

1739. *November 6.*

Competition betwixt the HEIRS and EXECUTORS of SIR JAMES ROCHEAD.

In a competition betwixt the heir and executor, with regard to bygone annual-rents due upon heritable bonds, secured by infeftment, which the executor claimed down to the day of the predecessor's death, as due *de die in diem*, the Lords found, That where the annual-rents, by conception of the bond, were made payable at Whitsunday and Martinmas, the same did belong to the heir from the term preceding the predecessor's decease, which in the present case was Martinmas, the predecessor having died 1st May; but they found, That where the conventional terms of paying the annual-rents were Lambmas and Candlemas, the annual-rent due at Candlemas before the predecessor's decease did belong to his executors. The foundation of which last opinion was, That where it is said that the legal, and not the conventional terms, are the rule betwixt heir and executor, the meaning is, that the postponing the legal term by the convention of parties does not deprive the executor of the benefit of the legal term, *dies cedit etsi non venit*; but if, by the convention of parties, the fruits be payable before the legal term, the executor must have the benefit, because there *dies et cedit et venit*; and the case would be the same in a forehand payment of rents of lands.

Fol. Dic. v. 2. p. 458.

* * This case is reported by Kilkerran, No. 44. p. 15906.

1765. *February 13.*

Mr. ROBERT DALRYMPLE *against* SIR ROBERT GORDON.

A Minister having been deposed by a Synod, 28th April 1763, the sentence was affirmed by the General Assembly, 1st June, who declared the parish vacant from the date of their own sentence.

Sir Robert Gordon the patron, refused to pay his share of the Whitsunday stipend 1763, upon the ground that the deposition took place from the date of the sentence of the Synod, which was prior to Whitsunday; and quoted Lord Bankton, II. 8, 220, and 227. to show that the sentence of the Assembly must draw back to that period.

The Lords decerned for the stipend in question, and found Sir Robert liable in expenses."

Act. Dav. Dalrymple.

Alt. Lockhart.

G. F.

Fac. Coll. No. 1. p. 193.

1789. *June 19.* EARL OF DALHOUSIE *against* SAMUEL GILMOUR.

Gilmour, in consideration of a sum of money, granted bond "to Dr. Thomas Glen and his heirs, for an annuity or yearly payment of £.32 Sterling, at the two terms of Whitsunday and Martinmas, by equal portions, beginning the

No. 55.

Quando dies cedit of annual-rents of heritable bonds?

No. 56.

Deposition of a Minister by a Synod, affirmed by the Assembly, found to take effect only from the date of the sentence of the Assembly.

No. 57.

An annuity by a bond granted for a price, being payable at

No. 57.
Whitsunday
and Martin-
mas for the
preceding
half year; no
part of it due
for such half
year, if the
annuitant do
not survive
the respective
terms.

first term's payment at Whitsunday first, for the half year preceding, and the next term's payment at Martinmas thereafter, for the half year preceding that term, and so to continue in the payment of the same at every subsequent term of Whitsunday and Martinmas in all time thereafter, during the natural life of the said Thomas Glen."

Dr. Glen died on the second day of November; and the Earl of Dalhousie, as his disponee, sued Gilmour for payment of a part of the annuity corresponding to the period from the term of Whitsunday to that day.

The Lord Ordinary pronounced this interlocutor: "Having attentively considered the bond libelled on, which does not constitute a liferent upon a sum of lent money, bearing annual-rent *de die in diem*, nor binds the defender to pay the annuity thereby constituted, daily and continually during the annuitant's life, but only to pay the said yearly annuity at two terms in the year, Whitsunday and Martinmas, by equal portions, (beginning the first term's payment, &c.) during the natural life of the annuitant, with a fifth part of each term's payment of penalty, in case of failing in the payment thereof, and the due and ordinary annual-rent of the said term's payments from the time they respectively fall due, and during the not payment of the same; finds, that this annuity, similar to an obligation for the payment of rents of lands, being made payable half yearly, at such of the terms of Whitsunday or Martinmas as might occur during the annuitant's life, the defender was not bound to pay any part or proportion of the said annuity, at or for any intermediate period between those terms within which the annuitant died, or at any time occurring after his decease."

In a reclaiming petition, which was appointed to be answered, the pursuer

Pleaded: The liferent-right of any subject, implies the liferenter's title to the whole produce or profits of it which arise during his life; nor is it inconsistent with this that for the sake of expediency liferents are usually made payable at a certain term. Thus, with respect to money, and all other subjects which yield profit or increase from day to day, the liferenter's right keeps pace with that gradual progress, and the last penny which has thus accrued at the day of his death, though the term day be ever so distant, is due to himself or to his executors; Ersk. B. 2. Tit. 9. § 66; Relict of Mr. Thomas Linning against Gustard, No. 53. p. 15914. It is true indeed, that had the subject here liferented been lands, the fruits of which arise not *de die in diem*, there would have been no room for this claim, because then the profits, which are understood in law as *unum quid*, existing at one particular period not arrived, could not have been said to accrue prior to the annuitant's death. But the liferent annuity in question is that of a stock or sum of money; the circumstances, of a higher rate of interest than the legal one, and of the debtor's being discharged of the obligation of payment, which are all that distinguish this from any other case of money bearing annual-rent, being evidently of no consequence.

If the money paid by the annuitant were even considered as a price; this, which is the only other possible supposition, would lead to the same conclusion.

For if it was the price of any thing, it was that of an alimentary provision, which, by its very nature, must be understood to correspond to the whole subsequent lifetime of the party for whose use it was destined. This is not only the reasonable presumption in the case, but likewise the legal one; Ersk. loc. sup. cit.; otherwise, and on the supposition that no proportion of the annuity was due prior to the term of payment, the annuitant, except on the term-day alone, could never be certain of obtaining a shilling for his subsistence at any period in the course of his life.

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Answered: A sum of money, which is properly said to be sunk or extinguished, cannot, with any propriety, be deemed a subsisting stock. Here there was no stock to bear either continual or periodical profits. A price was indeed paid for the obligation in the bond; and that obligation was qualified by the condition, that the payments were only to be made at the terms of Whitsunday and Martinmas which should occur during the annuitant's natural life. The half year's annuity in question then could never become payable, as the corresponding term did not arrive till after his death. This *dies incertus pro conditione habebatur*. In like manner, when a provision is, by a marriage-contract, made payable at a certain term, before which the party for whom it is destined is predeceased, there is no room for any claim corresponding to the period which he did survive.

The Lords adhered to the interlocutor of the Lord Ordinary, sustaining the defence.

Lord Ordinary, *Eskgrove*. Act. *Rolland*. Alt. *R. Armstrong*. Clerk, *Sinclair*.

Fac. Coll. No. 73. p. 132.

1792. November 28.

The TRUSTEES of SIR FRANCIS ELIOTT *against* SIR WILLIAM ELIOTT.

The late Sir Francis Eliott of Stobs disposed his whole personal estate to certain trustees, whom he also named his executors.

He died on the 20th June, 1791, and was succeeded by Sir William Eliott, his son and heir of entail, in the estate of Stobs, which consists of grass farms. The tenants of that estate enter into possession at Whitsunday, and are taken bound by their tacks to pay a half year's rent at the Martinmas after their entry, "for the half year immediately preceding," and another half year's rent at the following Whitsunday, "for the half year preceding that term."

The trustees claimed the half year's rents of the different farms, payable at Martinmas 1791, as part of the executry; and

Pleaded: In order to regulate the distribution of the rents in the hands of tenants, between the heir and executor of the landlord, the fiar and executor of the liferenter, practice has established Whitsunday and Martinmas as two legal terms, from which, whatever may be the conventional terms of payment, the rents payable for the crop of the current year, at the death of the predecessor, shall be

No. 58.

In grass farms, when the landlord survives Whitsunday, his executor draws a half of the rent payable at Martinmas and Whitsunday thereafter.