

No 70.

therefore did not pertain to the heir ; neither were the Lords moved with that allegiance made for the heir, viz. that albeit the husband died before the term of payment, yet his wife who was also creditrix, and had her liferent by the bond of the foresaid sum, lived after the term, and was yet on life, which was not respected, seeing the sum was found to come under the husband's testament, and the wife would have her own part of the principal sum, so much as of the law would fall to her. In this it occurs to be considered, who can have right to the annualrent since the husband's decease, there being many terms since, for the executor cannot claim it, as is alleged.

Act. ———.

Alt. *Hart.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 370. Durie, p. 251.*1628. *January 15.**FALCONER against BEATIE.*

No 71.

A SUM in a bond being payable at the first term after the decease of the creditor's mother, with annualrent after the term of payment, found heritable so as to go to the creditor's heirs, he dying before the term of payment.

Fol. Dic. v. 1. p. 370. Durie.

* * See this case No 34. p. 5465. — The contrary ; *Simson against White*, 20th March 1633, No 34. p. 698.

1629. *February 26.**DOUGLAS against M'MICHAEL.*

No 72.

A BOND made at Whitsunday 1627, of this tenor, to be paid at Martinmas 1627, with the annualrent at ten in the hundred, and failing of payment at that time, to pay L. 100 of penalty, and the annualrent thereafter so long as the principal should be unpaid, was found moveable, the creditor having died before the first term of payment, viz. Martinmas 1627, although it was *contended* it should be heritable, in respect of the express obligation of payment of annualrent from the beginning, and ever after till the payment of the principal sum.

Fol. Dic. v. 1. p. 370. Spottiswood, (CONTRACTS.) p. 66.

* * Durie reports the same case :

IN an action for delivery of a bond made to the creditor, which bore, the debtor to be obliged to pay the principal sum borrowed by him at the term contained in the bond, and also the annualrent thereof from the term of lend-

ing to the said repayment, (for, by the act of Parliament, annualrent could not be taken in hand, but only at the term of payment of the principal sum), and in case of failzie, to pay a certain penalty, together also with the annualrent, ay and while the sum should be repaid; and the creditor dying before the term of payment in the bond, and the obligation being sought to be delivered to the heir of the defunct, the executors alleging that it pertained to them, and not to the heir; the LORDS found the bond pertained to the executors, and not to the heir, albeit it bore payment of the annualrent *ab initio*, and was of the tenor foresaid, the creditor having deceast before the term of payment, whose surviving after the term, and not the clause of paying annualrent for that intervening term, betwixt the term of lending, and the repayment, should only have made the bond to pertain to the heir.

No 72.

Clerk, *Hay*.*Durie*, p. 430.1630. July 30. CARNOUSIE *against* MELDRUM.

A BOND heritable by a clause for annualrent, to commence at the term of payment of the bond, is moveable if the debtor die before the term of payment, and his executors are ultimately liable.

No 73.

Fol. Dic. v. I. p. 370. Durie. Spottiswood.

* * See this case No 8. p. 5204.

1666. July 31. SIR LODOVICK GORDON *against* SIR JOHN KEITH.

SIR LODOVICK GORDON being assigned to a sum due to Sir Robert Farquhar by Sir John Keith, pursues Sir John for payment, who *alleged* absolvitor, because he had right to the sum himself, as donatar to Sir Robert's escheat, and that the sum was moveable, albeit it bare annualrent, in so far as the term of payment was not come. It was *answered*, That sums were heritable as to the fisk, by the clause of annualrent, and the only exception was, that if the term of payment of the annualrent was not come, the same was moveable; and nothing in relation to the term of payment, if the annualrent was come due before the rebellion.

No 74.

A donatar claimed a sum as moveable, because the term of payment of annualrent had not arrived. Found to be heritable as to the fisk.

THE LORDS found, that the coming of the term of payment of the annualrents made the sum to become heritable as to the fisk, and therefore repelled the donatar's defence.

Stair, v. I. p. 403.