HERITABLE AND MOVEABLE.

SECT. I.

Nature and Distinctions of each.

1675. *June* 18. LD. of LEYES *against* FORBES.

No 1.

WHERE the order of redemption and declarator was after the wadsetter's death, the wadset sums were found to belong to the heir and not to the executor, because as to heritable and moveable, subjects are considered as they are at the defunct's death; and in this case at the death of the wadsetter the wadset was a subsisting real right.

Fol. Dic. v. 1. *p.* 367. *Stair.*

*** See the particulars of this case, No 6. p. 286.

1730. *July.* SCOT of Gala *against* HOPE-PRINGLE of Torsonce.

No 2.

WOODS ripe for cutting at the time of the proprietor's death, whether they go to the heir or executor, debated, but not finally determined, the matter having been taken up by transaction. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 366.

1738. *January* 11.
HENRIETTA CARRUTHERS, Relict of ANDREW BARCLAY, *against* ANDREW BARCLAY Merchant in Edinburgh.

No 3.
The annualrents which fall due the

THE deceased Andrew Barclay, writer in Edinburgh, having acquired right to two heritable bonds, upon which infeftment had followed, provided the same

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first term after a husband's decease, upon an heritable bond provided to him and his wife in conjunct fee and liferent, and the longest liver, belong to her, and not to the executor.

to himself and the said Henrietta Carruthers his wife, and longest liver of them two, in conjunct fee and liferent, for her liferent use allenarly. Andrew died on the 17th August 1735; after which, his relict brought a process against Andrew Barclay his executor, for repetition of the annualrents that had arisen upon the said bonds, betwixt the Whitsunday and Martinmas 1735, and which he had intromitted with, upon the supposition they belonged to him.

The arguments urged for the defender were; That our law, as well as that of the Romans, distinguished betwixt *fructus naturales*, or *industriales*, and *fructus civiles*, with respect to the interest of liferenters in these different subjects; and that, with regard to the last of these, as they yielded an utility every day, they ought to fall, from day to day, to the liferenter or fiar, according as the liferent subsists, or the interest of the fiar takes place. See Lord Stair, Book 2. Tit. 6. § 9, and Voet. Comment. tit. *De usu fruct.* and *Quomad. &c.* § 30. It is true, our practice has varied from the rules of the Roman law, that govern the decision of *fructus industriales*, and divided the interests of liferenters and fiars in these subjects by the fixed terms of Whitsunday and Martinmas, in order to avoid a variety of intricate and doubtful questions that occurred amongst them, thereby extending the interests of liferenters, who die after Whitsunday, and before the crop be reaped, to the half beyond what the subject liferented would have naturally yielded, and contracting the interest of liferenters who die after the crop is reaped, and before the term of Martinmas. But as to the *fructus civiles*, such as house rents, annualrents of money, &c. which yield their utilities equally every day, there can be no place for any such doubtful questions; therefore, there is no colour from public utility for departing from the Roman law, as to the division of *fructus civiles*, between liferenters and fiars, or betwixt the executors of the deceased and surviving conjunct fiar.

Answered for the pursuer; That where an annualrent, whether in money or victual, is payable out of lands at two terms in the year only, the term that the creditor survives falls to the executors, in the same manner as in the case of rents. See January 12th 1681, Trotter, No 12. p. 2375. Without distinguishing whether the annuity or annualrent be redeemable or irredeemable, or whether it be an infeftment of annualrent subjoined to a personal bond, as in this case, or an infeftment of annualrent constituted by itself, redeemable, or subject to requisition at the suit of the creditor; for where an infeftment of annualrent is granted in security of the personal obligement, this last is sunk in the annualrent, till the creditor recurs to the personal obligement, by charging for payment; but when the creditor dies before requisition or charge is used, the infeftment of annualrent is solely considered, and only the bygone terms belong to the executors, without any partition, with respect to which *dies nec venit nec cedit*. As to the principles of the civil law, they no ways apply, seeing the *usu fruct.* or liferent of money with them, was executed by delivering to the liferenter the money, that he might use it during his life; and he, for

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the security of the fiar, found caution to return the like sum at his death. It is true, the liferenter of the *operæ servorum* resembled, in some measure, the liferent of personal bonds with us, and was due *de die in diem*; but that can afford no argument in the present case; for, in personal bonds, the annualrent is purely accessory, and becomes due day by day; and consequently what was past of it must fall under the executry, as the principal sum itself does; but this rule cannot hold in infeftments of annualrent, payable at two terms of the year; for there the fiar himself could not uplift a broken term, or sue execution for the same; he could indeed charge for the whole sum, whereby the infeftment of annualrent would be loosed; but, even in that case, a broken term would not come under question, the creditor being always obliged to charge, some days preceding the term, to take effect thereat. And, though the creditor had liberty to charge upon a bond secured by infeftment of annualrent betwixt terms, yet that could not have any influence here, as the annualrent remained fixed and unloosed at the fiar's death.

THE LORDS found, that the sum pursued for being heritably conceived in favours of the husband and wife in conjunct fee and liferent, and for the wife's liferent, in case she survived the husband, and which is payable at two terms, Whitsunday and Martinmas, by equal portions; therefore the half year's rent, which fell due at Martinmas after the husband's death, does belong to his relict, and not to his executor.

C. Home, No 31. p. 133.

1739. *November* 6.

MR HUGH MURRAY KINNINMOUND, Advocate *against* MRS ELIZABETH ROCHEAD, &c.

*** The first part of this case relates to the subject of Sect. 28.

No 4.
Where the conventional terms of paying annualrents on an heritable bond are Candlemas and Lammas, the annualrent due at Candlemas, before the predecessor's decease, belongs to his executor.

LEWIS of Merchiston, and Blair of that Ilk, &c. being debtors by a personal bond to Sir James Rochead, for L. 800 Sterling, they, (after their affairs went wrong) executed several trust-dispositions of the subjects belonging to them to certain trustees, for behoof of their creditors specially therein recited; amongst whom was Sir James for his debt, who, alongst with the other creditors, assigned their debts to the trustees, in order that they might lead an adjudication in their name, of the subjects belonging to their debtors, and make over the same to the purchasers. This assignation contained the following proviso: 'That 'Sir James's granting thereof to the trustees should no ways hurt or prejudge 'him of any diligence then already used upon the said bond, or that he should 'thereafter use thereon against the persons of the debtors, or others liable in 'the same, or any other lands, &c. that do or shall appertain to them, till he is 'completely satisfied and paid of the sums before written; these presents being only granted by me to the said trustees, in order to make up sufficient