No 45.

to establish a right to such by a service. Yea, the Lords have found that even in heritable subjects an heir of provision's right might be ascertained or established, either by the acknowledgment of the contending party, or by a summary cognition that such a one was the heir of provision, respected in the destination; as was done in the case of John Carnegy against the Creditors of Kinfawns, See SERVICE AND CONFIRMATION.

Replied for the defender; Though the subject in dispute were of its own nature purely moveable, yet it being tailzied to the wife's heirs by the contract, no person could make up a title thereto without a service, cognoscing the person pretending right by a tailzie to be the heir. So that is of the nature of an heritable subject, to which confirmation is no sufficient title. The cited decision doth not meet the case, John Carnegy being the first heir substitute, whereas here it must not only be cognosced that such persons represent, but also that the heirs of the marriage failed, which can only be by service.

THE LORDS found that the tocher doth belong to the wife's heirs, and not to her executors.

Forbes, MS. p. 27.

1752. *November* 29. EUPHAN EWING *against* RALPH DRUMMOND.

No 46.
An assignation of a liferent right made by a daughter to her father, was found to fall, after the father's death, to his heir, and not to his executor.

IN a contract of marriage, a tenement of houses was provided to the husband and wife, in conjunctfee and liferent, and to the heirs of the marriage. The wife, who survived her husband, disponed her liferent to her father-in-law; and he having also died during the subsistence of the liferent, the question occurred betwixt his heir and executor, Whether the rents falling due after his death were heritable or moveable?

The argument *urged* for the executor was, That a liferent cannot be conveyed, so as to establish a real right in the person of the assignee. A liferenter is not a proprietor, so as to be entitled to give either a procuratory or precept; and therefore an assignation to a liferent stands upon no better footing than an assignation to mails and duties, granted by a proprietor. It entitles the assignee to claim the rents by a personal action against the tenants, when the rents fall due; and this claim, which is moveable, must descend to the executor.

On the other hand, it was *urged* for the heir, as a point established in law, that no subject descends to an executor, which has *tractum futuri temporis* after the proprietor's death. The reason obviously is, that the purpose of naming an executor, is to gather the defunct's effects without delay, and to make a distribution among the parties interested; which excludes subjects that have a course after the proprietor's death; and this is entirely independent of being heritable or moveable *sua natura*. Rights may be moveable *sua natura*, that have *tractum*

futuri temporis to fall under single escheat; and yet, for the reason given, will not fall to the executor. No 46.

But whatever be the foundation of this doctrine, it is undoubted law, as vouched by all our authors. Lord Stair, lib. 2. tit. 1. § 4, near the end, lays it down as a general rule, 'That all rights and obligements having a tract of future time, are heritable as to the executors, who are thereby excluded, though 'they no way relate to infeftments or lands, as pensions, tacks, &c.' In the same section, he observes, 'That rights having a tract of time, but not for life, 'are moveable so as to fall under single escheat.' And he adds, 'That assignations of liferent tacks fall under single escheat, as also the *jus mariti* of husbands, though they carry the profit of the wife's heritable rights, or rights of 'liferent.'

A liferent escheat of a land estate, is equivalent, in all respects, to a widow's liferent in lands, in the person of an assignee; and it was found that a liferent escheat, which has *tractum futuri temporis* in the person of the donatar, falls to the heir of the donatar, and not to his executor, except as to bygones. Coulter *contra* Forbes, No 26. p. 5460. And, upon the same principle, an annual payment, as to terms after the debtor's death, was found a burden upon the heir, not the executor. Hill *contra* Maxwell, No 43. p. 5473.

"THE LORDS preferred the heir."

Fol. Dic. v. 3. *p.* 265. *Sel. Dec. No* 23. *p.* 26.

*** This case is reported in the Faculty Collection:

ELIZABETH ANDERSON, widow of John Ewing, assigned her liferent right to a house in Stirling, to her father-in-law John Ewing. Upon his death this question occurred, Whether the assignation fell to his heir, Ewing, or to his executor Drummond? 'THE LORDS preferred the heir,' being of opinion, that rights having *tractum futuri temporis* belong not to executors; for this reason, that it is the office of executor to collect without delay the effects of the defunct, and to distribute them according to the respective rights of all parties concerned; now this cannot be done with regard to subjects which, having *tractum futuri temporis* after the demise of the defunct, do not even exist when the office of executor commences. Although it was pleaded for the executor, that as it is undeniable that the right of the assignee to the liferent in question would have fallen to the Fisk by the forfeiture of his single escheat, by parity of reason ought it also to fall to his executor.

Reporter, *Tinwald.* Act. *J. Grant.* Alt. *P. Haldane.* Clerk, *Kirkpatrick.*

D. *Fac. Col. No* 39. *p.* 61.