceased husband, was disallowed, after the lapse of twenty-six years. So also a claim made by younger children against their elder brother, was dismissed, not having been made until thirteen years after their father's death. In the present case, no less than thirty-six years have elapsed before any action had been brought, or any notice given to the defenders that a claim was to be made. The daughter's nonage is no answer, because this objection rests on the silence of her whole family, all of them older than her, and placed in different circumstances.

Tod *v.* Inglis, 2d Feb. 1770. This case is not reported; but is referred to in the case of the King's Advocate *v.* M'Allum. M'Laurin's Crim. Cases, p. 606. Wilson *v.* Wilson, 26th Nov. 1783. Fac. Coll.

After hearing counsel, on the 5th, 8th, 9th, 11th, and 12th days of this instant, February, and due consideration had of what was offered,

It was ordered and adjudged, that the interlocutor of the 8th June 1790, complained of in the appeal, be affirmed, and that the defenders be assoilzied.

For Appellant, *Wm. Adam, Tho. Macdonald.*
For Respondents, *W. Grant, J. Buchan Hepburn.*

MISS KATHERINE MERCER, eldest daughter of Colonel Wm. Mercer, . } *Appellant;*

SIR JOHN OGILVY, Bart., and Others, . *Respondents.*

House of Lords, 1st March 1796.

DEATHBED—SIXTY DAYS HOW COMPUTED—NOMINATION OF HEIR.—(1). In a reduction of deeds, executed on deathbed, by a person who lived fifty-nine days and two or three hours thereafter; Held, that the rule

dies inceptus pro completo habetur did not apply to such a case, and that, by the statute 1696, the sixty days, consisting of twenty-four hours each, behoved to be complete, in order to cut off the objection of death bed. (2). One of the deeds executed by the deceased the day previous to the one sought to be reduced, contained no clauses applicable to the disposal of heritage; but there was a clause, importing that the appellant was to succeed as heir in the first place, and evidently referring to some deed either executed, or to be executed to that effect. The appellant maintained that the clause contained an actual appointment, or nomination of her as heir, to take before the deceased's other heirs. Held, that this deed did not contain any appointment or nomination of heir sufficient to carry the estate in question to Miss K. Mercer.

Mr. Robert Mercer of Lethindy, was the last of the sons of Sir Lawrence Mercer of Lethindy, by his second marriage with Lady Kinloch,—the appellant and respondents were descendants of his three daughters by his first marriage with the heiress of Aldie. The estate had been forfeited by his son Lawrence's rebellion in 1745, but was redeemed by his brother Charles by purchase, and had now, by his death without issue, descended as an unlimited fee, to Robert Mercer, his third son.

Having received a hurt in the leg from a fall, which exhibited a very bad appearance, and showed some symptoms of a tendency to mortification, he, in January, had several meetings with his lawyer, for the purpose of making the settlements of his estate. He was then confined to the house, but going about with a staff; and this, with a weakness, or complaint in his stomach, were the only complaints Mr. Mercer then had. In these circumstances, he executed three deeds of settlement, namely, one on the 19th February, 1791. conveying a farm to his natural son, James Mercer, containing a reference to the settlement of the rest of the estate, to the effect of stating, that failing James Mercer, the farm was to go to his "heirs of provision." On the 21st Feb. Mr. Mercer executed a second deed, giving a life-rent of part of his estate of Lethindy to his natural son, containing this obligation, "I bind and oblige myself, my heirs of "tailzie and provision, and successors whatsoever, to grant, "subscribe, and deliver all formal writs and deeds requisite "for establishing the foresaid liferent provision. And I oblige "myself and heirs succeeding in my estates, to warrant, &c." Then follows the clause in which he nominates the appel-

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lant to be his heir, to succeed to him in the lands and estate, and gives directions to her in that character: "And I do "hereby recommend to Miss Katherine Mercer, *who is heir* "*first appointed to succeed to me*, to pay to Charles Mercer," &c., and "recommend to her, and to the other heirs, upon "whom my lands shall devolve, still to continue him in the "management of my said lands and estate." This deed contained no dispositive words, conveying the lands expressly to her. On 22d February 1791, on Tuesday at 8 o'clock in the evening, he executed an entail of his estate of Lethindy, *in favour of the appellant*, and on 23d March following, executed a disposition of the estate of Fardle upon his natural son. He died on 22d April 1791, and the respondents being (together with the appellant) his heirs at law, raised a reduction of those deeds—the two last, 22d February and 23d March, being sought to be reduced on the head of death-bed, setting forth, 1st, That before Mr. Mercer executed any of these deeds, he had contracted the disease of which he died. 2d, That he did not live sixty days after the date of these deeds. A proof being allowed and taken, the points discussed were, 1. Whether Mr. Mercer, when he executed the deeds challenged, had contracted the disease of which he afterwards died? 2. Whether Mr. Mercer executed that deed on the 22d February 1791, between seven and eight o'clock in the evening, and died the 22d April thereafter, between 10 and 11 o'clock at night, he had lived the statutable period of sixty days, introduced by the act of parliament 1696? 3d. Whether, in the deed that was executed on the 21st of February, there was an *institutio hæredis* in favour of the appellant, sufficient to give her the estate, if it were admitted that the subsequent deed of 22d of February was executed within sixty days of Mr. Mercer's death?

Dec. 1, 1792. The Lords found that "the deceased had, at the date of the "deeds sought to be reduced, contracted the disease of which "he afterwards died," and ordered memorials as to the other points.

May 28 & 30, 1793. Of this date, the Lords "sustained the objection to the deed "of tailzie, dated 22d February 1791, that the said Robert "Mercer did not live sixty days after the execution of the "deed. Parties to be further heard as to the other points.*

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* Opinions of Judges:—

LORD PRESIDENT CAMPBELL.—"1st point, Whether Mr. Mercer lived sixty days in the sense of the act?

They finally repelled "the defences, as to the deed 21st Feb- "ruary, and also as to the deed 23d February and 28th March "1791, and reduced the two latter deeds, as well as the "infeftment thereon." (Vide bottom note p. 439).

"Counting *de momento in momentum*, he lived fifty-nine days and some hours. But counting *de die in diem*, and holding the 22d February to be the first day agreeable to the rule laid down in the English authorities, he lived fifty-nine days complete, and part of another day, for he died while the 60th day was current. Ergo, he did not live sixty days as required by the statute, unless we hold that the commencement of the sixtieth day is by construction of law the same with its being complete.

Viner, vol. xx. p. 269, Salkeld's Reports.

"It is said that fractions of days are to be laid aside. True.—But, Whether are we to make a present of them to the one party or the other? At the commencement of the time, we count the first day as an entire day, and therefore we give the benefit of the fraction to the defenders, holding the deed as executed upon the first moment of that day, when in fact it was not signed until the evening. The act contains nothing contrary to this, and the rule laid down in the English cases seems to be founded on reason.

"But, as to the second period, viz., the last of the sixty days both the words and the sense of the act require that it should be complete; for it is plain that a person who lives fifty-nine days and two or three hours only, does not live for the space of three score days, and there is no more reason for holding the last day complete, when only begun, than to make the same rule as to the last week. Had the act only said, that the person must live till he attains to the sixtieth day, it would be enough to find him alive that day, and in some cases, *e. g. testamenti factio*, this is held by construction of law to be the case as to the last day of the year, and the text quoted takes a still greater latitude in the case of enjoying honours, viz., a whole year. None of them apply to the case in hand, which relates to a statutory exception from the former law, limited and described in a certain manner, and the question is, Whether the party founding on this exception can avail himself of it, without showing that the condition has been literally and fully complied with.

Text quoted by Vinnius & Voet, from Ulpian, "L. 5, qui. test. fac. possit."

"It would be two violent a stretch to count both the first and last days complete, when neither of them were so. It is admitted that the counting ought not to be *de momento in momentum*, but *de die in diem*, and therefore, had the testator, in this case, lived till 12 o'clock at night of the last day, or, in other words, survived the whole of that day, the condition of the law would have been complied with, although counting *de momento in momentum*, from the

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—1. Mr. Mercer, when he executed the deeds under challenge, had not contracted the disease of which he afterwards died. He was feeble and

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date of execution, sixty days of twenty-four hours each would not have been completed.

" In the case of Crawford *v.* Kinnaird, Lord President Dundas laid down the rule thus :—" The day on which the deed is executed " is to be counted one day, and it requires fifty-nine days more to " be completed, to make out the sixty." This opinion was correct, and ought to be adopted here.

" Second point.—This is attended with more difficulty, on account of the express reference in the second deed. The first deed contains no reference to, or mention of Miss Mercer, and none of the other clauses in the second deed are of importance, except that which says, " I do recommend to Miss K. Mercer, who is the heir " first appointed to succeed to me, to pay," &c. The clause which immediately follows, recommending to Miss K. Mercer and the other heirs, &c., is of importance, because, independent of the deeds in question, Miss K. Mercer was one of the heirs. And even the first clause may admit of a construction, that he had in view the old tailzie 1722, by which Miss K. Mercer would have succeeded in the first place, (unless Miss Elphinstone, the daughter of the eldest sister, is entitled to hold both Aldie and Lethindy), as he might be ignorant that this was done away by the forfeiture, &c. Indeed, there seems to have been some mistake as to the effect of the forfeiture *quoad* the substitute heirs. Vide Decisions, House of Lords, in case of Gordon of Park, (vide Ante, vol. i., p. 508 *et* p. 562). and perhaps Miss K. Mercer may still be advised to try this point, unless the vesting act stands in the way.

" But, taking the deed as it stands, and the question as now pleaded, it would be a wide stretch to hold the clause above mentioned as an actual appointment or nomination of Miss K. Mercer to be heir in the estate, when the deed was not made *eo intuitu*, and even the estate itself is not named.

An estate cannot, by the law of Scotland, be setled by mere will. It requires a disposition or an obligation to dispone; and if at any time words importing a mere *significatio voluntatis* have been sustained, it has only been in the exercise of reserved faculties, or in deeds of an accessory and relative nature. All this doctrine was fully discussed in the last decision of the cause between the Duke of Hamilton and Lord Douglas, upon the import of certain words in the deed of revocation, 1744. The Court found that this was no settlement of succession, and could not be the ground of any claim, which judgment was affirmed in the House of Lords, 29th March 1779,

complaining in health, but was not in law *in lecto ægritudinis*. Anciently, the law was justly jealous of all deeds having the effect of altering the order of succession, contained in the investitures, and more particularly of those ex-

(ante Vol. ii. p. 450). Vide also case of Douglas *v.* Earl of Morton, determined in the House of Lords, 21st Jan. 1773. (Vide ante Vol. ii. p. 605 *et* App. to Vol. iii.). The clause in the deed, No. 2, cannot be sustained as the exercise of any reserved power in another deed previously made and subsisting. Neither can it be sustained, as accessory to a deed which was not then executed, and never became effectual. It may be a good disposition of the subjects therein mentioned, but *quoad* the succession to the estate of Lethindy, the question is, If it can have effect, as it does not mean to dispose of that estate, but only takes for granted that this was done, or to be done, in some other deed, and does not even specify the estate of Lethindy, or any particular lands whatever, as contained in that other deed, though, at the same time, it is plain from other clauses that no other lands could be meant. Nor can the condition itself have effect against Catherine Mercer, unless she takes the estate, so that the case is attended with some difficulty; and it is doubted if the argument has yet been stated so fully as it might be, especially as the case of the Duke of Queensberry *v.* Sir William Douglas, decided in the House of Lords, 3d April 1783, (ante Vol. ii. p. 603,) has been overlooked, though it is the case that comes nearest to the present, and the judgment there given makes strongly in favour of Miss K. Mercer."

Lord Eskgrove.—"The favour of the law is for the will of the defunct. It is enough that he lived a part of the last day."

Lord Justice Clerk, (M'Queen).—"As to the rule, *Dies inceptus pro completo habetur in favorabilibus, &c.*, it is out of the question; for it only applies to the case where time is completed by years; and it is no great stretch to hold the last day of the year is completed. But no such rule applies where time is computed by days, *e.g.* Induciæ of Summons, Aliment of Prisoners, &c.—hours do not enter into the computation, because they are not mentioned in the act."

Lord Swinton.—"Of the same opinion. Suppose it had been one day."

Lord Henderland.—"See Wright's History of the Jameses. The meaning of the Legislature is not to go into questions, but to take round periods."—"The Court sustain the objection of not having lived sixty days complete; and order counsel to be heard on the other point."

Interlocutor, 11*th December* 1793.

Lord President Campbell.—"The deed of 21st February is merely an accessory deed, referring to that of the 22d February,

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ecuted *in lecto ægritudinis.* Accordingly, ever since the time of King William, c. 13, and the *Regiam Majestatem*, such deeds so executed were reducible at common law, if the party, at the time of executing them, had contracted that disease of which he afterwards died. The statute 1696, then qualified the common law rule of deathbed by adjecting the period of sixty days. To prove that the party is *in lecto ægritudinis*, is hence of importance; and in doing this, it will not be sufficient to show, that at the time he made the settlement he was in a precarious and declining state of health. Mere weakness, from old age, or other causes, will not do, because every man, after attaining

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which was framed at the same time, though not executed till too late. The rule, *accessorium sequitur principale* applies. It is not a substantive deed, and does not even contain a will, or indication of a will, either express or implied, to give the succession to Miss Mercer, but only supposes that such will was then or immediately to exist. Supposing, however, it could be construed into an indication of will, and that such indication should be held as an actual will, it would not be sufficient, according to the case of Hamilton and Douglas, before referred to. *Titius heres esto* was good Roman law, but bad feudal law. The case of Judge Ross, observed in Lord Monboddo's information for Douglas, 12th March 1762, is nothing to the purpose. It is not said he had any more heirs than his brother, and the superior confirmed the nomination by a charter. I am clear that the granter was on deathbed, no matter what the name of the disease was—physicians are often at a loss about that."

LORD ESKGROVE.—"The deed must be done *eo intuitu*. Had it been so, I could have held the signification of the will sufficient."

LORD JUSTICE CLERK, (M'QUEEN).—"The deed of 21st February is not a settlement by itself; and was not intended as such. But suppose it had said expressly, "who is hereby appointed my heir," it would not have been sufficient unless it had been in exercise of a reserved faculty. But truly it is a relative deed, referring to another which has become ineffectual, no matter whether upon deathbed or any other ground."

LORD SWINTON.—"Of the same opinion. Heritage can only be given *per verbæ de presenti*. *Titius heres esto* is no more than the mere making of a *will*."

LORD DREGHORN.—"Of same opinion as to first deed; but if it had contained nomination of her as heir, I would have doubted."

LORD MONBODDO.—"For adhering."

LORD ABERCROMBIE.—"For adhering."

LORD HENDERLAND.—"For altering."

Vide President Campbell's Session Papers, Vol. 71.

a certain age, is subject to a certain degree of bodily infirmity and weakness. The decay, incident to all humanity, is not the disease law recognizes, but must be some regularly formed distemper tending to death. There is no proof of any such here. That the deceased was gradually declining in his health is true; that he had lived irregularly, and indulged in drinking to excess, was also true; but he laboured, at the time he executed these deeds, under no regularly formed disease. 2. But even supposing it were true, Mr. Mercer, when he executed the deed, had contracted the disease of which he afterwards died, Mr. Mercer, after executing the deed, lived the statutable period of sixty days, which fact alone validates the settlement. The deed being executed on 22d February, between seven and eight o'clock evening, and Mr. Mercer having died on 22d April, between ten and eleven at night, he thus lived sixty days after executing the deed, in terms of the act 1696, and *dies incæptus pro completo habetur*, according to the maxim in the civil law. 3. Although the deed of the 21st February contains no dispositive words, no words *de presenti*, giving the estate to the appellant, yet there was no necessity for a deed containing such words, in order to convey the estate to her, because there is no formula or fixed set of words known in the law of Scotland which a person must employ; all that is required is, a clear and explicit declaration of will. In the present case, it is impossible to deny that Mr. Mercer, in the deed 21st February, expressly declared his will, that the appellant should be his heir; and therefore, if he had never executed the deed of 22d February, still she was entitled to take the estate, assuming that declaration as equivalent to an obligation to convey. That, at all events, a clear obligation of this nature attaches where the testator has declared his intention as to his succession is clear, and that obligation devolves on his heirs so as to enable her to adjudge and complete her feudal right. This proposition is supported by the decisions, both here and in the House of Lords, in the case of Douglas *v.* Earl of Morton, 21st February 1773, and Duke of Queensberry *v.* Sir William Douglas in 1783.

Pleaded for the Respondents.—1. That in law it is sufficient that the granter is proved to have contracted the disease or sickness at the time of granting the deeds of which he afterwards dies. It is not necessary, according to the authorities, to prove mortal sickness, or any sickness affecting the brain. Sickness induced by a sore, a

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wound, or a bruise, if it confine him to the house, as in this case, will be sufficient. 2. The first deed challenged is dated 22d February. The act makes it incumbent to prove, "That the granter lived for the space of threescore days "*after* making and granting thereof." But as the deceased, in this case, only lived thereafter fifty-nine days and three hours, he had not lived the statutory period required by the act to overcome the presumption of deathbed. And no recourse can be had to fictions in order to make out that a part of a day is equal to the whole, according to the maxim of the Roman law, *dies inceptus pro completo habetur*, because the statute expressly proves that the granter must survive threescore *days after* granting the same. 3. The deed of the 21st February, contains no dispositive words, no words *de presenti* giving the estate to the appellant, and without such expressions, heritage cannot be conveyed by the law of Scotland. Besides, the expression used does not import any obligation, or such words as import an obligation, sufficiently binding on the deceased's heir, so as to entitle the appellant to make up a feudal title. Nor can the deeds of the 21st and 22d, even if held as one settlement, avail her, because if the latter is cut off by the law of deathbed, she has no claim.

After hearing counsel for four days,

LORD THURLOW said, (LORD LOUGHBOROUGH concurring,)

"My LORDS,

"The *terminus a quo* mentioned in the act, is descriptive of a period of time, and synonymous with the date or day of the deed, which is indivisible, *and sixty 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 only lived fifty-nine days of the period required. Had he seen the morning of the 60th, or subsequent day, it would have been sufficient; the rule of law above mentioned, (*dies inceptus pro completo habetur*,) then applying and making it unnecessary and improper to reckon by hours, or to inquire if the last day was completed."

Vide President Campbell's Session Papers, Vol. 71.

It was ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, Wm. Tait.*

For Respondents, *R. Dundas, W. Grant, W. Adam.*