No 3.

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 be-'ing only granted by me to the said trustees, in order to make up sufficient

No 4. ' rights to the purchaser of the said lands, for security of the said purchaser.' In consequence of this trust-right, the trustees led an adjudication, and sold part of the subjects in Sir James's lifetime; and, after his death, this question occurred betwixt his heirs and executor, Whether Sir James's acceding to the trust-right, and the adjudication deduced in consequence thereof, rendered the bond wholly heritable, so as to devolve to his heirs? or if it still remained moveable, as not falling under the assignation to the trustees, with respect to what part of it is not recoverable out of the trust, as Sir James's proportion of the same?

For the executor it was *contended;* That the trust-rights could not render any of the debts heritable, though they were heritably secured, because it is not in the power of the debtor, by any deed of his, to alter the nature of the debts without the creditor's consent; and it is plain, that wherever debtors embarrassed denude of their heritable subjects for security and payment of their debts, as not only in trust-rights, but likewise where prisoners for debt dispone their estates for their creditors' security, in order to be entitled to the act of grace, a debt may be heritably secured, and yet remain moveable as before the security. Since, then, trust-rights by themselves cannot render heritable such debts as were originally moveable, let us examine if what followed thereafter, on the part of Sir James, can have that effect. With regard to which, it is clear, from the nature of the assignment, that the sole intent thereof was, that an adjudication should be led in the name of the trustees, of the several subjects of the trust-right, so as they might be enabled to convey the same to the purchasers for security of their respective purchases, to the extent of the sums to be received by the creditors as their proportion of the price, and no further; as this is the case, it is the very same as if Sir James himself, without leading any adjudication, had received his proportion from the purchasers, or trustees on their account, of the price of the subjects, and granted an assignment of his bond, with absolute warrandice as to the sum received, and with power to the purchasers or trustees for their behoof, to lead an adjudication of the subjects for security of their respective purchases; surely such an adjudication led upon the bond would not render it heritable as to the remainder still unsatisfied. Now the case in question is in effect the same. Sir James conveys this debt to the trustees to a limited effect, ' that an adjudication may be led thereon in their ' name,' to be made over to the purchasers in security of their purchases, and with power to bind Sir James in absolute warrandice as to the proportion of the price to be received by him; and, at the same time, reserving the debt to all other intents and purposes, which is no more than conveying the debt by way of anticipation to the purchasers, with absolute warrandice as to the sums received, reserving the bond as to the remainder; and with power to the purchasers to lead adjudication upon the same, so far as conveyed for security of the purchasers. Whence it is plain the debt was never intended to be heritably

secured in Sir James's person, or for his behoof, by leading the adjudication, further than to the extent of the price of the subjects. No 4.

It was *answered* for the heirs; That no such anomolous right occurs in law, which is at the same time heritably secured, and yet moveable to all other intents and purposes. If a debt is heritably secured, it must necessarily descend to the defunct's heirs; nor is it possible for his executor to make up a title to it. Neither is the instance of an heritable security granted by the debtor, without the creditor's consent, an example to the contrary; because if the creditor refuse to accept of it, the debt cannot be said to be heritably secured, and consequently there is no place for its descending to the heir; but if the debt can at all be said to be cloathed with an heritable security, the descent to the heir is an unavoidable consequence, seeing he only can succeed in the real right, and the debt must go along with it as the *jus nobilius*. Nor is a formal acceptance of the creditors necessary for this purpose; if the creditor knows that the additional security is granted. he is presumed to accept of it. But, in the present case, there is no occasion for this disquisition, as Sir James's acceptance of the trust securities is not left to presumption or conjecture, but is plainly proved by his concurrence with the trustees in every step of their management, by keeping their meetings, by assigning the debts in question, and, in a word, doing every thing which any other creditor did who acceded to the trust-right, consequently these trust-rights must be considered in the same view as if they had been granted directly to Sir James himself; in which case, there could be no doubt the debt thereby secured would be heritable to all intents. And as to the argument, That no more can be deemed heritable than to the extent of what may be drawn by the subjects still undisposed of, it was *answered*, That, when a debt is heritably secured, however small the subject is over which the security extends, that the whole is thereby rendered heritable, since every part thereof is equally secured upon land, though the subject may be too small to pay the whole; because, as the heritable security applies equally to the debt *pro indiviso*, it must of consequence be wholly reputed heritable; and it is inconsistent that it should be both heritable and moveable at the same time; or that the nature of it should depend upon any after chance of the debt being recovered in one manner or another. And with regard to the argument, That the assignation was only intended for an additional security to the purchasers, and to be considered as their right and evident, but not at all to alter the nature of Sir James's debt, it was *answered*, *1mo*, It is not by the adjudication that Sir James's debt was rendered heritable, but by the disposition and infeftment in security, taken by trustees for his behoof, a considerable time before the adjudication was led, and by which the debts were rendered heritable, though the same had never been deduced. *2do*, The adjudication is not rightly represented, when it is considered as a security only belonging to the purchasers, and not to Sir James; for it did not belong to the purchasers till it was made

No 4. over to them upon the sales of the several subjects; till then, it was in the person of Sir James's trustees, which is equal as if it had been in his own; and though he empowers them to make over the same to the purchasers, that is no more than what every creditor is bound by law to do.

Another point occurred betwixt these parties, which was this: In some of the heritable bonds due to Sir James, secured by infeftment, the annualrent was taken payable at two terms in the year, Candlemas and Lammas. Sir James died the 1st of May 1737, consequently the executor *pleaded*, That the half year's annualrent that was payable at the Candlemas preceding, if not the annualrents to the day of his death, fell under his executry. In support whereof, it was *observed*, That annualrent secured by infeftment, though payable termly, must either be due *de die in diem*, and so the executor's right will go to the day of Sir James's death, or they must only be understood to be due termly, when they are exigible, and then the conventional terms that were passed before his death, fell under his executry. Annualrents, which are termed *fructus civiles*, in whatever manner they are secured, grow due from day to day, though they are not exigible till the term covenanted. And there is nothing better known in law than the distinction betwixt *diem cedere* and *diem venire*; by the first, the obligation becomes due, and is transmissible; so that since the annualrents become due by the use of the principal sum, and forbearance of exacting it, every day's use must produce a new day's interest. This infallibly holds in moveable bonds; and there does not appear any solid reason why it ought not to take place in annualrents constituted by infeftments; but if those shall be deemed only due termly, then it would seem past doubt, that all the bygone terms due at the defunct's death fell under his executry; these were sums exigible by the defunct himself; and whether the terms of payment were, by the agreement of parties, or those called legal, cannot alter the case; for still the term's annualrent was passed, and must be regarded as a sum in the defunct's own hands. *Answered*; The annualrents were not to be computed *de die in diem*, but to be regulated by the legal terms of Whitsunday and Martinmas, in the same way as the rents of the lands, since there is no reason why that rule, which has been wisely established for preventing many disputes which would otherwise happen anent the conventional terms, ought to be departed from. The reason why annualrents or annuities are made payable at bye-terms, as Candlemas, Lammas, &c. is to answer the terms the tenants pay their rents; and as those conventional terms of payments are justly disregarded in the question of the heritor's succession, as little ought they to have any influence in the succession of the real creditor, who has a partial interest in the lands, conform to the decision, Trotter against Rochead, No 12. p. 2375.

THE LORDS found, that the bond in question was rendered heritable, and remained so at Sir James's death, except in so far as he was entitled to draw of the sums therein contained, out of such of the subjects as were sold and dis-

posed of by the trustees before his death; and found, that the annualrents due at Candlemas, preceding Sir James's death, do belong to his executors. No 4.

C. Home, No 131. p. 220.

*** See the report of this case by Kilkerran, Sect. 28. *h. t.*

1741. *June* 4. THOMAS PRINGLE of Symington *against* ALISON PRINGLE.

No 5.
The proprietor of a grass farm let in tack, having out-lived Martinmas, his executor and not his heir was found entitled to the whole year's rent, payable at Martinmas preceding, and Whitsunday subsequent to his decease.

ROBERT PRINGLE of Symington deceased, set two tacks of two grass-rooms belonging to him, for a term of years, and, by the tacks, the tenant's entry to be at Whitsunday 1736, and the first years tack-duty is declared payable at Martinmas 1736, and Whitsunday 1737, by equal portions, and so forth yearly thereafter, and Robert Pringle died in April 1738; whereupon this question ensued, Whether the rents for crop 1737, payable at Martinmas 1737, and Whitsunday 1738, belonged wholly to Alison Pringle the executrix, or if the half belonged to Thomas Pringle the heir?

For the heir it was *pleaded*, That the possessions of the tenants being grass-rooms, the legal terms, as well as the conventional, were Martinmas and Whitsunday; and that the defunct, having died before Whitsunday, though after the term of Martinmas, the rent payable for these possessions from Whitsunday 1737 to Whitsunday 1738, fell to be divided between his heir and executor; and that the heir had right to the rent due at Whitsunday 1738. In support thereof, it was *observed*, That the law and practice of Scotland had established certain legal terms, which are always made the rule for determining questions of this kind betwixt fiars and liferenters, and heirs and executors, and that without regard to the conventional terms; and therefore, the heir grounds his claim, not upon the Martinmas and Whitsunday being the conventional terms, but upon their being, as he conceives, the legal ones. In corn rooms, the term of Whitsunday is always considered as the first, and Martinmas as the last legal term; so that the surviving one, or both of these, gives right to the whole, or half the rent of that crop. In establishing these legal terms, the law has had regard both to the time of the tenant's entry, which, in such, is generally known to be at Martinmas, and can never be sooner to the corn-grounds than the separation of the former crop, and therefore has made the first term at a half year's distance from the entry, and to the second at a full year's distance; and likewise to this, that by Whitsunday, the lands are fully sown, and at Martinmas fully reaped, and all that year's profit fully got. From the above rule, it is consequential, that the entry, as to grass-rooms, is always at Whitsunday; and therefore, the next term of Martinmas falls to be considered as the first legal term of that year, and the Whitsunday following as the last, which is most agreeable to reason; because otherwise, that is, if Whitsunday was to be considered as the first legal term, it would suppose a half year's rent to be, by law, due by the tenant, at, or even before his actual entry, which, for the most