

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.

No. 48.

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 ?

No. 50.

Which point the Ordinary gave for the creditors, and found, " That the executors of the Lady had right to the whole crop upon the ground of the lands which were in her natural possession at her death, but that for the said crop the executors having right thereto, must pay the last half year's rent due for the same, and which fell due and was payable at Whitsunday 1742."

But, upon advising petition and answers, the Lords found, " That the executors were not liable to any rent for the crop of corns which was on the ground at the time of the liferenter's death, to which the executors have right by law; and remitted to the Ordinary to proceed accordingly." By which remit the Lords had this in view, That as the executors had continued to possess after the reaping of the crop, the heir might have a claim, not as for rent, but for the grass, upon which a value might be put.

The factor having reclaimed, the Lords not only refused the bill, but also added, " That he should not be allowed to state the expense of the application in his accounts to the creditors;" and which they did, because, being their own factor, it was not his duty to impugn their interlocutor.

As to the point itself, we have receded entirely from the Roman law in this matter. With them the question was, To whom, upon the liferenter's death, the property of the crop belonged? and, as with us in the case of teinds, the separation of the crop from the ground was the period which determined it; for, if the liferenter died before the separation, the crop belonged to the heir, with the allowance only of the expense of seed and labour to the executors of the liferenter. With us, again, there is no such question, as, in both cases, the sown crop belongs to the executor of the liferenter; and all the question is, Whether any rent is paid for it, where she doth not survive both terms?

And were the question entire, there might have been much to say for the Ordinary's interlocutor; as it is not obvious why the right of the heir should be less when the liferentrix possessed by herself, than when she possessed by a tenant; but as the difference is established in practice, by which no rent was ever found due by the executors for the crop to which they had right, *et omnium quæ a majoribus*, &c. the Lords found as above.

Kilkerran, No. 7. p. 569.

* * D. Falconer reports this case :

Helen Brown, relict of Mark Ker of Blackburn, liferented the said estate, until July 1741, that she died, having assigned the crop growing on the Mains, in her natural possession, to Helen Brown, her niece, spouse to Job Buck, shipmaster in Berwick; who took possession of the Mains, reaped the crop, and kept possession till Whitsunday 1742.

The estate was sequestrated; and Thomas Cockburn, the factor, pursuing the possessors for their rents, the Lord Ordinary, 1st December, 1747, " found, That the executors of Lady Blackburn had right to the whole of the crop upon

the ground of the lands which were in the natural possession of the Lady at her death, being crop 1741 ; but that, for said crop, the executors, having right there-to, behoved to pay the last half year's rent due therefor, and which fell due and was payable at the term of Whitsunday 1742."

No. 50.

Pleaded in a reclaiming bill for the assignees: They acknowledge that, having possessed from Martinmas 1741 to Whitsunday 1742, they are liable for half a year's rent ; but not as the rent of crop 1741, which being sown by the liferentrix, belonged to her ; 14th December, 1621, Macmath against Nisbet, No. 3. p. 15877. 25th July, 1671, Guthrie against Mackerston, No. 26. p. 15891.

Answered: Our lawyers have determined, that the liferentrix has right to the crop sown ; but never said that her executors are free of all rent therefor. This must be determined by the time of the death ; which, if it be before Whitsunday, the whole rent must be paid ; if only before Martinmas, the half ; and if after it, none.

It was disputed betwixt the parties, Whether the Mains of Blackburn were chiefly a grass or a corn room ? and whether the rent payable at Whitsunday 1742 was for the crop reaped the preceding harvest, or was fore-rent ? But this did not influence the question determined, to wit, whether any rent was payable for the corn sown by the liferentrix ? neither was it at this time determined, what consideration should be paid for the grass used after her death, before the next term.

The Lords, 10th November, 1748, found, That the executors were not liable for any rents for the crop of corns which was upon the ground at the time of the liferentrix's death, to which the executors had right by law ; and refused a bill, and adhered.

Act. *J. Stewart.*Alt. *G. Pringle.*[Clerk, *Gibson.**D. Falconer, No. 9. p. 10.*1727. *February.*SIR WILLIAM JOHNSTON *against* MARQUIS of ANNANDALE.

In a grass room, whereto the tenant's entry was at Whitsunday, the half year's rent payable at Martinmas, and the remainder at the Whitsunday thereafter, the proprietor dying in January, 1721, the question was, Whether the half year's rent payable the next Whitsunday fell under his executry ? It was argued, That the term of entry or term of payment signifies nothing in this dispute ; that it is the crop, year, and possession, which regulates all. But it was contended, Though in corn rooms, where the rent payable at Whitsunday 1721 is payable for crop 1720, the proprietor surviving Martinmas 1720, that rent falls under his executry, yet, in grass rooms, where the half year's rent payable at Whitsunday 1721 is actually payable for the possession betwixt Martinmas and Whitsunday, unless the

No. 51.