

1744. _____.

DAME SIDNEY SINCLAIR *against* SIR WILLIAM DALRYMPLE.

No. 47.

Rule for determining the several interests of heir and executor.

The rule for determining the several interests of heir and executor is very different in lands possessed by tenants, and in such as were in the natural possession of the heritor at his death. In those the executor has the one half of the year's rent, where the heritor survives Whitsunday. But in these, whether the heritor survive Whitsunday or not, the executor has right to nothing but to the crop, so far as the same was sown before the heritor's death, and the heir has right to whatever may be sown afterwards by the executor, upon re-paying the expense of seed and labour; and as for the grass and growing hay, the right of the heir commences from the moment of his predecessor's death.

And in these terms judgment was in this case given. *Vide* Craig, Lib. 2. Dieg. 9. § 13.

Kilkerran, No. 4. p. 565.

1745. June 11.

CAMPBELLS *against* CAMPBELL.

No. 48.

The tenant who entered at Whitsunday, being liable for a year's rent at the Martinmas thereafter, and the heritor dying between Whitsunday and Martinmas, Who entitled to the rent?

Archibald Campbell of Shirvan settled his estate on Dougal, his only lawful son, whom failing, on Alexander his natural son, &c. Archibald, the father, having died in June, 1737, and Dougal, his son, in the August thereafter, Margaret and Liliass, his sisters, daughters of Archibald, brought a process against Alexander, now of Shirvan, to account to them for the half of the crop 1737, with the whole of which he was alleged to have intromitted, seeing the rents of the lands being, by the tacks, all payable at one term, viz. Martinmas yearly, he had uplifted the whole year's rent payable at Martinmas 1737.

In point of fact, the intromission was acknowledged, as it also was in point of law, that the pursuers had right to the half of the crop 1737, so far as the same was due at their predecessor's death. But the point controverted was, whether in this case, where the tenant's entry was at Whitsunday, and the whole year's rent payable at the first term of Martinmas thereafter, the year's rent payable at Martinmas 1737 was for crop 1737, or, if it was not rather the year's rent for crop 1738, and if the year's rent for crop 1737 was not that which was payable at Martinmas 1736? and if that was the case, then as Archibald and Dougal had in their life intromitted with the whole year's rent payable at Martinmas 1736, the rent of crop 1737 was already uplifted by the predecessor, and could not be again claimed by his executors?

Upon this question the Court was much divided. All agreed in the rules, that Whitsunday and Martinmas are the legal terms of the year; that the legal, and not the conventional terms are considered; and that therefore, where the predecessor survives Whitsunday, the executor has right to the half, and where he

survives Martinmas, to the whole of the year's rent due for that year; but they differed in the application of them.

It was on the one hand said, That in order to a just application of these rules, a distinction was to be made between grass-rooms and corn-rooms, because it is from the subject or produce of the ground, on account whereof the rent is paid, that we know what the year is for which the rent is paid; for the rent follows the subject; and in grass-rooms and corn-rooms, the subject for which the rent is paid is very different. In grass-rooms, the subject for which the year's rent is paid, by the tenant entering at Whitsunday, is the produce of the summer and harvest immediately following his entry, such as the wool, butter, cheese, lambs, and hay, &c. In corn-rooms again, the year's rent is paid for the corn crop; and therefore where a tenant enters at Whitsunday, while the out-going tenant's crop is upon the ground, he gets not the subject for which his first year's rent is paid, till the second harvest after his entry.

In both cases, the valuable produce of the ground is reaped in the space of one half year, and the year's rent is understood to be paid for that half year which produces the valuable profits; and therefore, as in grass-rooms, the tenant gets *per* advance, the first summer after his entry, the chief product of the ground, and for which his first year's rent is supposed to be paid, it follows that, the heritor dying in the June or August after the Whitsunday at which the tenant entered, the executor has right to one half of the year's rent, whether by the tack the whole be payable at Martinmas, or, which is more usual, the one half at Martinmas, the other at the Whitsunday following, because it is payable for the subject produced the first half year; whereas in corn-rooms, as the tenant entering at Whitsunday, gets not the valuable produce of the ground, for which his first year's rent is paid, till the second harvest after his entry, it follows, for the like reason, that the heritor, dying in the June or August, or, which is all one, on the 16th of May immediately following the tenant's entry, the executor can have no right to any part of the first year's rent payable by the entrant tenant, and that whether his rent be foremailed or aftermailed; because he does not pay it for that year in which the heritor died, but for the year following, in which he reaps his first crop, and the half year falling to the executor is the half of the year's rent due by the out-going tenant, who reaps his crop in the harvest after his removal, and which crop, joined with the grass which he had got *per* advance the first summer after his entry, is the subject for which the rent for the last half year of his tack is paid.

That, however, there is this difference between the case where the rent of a corn-room is aftermailed, as most usually it is, and where it is foremailed, that, where it is aftermailed, the case, as to his rent, becomes just the same after the lapse of the first year after the tenant's entry as it is in grass-rooms; for, the heritor dying on the 16th of May of the next year after the tenant's entry, as his year's rent is paid for the crop reaped the harvest thereafter, the executor is entitled to the one half of it, and so of all subsequent years. But, if in a corn-room the rent be foremailed, that is, payable, as in the present case, the first Martinmas

No. 48. after his entry, as it is truly paid for the crop of the subsequent year, the heritor dying on the 16th day of May, whether of the first, or any future year of the tenant's possession, the executor can have no claim to any part of the rent payable by him at the Martinmas thereafter, because it is payable, not for that year, but for the crop of the subsequent year to which the executor has no right. Though it is nevertheless true, that still the executor has right to a half year's rent; but that will be the half year of the rent payable at the Martinmas before the heritor's death; and if that has been uplifted by the heritor himself, his executor cannot demand it over again. And from all this, they concluded with a motion for a proof for clearing these facts, whether the farms of the estate of Shirvan were grass-rooms or corn-rooms; and as there were no tacks, whether they were formailed or aftermailed?

It was on the other hand said, that the rule was general, and had been uniformly followed for these 100 years and more, That where the heritor dies after Whitsunday, the executor has right to the one half of the year's rent, payable in the year in which the heritor dies, and to the whole of it where he survives the Martinmas, and that without distinction, whether the farms were corn-rooms or grass-rooms, or whether the rent was formailed or aftermailed; and for this, an appeal was made to certain decisions observed by Durie, particularly to one wherein mills, though the rents thereof are produced from crops, and the rent was formailed, the heritor dying after Whitsunday and before Martinmas, the executor was found to have right to the half; where he survived Martinmas, to the whole of the rent payable in that year, Lord West-Nisbet against Lord Swintoun, February 21, 1635, No. 15. p. 15883. It was argued, that it would be attended with great inconveniencies to lay down any other rule, as it would often be very difficult to determine what was a corn room and what a grass room, especially in farms lying between muir and dale, where there was part grass, part corn, from which the tenant made his rent; and that farther, great difficulties would occur in the case of life-renters and heirs of entail: A liferenter has right to the first term after the fiar's death; but, according to the above doctrine, the rent due at the first term after the fiar's death may have been uplifted by the fiar in his own time, whereby the first rent she could get would be the rent payable the following year; her executors also, at her death, would be deprived of the rent falling due in that year in which she died; and the like inconveniencies would happen in the case of heirs of entail.

To the *first* it was replied, That in the case of mill, the decision was just, because these were in the same state with grass-rooms, the mill-rent being paid for the multure of the grain that is reaped the very harvest immediately following the miller's entry.

To the *2d*, That, *1mo*, Wherever it is a doubt, whether a farm is a corn-room or a grass-room, the presumption is for its being a corn-room; corn being the ordinary and presumed product of the ground, though in fact none of the rent should be payable in victual, which frequently is the case even of corn rooms, where vic-

victual has formerly been paid, which being rentalled, the farm comes in a course of time to be set as for a money-rent. *2do*, Wherever any victual, however little, is paid, that determines the farm to be a corn-room, as no victual is ever paid for a grass-room.

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To the *3d* it was replied, That where there is a standing infestment in liferent, it is not in the power of the fiar to foremail a corn-room to the disappointment of the liferenter at her entry, or of her executors after her death ; and should the fiar, in his own time, uplift the term's rent, to which the liferenter would have been entitled had it remained in the tenant's hand, the tenant would in strict law be obliged to pay it over again. And as to the case of heirs of entail, that it was a consideration of no consequence ; though even in that case, in strict law, the tenant in tail cannot foremail a corn-room to the disappointment of the next heir of entail.

The Lords, before answer, " Allowed a proof, whether the rooms of the estate were corn-rooms or grass-rooms ; and if corn-rooms, whether they were foremailed or aftermailed."

Kilkerran, No. 5. p. 566.

1747. January 14. EARL OF DUNDONALD *against* ALEXANDER.

The different effect of obligations to be performed at a day certain, and of obligations to be performed *sine die*, as to damage for not performance, are agitated in this case, No. 238. p. 12415. *voce* PROOF.

No. 49.
Effect of obligations *sine die* with regard to damage.

Kilkerran, No. 6. p. 569.

1748. November 9.

COCKBURN *against* The EXECUTORS and TRUSTEES of HELEN BROWN.

Helen Brown, liferentrix of the estate of Blackburn, died in July 1741 ; and so far as the liferented lands were in tenantry, there was no dispute between the creditors and her executors, who were admitted to have right to the one half of the crop 1741, and farther they did not claim. But the liferentrix having been in the natural possession of the Mains of Blackburn, a question arose between Thomas Cockburn, as factor for the creditors of the proprietor, and the executors of the liferentrix ; the factor insisting, that the executor, who, he admitted, had right to the whole sown crop, should be liable to pay the one half of the rent of the year 1741 ; and the executors, on the other hand, alleging, that where a liferentrix survives Whitsunday, her executors have right to the crop growing on the lands whereof she was in the natural possession, without being liable in any rent to the heir.

No. 50.
Executors of a liferenter, if liable for the rent of the lands in her natural possession ?