

1697. *February 23.*LOCKHART of Cleghorn and SOPHIA GUTHRIE *against* ROBERT WATSON.

No. 38.

The Lords preferred the donatar to the single escheat, before the donatar of the life-rent, as to the crop growing upon the ground at the time of the gift; in regard his intromission and possession were before the donatar of the life-rent had raised a declarator, and that it seemed to agree with the decision 2d February, 1627, Somervel, No. 5. p. 15878; and Sir George Mackenzie's opinion, in his Institutions anent Escheats: Yet the President differed, and thought, albeit the donatar of the single escheat had the right to the *ipsa corpora*, and to intromit with the crop, yet it was burdened with the hypothec of the farm and duty, payable out of it to the master of the ground, the rebel, and which the donatar to the life-rent might claim; but the plurality of the Lords thought, since it was here in the rebel's own hand, there was no rent to be paid out of it to any. Yet it was argued, If he had sold it at that time, he would have been liable to the buyer for the farm of that year's crop as a tenant.

Fountainhall, v. 1. p. 565.

1697. *July 2.* COUPAR *against* EARL of ROXBURGH.

No. 39.

Found, that an incumbent had right to the last half of the year's stipend, having been admitted to another church after Michaelmas, though during all that half year he resided not at the church from which he was transported.

Fol. Dic. v. 2. p. 456. Fount.

* * * This case is No. 232. p. 12411. *voce* PROOF.

1704. *December 8.* ROBERT PATERSON *against* THOMAS SMITH.

No 40.

A liferentrix dying in the forenoon of Martinmas day, the question arose, whether her executors could claim that half year's rent as due. It was found, that the liferentrix attaining any

In a cause pursued by Commissary Robert Paterson against Thomas Smith, it came to be debated if a liferentrix dying on a Martinmas day in the forenoon, her executors could claim that half year as due. Some alleged, that, in favourable cases, *dies inceptus habetur pro completo*. Others said, Though it was favourable to life-renters, yet it was not so to fiars; and therefore it should be counted *de momento in momentum*; and, if one have a bond payable on Martinmas day, and should charge with horning for payment that day, it would be thought precipitant, seeing that whole day is in favour of the debtor, *et nec venit nec cessit dies* till the next day after, and then the *jus exigendi* begins. There is one practise observed by Durie in this case, on the 16th of February, 1642, Executors of the Lady Brunton *contra* the Bishop of Glasgow's Heirs, No. 16. p. 15885. where her executors are pre-

ferred, she having died in the afternoon of Martinmas day ; but there, the matter of fact was, that she lived till three or four o'clock in the afternoon, and so leaves in the dark what the Lords would have said if she had died before twelve, and does not determine the case now in hand ; and there seems to be no reason why her out-living mid-day should give her executors, or husband, *jure mariti*, right, more than if she live to the beginning of that day ; there being no standard to fix on, save either to require her out-living the whole term-day, or her reaching the beginning of it ; yet it was generally thought a principle, that though life-renters lived to the term, yet if they died before the afternoon, they had no right to that half year ; and so think Sir George Mackenzie in his Institutes, Title, SERVIDITUDES ; and Stair, Title, LIFERENT INFEEFMENT, § 9. and Title, EXECUTRY, § 57. The Lords being equally divided on this question, it was carried by the President's vote, that the liferentrix attaining any part of Martinmas day, her executors had right to that half year ; which seemed to innovate the former general opinion about this matter, though it was not contrary to any prior decision.

Fountainhall, v. 2. p. 245.

Dalrymple reports this case :

In the process at Bailie Paterson's instance against Smith, for clearing the by-gone annuities which had been resting unpaid to his wife by virtue of her life-rent provision granted by Young her first husband ; it appeared that his wife died on Martinmas day, betwixt three and four o'clock in the morning ; so that the question arose, Whether the pursuer, as in place of his wife, had right to the annuity payable at the term of Martinmas that she died.

It was alleged for the defender, That the liferentrix dying in the forenoon, she had no right to that term, because the greatest length the Lords did proceed in the like case, was to sustain the right of the liferentrix surviving mid-day, 16th February, 1642, The Lady Brunton, No. 16. p. 15885. where the question is stated, whether the liferentrix not having survived the whole day had right to that term of Martinmas ; and it was found she had ; but it was also remarked as the *causa decidendi*, that she died not till the afternoon about three or four hours ; and ever since it has been held as a fixed rule, that the relict's surviving mid-day could only entitle her to that term's life-rent.

It was answered : The former practise does indeed remark the liferentrix surviving mid-day, both in the debate and in the decision ; yet that cannot be said to be the *causa decidendi*, but only the *species facti* ; for decisions are made according as the fact is stated. But there is nothing either reasoned in, or imported by that debate and decision, that can infer the necessity of the relict's surviving mid-day. It has indeed been reckoned a rule ever since, that the relict's living till afternoon, gave her right ; but whether the relict's dying in the morning had right, has not occurred to be determined. But now that the case lies before the Lords, it must be judged by the analogy of law ; and by the same rule that the

No. 40.
part of Martinmas day,
her executors
had right to
that half year.
See Brunton,
No. 16.
p. 15885.

No. 40. relict surviving mid-day had right, she must necessarily have it by her surviving any part of that day, because the only foundation of the decision is, that *dies cepit pro completo habetur*, which holds as well in this case as in that; for if her title did not arise by the out-running of the whole day, which is indeed the only proper ground of debate about the term, it must necessarily arise from surviving the commencement of that day; and there is no shadow of reason for fixing mid-day to be the period more than any other hour.

“The Lords found that the pursuer as in the liferentrix’ place had right to the Martinmas term.”

Dalrymple, No. 52. p. 67.

1710. June 28. EARL of MARCH *against* The EARL of LEVEN.

No. 41.

The Governor of a garrison whose commission from the Sovereign was recalled after Whitsunday, entitled to half of that year’s rent, though payable in victual only betwixt Yule and Candlemas thereafter, and the succeeding Governor was expressly assigned in his commission to that whole year’s rent.

The deceased Earl of March having procured from the Queen a commission under the Great Seal, to be Governor of the Castle of Edinburgh, *durante beneplacito*, dated December 31, 1702, and sealed the 14th January, 1703; and having served in that station till after Whitsunday 1704; the present Earl, as deriving right from his father, pursued the Earl of Leven, the succeeding governor, for payment of the first half year’s victual rent, payable to the Governor of the Castle for the crop 1704, that had been uplifted by the defender.

Answered for the defender: The pursuer hath no right to any part of the crop 1704, in respect the same was payable only betwixt Yule and Candlemas thereafter, and his father’s commission was revoked long before, and a new one granted to the Earl of Leven, assigning expressly to him the whole Castle rents for the crop 1704.

Replied for the pursuer: The Queen’s gift to the defender is only to be understood *civiliter*, that he should have the crop 1704, from the time he began to be Governor; and the recalling the Earl of March’s commission cannot wrong him of the pay and perquisites due for his service. It is notour, that military commissioned officers are paid to the day of their death, or deprivation; yea, crops of victual are divided according to the interest of parties between the heir and executor; so ministers serving the cure after Whitsunday, or life-renters surviving that term, have unquestionable right to half a year’s stipend or life-rent.

Duplied for the defender: The rents being only assigned to the Governor for his service, as payable betwixt Yule and Candlemas; and a power reserved to recal the assignation at pleasure any time before the rent is due, *i. e.* before the term of payment; no part of the rent is due, unless the Governor serve till the term of payment, as is clear from a decision in the parallel case, June 24, 1630, Scrimzeour against Dean-Miln, No. 12. p. 15881.

The Lords preferred the Earl of March to the half of the crop 1704.

Forbes, p. 415.