N.B. Lord Elchies and Lord Arniston gave it as their opinion, in the debate, that an adjudication for bygone annualrents, upon a decreet of poinding the ground, would proceed in terms of the statute 1672; and that the proprietor would have the option mentioned in the Act; contrary to the opinion of Stair, —see title Poinding and title Apprising. They founded their opinion upon the words of the Act above mentioned.

1740. *February* 14. KILBUCKO *against* ———.

[Elch., No. 24, *Adjudication*; Kilk., *ibid.* No. 7.]

The Lords found that the adjudication did carry the bygone annualrents in question, and that the heir's not entering was the same thing as if he had renounced; and that, by his contumacy in not entering in obedience to the charge, he cannot be in better condition than if he had formally renounced. Add to this, that his silence in neither entering nor renouncing ought to be interpreted against him, in the same manner as in the Roman law,—see *Tit. Cod. de Jure Delib., l. ult. p.* 14.

But the chief reason that moved the Lords was, that there was no other form of diligence that could affect these annualrents.

1740. *February* 27. LORD DAER *against* DUKE of HAMILTON.

[Elch., No. 11, *Heritable and Moveable.*]

THIS was a question betwixt the heir and executor of the late Lord Selkirk about the annualrents of heritable bonds. Lord Selkirk had secured certain sums of money by infeftments of annualrent, out of his debtor's lands, upliftable, in some of the bonds, at the two terms of Whitsunday and Martinmas, in others at Lammas and Candlemas, by equal proportions. The Earl died in March, and the question came betwixt his heir and executor, about the annualrents of the bonds, betwixt that time, and the last preceding term of payment of the annualrent, *viz.* Martinmas and Candlemas. The executor contended, that all the bygone annualrents, till the day of the death, belonged to him; because the rule for determining the interests of an heir and an executor, a liferenter and a fiar, did not depend upon the conventional term of payment, *quando dies venit*, but upon the legal, when the rent is due, *quando dies cessit.* Thus, in lands, the rule is not the conventional term of payment betwixt the master and tenant, but the legal terms of Whitsunday and Martinmas, when the rents begin to be due; so that, if the defunct died after Whitsunday, the executor has right to a half-year's rent, if after Martinmas to a whole. The same rule obtained in the civil law in regulating the interests of liferenter and

fiar, as appears by *l.* 58, *De Usufr.* Now, in money and houses, and other subjects which yield continual profits, *dies cedit* every day the money is lent or the house let. The annualrents of the money fall due *de die in diem*, notwithstanding the payment of them may be delayed to a longer day; and, therefore, as in this case annualrents were due to Selkirk for every day till he died, notwithstanding the conventional term was Whitsunday or Lammas thereafter, they behoved to be *in bonis mobilibus defuncti*, and so go to the executor. And this is agreeable to the principles of the civil law, *l.* 26, *De Usufr.*;—and, as there are no decisions in point in this affair, ought likewise to be the rule of our law.

The Lords found, That the executor had only right to the annualrents for the conventional terms preceding the Earl's death, and not for the time betwixt the last preceding term and the Earl's death. The *ratio decidendi* seems to be simply, that there was no more due at the Earl's death, because, by the conception of the bonds, the annualrent did not fall due, *de die in diem*, but only twice a-year. Add to this, that the creditor, by taking an infeftment of annualrent, had accepted of the rents of lands for the interest of his money. Now rents of land only fall due twice a-year, and this reason weighed once so much with the Lords, that in the year 1737 they found that the legal terms of Whitsunday and Martinmas, and not the conventional terms, ought to be the rule in these annualrents, as well as in the rents of lands.

N.B.—As to what was said that the *dies cedit*, or rents begin to be due at the legal terms, and that the *dies venit* at the conventional, that is not so easily understood. The origin of this rule I take to have been the custom of making one half of the rents payable at the sowing of the crop, and the other half after it was reaped, which by degrees passed into a law, as it was fit to have a general rule in that case.

In those things that continually yield fruit, such as money and houses, the argument seems to hold, for, there, *dies cedit* every day, however long the exaction may be delayed. And we do not know how the Lords would have decided if the bonds had been excluding executors without any infeftment; especially if the term of payment was past, when, by the style, annualrent is due *yearly, termly, and continually*, aye and while the sum is unpaid.

1740. *June* 26. Sir John Maxwell *against* Alexander M'Millan.

[Elch., No. 5, *Superior and Vassal*, and No. 4, *Suspension*; Kilk., No. 4, *Superior and Vassal*; and C. Home, No. 280.]

Sir John Maxwell held the lands of Cathcart and Goldenlees blench of Blair of that ilk, who disponed the superiority to Alexander M'Millan, and he, upon his author's resignation, expede a charter under the seal of the Prince, of whom Blair held the lands. Before M'Millan infeft himself upon this