

APPENDIX

PART I.

LIFERENTER.

1801. December 1. IRVING against ROLLO.

No. 1.

THIS case (No. 41. p. 8282), was appealed. The House of Lords, (27th July 1803) ORDERED and ADJUDGED, That the interlocutors complained of in the said appeal be Reversed; and find, that the extraordinary dividend or bonus given by the Bank of Scotland to the proprietors of the stock of the late Alexander Houstoun, deceased, ought not to be considered as belonging to Mrs. Houstoun as the liferenter of the stock of the Bank of Scotland, belonging to the said late Alexander Houstoun, but that the same ought to be considered as belonging to all the persons interested in the said stock of the said late Alexander Houstoun, and that Mrs. Houstoun is therefore entitled only to the interest thereof for her life: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland, to proceed accordingly.

1806. February 18. NIXON against BORTHWICK.

No. 2.

ALEXANDER HAY, in his contract of marriage with Janet Smith, entered into in 1749, provided to her an annuity, with a certain sum for furniture, in the event of her surviving her husband, and granted a procuratory for infestment in certain subjects belonging to him in Edinburgh, "to Janet Smith, for her liferent-use *allemarly*, and to the heir of the marriage in fee." Elizabeth, the only child of the marriage, was married to William Borthwick, and in her contract of marriage, her father disposed all the heritable and moveable property

Arrears of an annuity due to a widow, how they affect the different interests of liferent and fee.

No. 2. of which he might die possessed, to her and her husband, and the longest liver, in conjunct fee and liferent, and to the children of the marriage in fee.

Alexander Hay died in 1780, and his widow resided after his death in the family of her son and daughter without drawing payment of her jointure. William Borthwick died in 1792, leaving seven children. After her husband's death, Mrs. Borthwick enjoyed the rents of her father's property. She likewise intromitted with her husband's moveable estate.

In 1799, Mrs. Borthwick entered into a second marriage with Walter Lunn, who was at that time in bankrupt circumstances, and whose estate was soon after sequestrated. The rents of her father's subjects, to which Mrs. Lunn had right of course, devolved to her husband's creditors *jure mariti*. With the view of reserving some part of the funds of the family for their benefit, Mrs. Hay took infestment on her contract of marriage in the subjects in Edinburgh, and raised an action against her daughter and her husband, for payment of the annuities due to her, which she had never drawn from the period of her husband's death.

In this action, compearance was made by John Nixon, trustee on Walter Lunn's sequestrated estate, who likewise raised a process of mails and duties against the tenants of the different subjects; and the question came to be, Whether the claim under the marriage-contract in 1749, or that of the trustee on the sequestrated estate, was preferable?

The Lord Ordinary pronounced the following interlocutor: ' Finds, That the rents of the subject in question fell under Mr. Lunn's *jus mariti* during the subsistence of his present marriage, which is carried by the sequestration to the creditors, and could not be effectually renounced in contemplation of insolvency; but that the said rents descend *cum suo onere*, viz. the debts due by Mrs. Lunn to her mother and her representatives, which of course must be satisfied before any part of these rents can be appropriated by the husband or his creditors; and prefers Mrs. Hay's representatives to the rents *in medio* accordingly, and decerns." In the process for payment, the Lord Ordinary Finds, That it may be presumed that one-half of the debt due by Mrs. Lunn to her mother as annuity, was extinguished by the board afforded her ever since Mr. Hay's death; but finds, That the other half of the annuity, and the £20 for furniture, remained due by Mrs. Lunn; decerns in favour of the representatives of Mrs. Hay, and against the defenders for their respective interests for the same, but assoilzies *quoad ultra*.'

Against this interlocutor, both parties reclaimed to the Court; and upon advising their mutual reclaiming petitions, ' The Lords adhere to the interlocutor of the Lord Ordinary, reclaimed against; with this variation, that the parties be further heard before his Lordship, whether any, or to what amount a deduction should be made from the bygone annuities, pursued for, so far as incurred during the period Mrs. Hay lived in family with William Borth-

‘wick; and remit to his Lordship to proceed and determine as to him shall seem just.’

No. 2.

His Lordship pronounced an interlocutor, disposing of this part of the cause, which was brought under review of the Court, when their Lordships ordered memorials ‘on the question, whether Mr. Lunn is liable in payment of the arrears of annuity falling due to Mrs. Hay during the subsistence of the marriage between Mr. Borthwick and Mrs. Lunn, or whether the burden of these arrears ought to be borne by Mrs. Lunn and the children, in proportion to their respective rights of liferent and fee in the estate of Alexander Hay, the granter of the annuity.’ Upon this question the trustee

Pleaded: The children of Borthwick are themselves the fiars of the property out of which these annuities are payable. As the annuity was heritably secured upon the subjects, they might have been evicted for payment; and since it has not been paid, the fee of the subjects is liable for the arrear. The liferentrix must undoubtedly pay the annuity during the period of her possession since the death of her first husband; but with the arrears previously incurred she has nothing to do. These must be considered as a debt upon Hay’s subject, and to be recovered like any other debt.

Answered: The liferenter is the only child and heir at law of her father. In so far as she derives any succession from him, she is liable for his debts and obligations. It makes no difference whether she took such right by service as heir, or by a gratuitous settlement executed in her favour during her father’s lifetime. The subjects were conveyed to her in conjunct fee and liferent; she was therefore bound to pay off all yearly burdens, in the same manner as an heir of entail would have been bound to keep down the interest of an entailer’s debt during the period of his possession. She was the proper debtor in her mother’s annuity, even during the subsistence of her first marriage; Erskine, B. 1. Tit. 6. § 16. and cannot get free of the debt from the circumstance of having got into arrear. The debt consists entirely of an annual payment, and as there is no capital sum, it must be discharged out of the rents which the subjects annually yield, with which she has nothing to do. Otherwise it might happen that a total alienation of the fee might take place by the accumulation of annual burdens.

Upon advising the memorials, the Lords were in general of opinion, that Borthwick, during his life, being in possession of the rents of his father-in-law Hay’s estate, was liable in the annuities due to Mrs. Hay out of it, with deduction of a reasonable board; and that the arrear still remaining due to her for that period, must be paid out of his funds in the hands of his representatives, if he left any; that so far as it could not be recovered in this way, it remained a debt upon the estate of Mr. Hay, the granter of the annuity, which now belonged to Mrs. Lunn in *liferent allenary*, and to her children *in fee*, and therefore that Mrs. Lunn’s liferent could only be affected for the growing in-

No. 2. terest of that arrear, the capital being a burden upon the children themselves, as having right to the fee of the estate.

The Court therefore found, "That the burden of the arrears of annuity falling due to Mrs. Hay, and, during the subsistence of the marriage between Mr. Borthwick and Mrs. Lunn, ought to be borne by Mrs. Lunn and her children, in proportion to their respective rights of liferent and fee in the estate of Alexander Hay, the granter of the annuity."

Lord Ordinary, *Meadowbank.* Act. *Campbell.* Agents, *Riddell & Gillon*, W. S.
Alt. *Baird.* Agent, *Bain Whyt*, W. S. Clerk, *Mackenzie.*

J.

Fac. Coll. No. 238. p. 536.

1807. February 10.

LAIRD *against* FENWICK.

No. 3.

Whether a liferenter is entitled to the benefit of improvements made upon the subject by the fiar?

PATRICK HONEY purchased a field in the immediate neighbourhood of Perth, and took the disposition to himself and his wife Elspeth Laird, in conjunct fee and liferent, and in the event of her surviving, for her liferent use. Some years afterward, he borrowed £80, for which he and his wife granted heritable security over it. His affairs having afterward gone into disorder, his estate was sequestrated, and the trustee having exposed it to sale, it was purchased by William Fenwick.

In the disposition granted to Fenwick, it was provided, that he was to be burdened with the jointure to which Elspeth Laird was entitled, in the event of his surviving her husband, in so far as it affected the subject disposed.

Fenwick erected a large tenement upon this piece of ground, besides laying out considerable sums of money in meliorations, so that at the death of Patrick Honey, which happened a good many years after his bankruptcy, this subject had become much more valuable.

Upon the death of her husband, Elspeth Laird raised an action of mails and duties before the magistrates of Perth, against the tenants and possessors of the subjects, in the course of which the question occurred, Whether she was entitled to the liferent of the subject, as it stood at the date of her infeftment, exclusive of the consequent meliorations, or was entitled to take the subject as it stood, with the benefit of those meliorations.

Upon this point the Magistrates pronounced the following interlocutor (21st May 1805 :) "Find, That the pursuer's right of liferent in the yard mentioned in her infeftment, does not entitle her to the liferent of the valuable tenements of houses since erected thereon by the defenders, and with the money of her husband's creditors, but that she is entitled to the full value yearly of what that yard would now bring, if it were now to be let in the state in which it was when she was infeft therein, that is, to the full yearly value of what a yard of the extent it then was, exclusive of the buildings, is now worth, all circumstances considered."