

D I E S I N C E P T U S.

1624. June 26. DRUMMOND *against* L. CUNNINGHAM-HEAD.

IN an action of suspension betwixt Dummond and Cunningham-head, where-
in Cunningham-head being charged upon his obligation, as cautioner for
Patriek Sommerville, to pay 1000 merks, which being suspended, as being sub-
scribed by him, being then minor, having curators, without their consent;
and this reason being elided by an *answer*, That he was major at the date
and time of the subscribing of the bond; which being admitted, it was
found by the probation, that he wanted 12 or 18 hours, or at the most a
day of his years of majority, when he subscribed the bond foresaid, and for
that inlake they found the bond null; for the LORDS found, That in this, and
the like cases, the account behoved to be made *de momento in momentum*, for he
was born upon the 24th November 1601, and the bond was subscribed upon the
23d November 1622.

THE LORDS also found, That where a renunciation to enter heir is subscrib-
ed by a minor, with consent of his curators, the curators are not restricted
to be bound as cautioners for the minor, or otherwise to become obliged for him
to warrant that deed, and that they are no further obliged, but to consent.

Act. *Nicolson.*

Alt. *Cunninghame.*

Clerk, *Hay.*

Fol. Dic. v. 1. p. 236. Durie, p. 130.

1680. February 25. WADDEL *against* SALMOND.

GEORGE WADDEL having married his daughter to George Salmond, and paid
the tocher in her contract, being 1300 merks; the daughter having been mar-
ried upon the 23d of November 1677, and having died upon the 24th of Novem-
ber 1678, at two or three o'clock in the morning, Waddel pursues for repetition of

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No 1.
The Lords
reduced a
bond of cau-
tion signed
by a minor,
though he
wanted only
twelve or
eighteen
hours of ma-
jority.

No 2.
Marriage ha-
ving conti-
nued a full
year and part
of the day af-
ter the year,

No 2.
the tocher
was found
to belong
to the hus-
band.

the tocher, because the marriage was dissolved within year and day.—The defender *alleged* absolutor, because the marriage stood undissolved for a full year, and part of the day after the year, which the law doth introduce only to make it evident, that the full year is complete, *et in favorabilibus dies captus habetur pro completo*; so that the husband's case being more favourable than the father's, he should enjoy the tocher.—It was *answered*, That the terms of the law is, that where the marriage is dissolved within year and day after the solemnization of the marriage, the tocher returns, and the case of the father is more favourable, the daughter being dead without succession; and by the common law, tochers do return in all cases by the dissolution of the marriage.

THE LORDS found, That the marriage having stood undissolved a year, and and a day thereafter, the husband had right to the tocher, albeit that day was not complete.

Fol. Dic. v. 1. p. 235. Stair, v. 2. p. 763.

1680. February 11. * * * Fountainhall reports the same case :

GEORGE WADDELL pursues one Salmond for a tocher. It was *alleged*, the marriage had dissolved before year and day expired, in so far as she was married on the 23d of November, and on the 24th of November of the year following she died at two o'clock in the afternoon; and so the year and a day more were not fully expired. *Answered*, In such a favourable case the time must not be counted strictly *de momento in momentum*, but *dies inceptus haberi debet pro completo, ut in favorabilibus interpretari solet*: Yea it may be said this year and day is a kind of prescription, which is not counted *de momento in momentum*, l. 6. D. de *usucapion*. *Answered*, The father was more favourable to get back his money in *solatium* of his daughter and her issue he wanted; and in all other cases it behoved to be a full natural day, as in annual rebellions for liferent escheats, in the *annus deliberandi*, in the possession on base infestments, by act 105, Parl. 1540; And Craig, l. 2. *Dieg. 12.* speaking *de non-introitu*, gives a good reason for it, *Additur dies ut omnes molestæ quæstiones de anni tempore tollantur*. THE LORDS, on the 25th of February, 'found, that the tocher was due to the husband.' *Nota*. It was only carried by a single vote of an extraordinary Lord, and the President was against it.

1681. June 7.—THE probation led in the action (mentioned February 11th 1680,) between Waddel and Salmond, coming this day to be advised, the LORDS, after much debate, 'found it was enough that both the days of the marriage and of the wife's death were inchoate, though they were not complete, to make up the year and day; and found, seeing she was married on the 23d of November, and died the next year on the same 23d of November, there could

not be two 23ds of November in one year; and therefore she had lived year and day.' But this was a quibble, and no solid ground; for thus it should be construed year and day, though she was married the 23d at night, and died the 23d next year in the morning thereof; though in effect this would want a day of the full year.

No 2.

In the *triduum* of our Saviour's lying in the grave, neither the day of his suffering, nor of his resurrection were complete days, but only parts of days; yet they enter into the account of the three days. See Doctor Hammond's observations on the 40th verse of the 12th chapter of Matthew, anent Christ's lying three days in the grave, and Grotius's notes on the same passage. See elegantly for this, that *annus inchoatus habetur pro completo*, a debate in D'Avila's History of the Civil wars of France, anno 1563.

Some of the LORDS were of opinion that it ought to be *tempus continuum*, and so counted *de momento in momentum*, that one of the days ought at least to be complete; but the contrary was carried: In this cause, the LORDS also admitted women to be witnesses for proving the time of the wife's death, because they are more commonly present in such cases, than men. See WITNESS.

Fountainball, v. 1. p. 84. & 140.

1681. January 26.

LADY BANGOUR against MR WILLIAM HAMILTON Advocate.

THE Lady contending her adjudication of her husband's estate was within year and day of the first, and so behoved to come in *pari passu* with it, alleged the first adjudication was dated 30th day of July 16—, and hers was the 31st of July the following year, which was a day without the year. 'THE LORDS sustained her comprising as within the year and day, and found the year as to this favourable calculation of bringing in creditors together was not only 365 days, but also 24 hours farther, counting *de momento in momento*;' yet in leap year, there is an intercalary day more in February. 'But the LORDS found her adjudication null, because it wanted both a decret *cognitionis causa*, and a renunciation to be heir.' Though it was answered, finding she was prevented in diligence, she gave in a bill to the Lords, that they might allow her summarily to adjudge, at least to declare her inchoate diligence before the year expired should come in *pari passu* with the prior adjudgers; and which the Lords had granted; but this was only *periculo petentis*, and cannot alter the form established in such cases.

No 3.
In favourable cases year and day counted *de momento in momentum*.

Fountainball, v. 1. p. 127.