

For if it was the price of any thing, it was that of an alimentary provision, which, by its very nature, must be understood to correspond to the whole subsequent lifetime of the party for whose use it was destined. This is not only the reasonable presumption in the case, but likewise the legal one; Ersk. loc. sup. cit.; otherwise, and on the supposition that no proportion of the annuity was due prior to the term of payment, the annuitant, except on the term-day alone, could never be certain of obtaining a shilling for his subsistence at any period in the course of his life.

No. 57.

Answered: A sum of money, which is properly said to be sunk or extinguished, cannot, with any propriety, be deemed a subsisting stock. Here there was no stock to bear either continual or periodical profits. A price was indeed paid for the obligation in the bond; and that obligation was qualified by the condition, that the payments were only to be made at the terms of Whitsunday and Martinmas which should occur during the annuitant's natural life. The half year's annuity in question then could never become payable, as the corresponding term did not arrive till after his death. This *dies incertus pro conditione habebatur*. In like manner, when a provision is, by a marriage-contract, made payable at a certain term, before which the party for whom it is destined is predeceased, there is no room for any claim corresponding to the period which he did survive.

The Lords adhered to the interlocutor of the Lord Ordinary, sustaining the defence.

Lord Ordinary, *Eskgrove*. Act. *Rolland*. Alt. *R. Armstrong*. Clerk, *Sinclair*.

Fac. Coll. No. 73. p. 132.

1792. November 28.

The TRUSTEES of SIR FRANCIS ELIOTT *against* SIR WILLIAM ELIOTT.

The late Sir Francis Eliott of Stobs disposed his whole personal estate to certain trustees, whom he also named his executors.

He died on the 20th June, 1791, and was succeeded by Sir William Eliott, his son and heir of entail, in the estate of Stobs, which consists of grass farms. The tenants of that estate enter into possession at Whitsunday, and are taken bound by their tacks to pay a half year's rent at the Martinmas after their entry, "for the half year immediately preceding," and another half year's rent at the following Whitsunday, "for the half year preceding that term."

The trustees claimed the half year's rents of the different farms, payable at Martinmas 1791, as part of the executry; and

Pleaded: In order to regulate the distribution of the rents in the hands of tenants, between the heir and executor of the landlord, the fiar and executor of the liferenter, practice has established Whitsunday and Martinmas as two legal terms, from which, whatever may be the conventional terms of payment, the rents payable for the crop of the current year, at the death of the predecessor, shall be

No. 58.

In grass farms, when the landlord survives Whitsunday, his executor draws a half of the rent payable at Martinmas and Whitsunday thereafter.

No. 58. held to have been *in ejus bonis*, and to transmit to his executors. If he survives Whitsunday, his executors get a half, if Martinmas, the whole, of the rent payable for that crop.—Erskine, Book 2. Tit. 9. § 64. This rule, found to be a very convenient one, was probably introduced from its having been the old custom, in this country, for tenants to pay their rent, the one half at the Whitsunday before, the other at the Martinmas after, the corn-crop was reaped. It took place at first, probably, only in the case of corn farms; it is now equally applicable to grass ones. In the following cases, February, 1727, Sir William Johnston against Marquis of Annandale, No. 51. p. 15913. 4th June, 1741, Pringle against Pringle, No. 46. p. 15907. and 3d July, 1760, Kerr of Hoselaw against Turnbull, (Not reported), where the terms of entry, and conventional terms of payment, were the same as in the present case, the Court found, that the heritor, by surviving Martinmas, transmitted to his executor the rent payable by convention at the Whitsunday following; and although, in the case 11th June, 1745, Campbell against Campbell, No. 48. p. 15908. the Court allowed a proof, before answer, to a certain effect, the point now in dispute was taken for granted.

Answered; The portion of rent which goes to the executor is the same that was actually due to the deceased himself; what was not due to him, goes to his heir.

Each term's rent is payable for the corresponding period of actual possession, though, in consequence of positive agreement, it may not then be exigible. In corn farms, as the tenant enters to the arable lands at Martinmas, so at the following Whitsunday he owes a half year's rent, for his half year's possession; and this the heritor, if he survives that term, will transmit to his executor. By the same rule, if the tenant only enters to a grass farm at Whitsunday, no rent can be due till the following Martinmas; and the heritor dying before that period, can transmit no part of it to his executors.

In grass farms, the legal and conventional terms of payment are generally the same. The tenant enters into possession at Whitsunday, and pays one half of the rent at Martinmas, the first, the other at Whitsunday, the second legal term after his entry. Hence, as Sir Francis died before Martinmas, when the first half became due, as well as exigible, he cannot transmit it to his executors.

The point has not yet been settled by decisions. The case of Kerr, which is the last, was taken out of Court by compromise before a final judgment; and in that of Campbell, no decision of the point of law was given, but only a proof before answer allowed. The notion, too, which appears to have been weighed in the decision of the two older cases, viz. that, in grass farms, the whole rent is payable for the possession during the summer months, would seem to be equally inconsistent with the fact, and with the settled rule of law, which has divided the rents into moieties, and appointed a legal term for the payment of each; Kames, Eluc. p. 65. *et seqq.*

The defender's general doctrine is also confirmed by the terms of the tacks in this case, which declare, that each half year's rent is payable "for the half year preceding that term."

Observed on the Bench : In whatever manner the tack may be expressed, it is plain, that in a grass farm, the entry being at Whitsunday, the grass crop of that year is the tenant's *first crop*; and although he pays no rent till Martinmas and Whitsunday thereafter, yet this rent, when payable, is for the preceding crop and year, not for the subsequent. Anticipating the term of payment may have an effect upon the succession; but postponing it can have none.

No. 58.

The Lord Ordinary had sustained the defences, "both on the general point, and on the special terms of the tacks of the grass farms in question."

The Court altered that interlocutor, and found, that the half year's rent payable at Martinmas 1791 belonged to the Trustees.

Lord Ordinary, *Dreghorn*. Act. Lord Advocate, *Wight*. Alt. *Tait*. Clerk, *Home*.
D. D. Fac. Coll. No. 6. p. 14.

1802. June 23. WRIGHT against LADY ELIZABETH CUNNINGHAM.

The tenants on the estate of Finlayston, belonging to the Earl of Glencairn, were in use to pay their rents at Martinmas and Whitsunday, by equal portions. Upon the Earl's dying insolvent, William Wright used an arrestment in their hands, on 11th November, 1795. The Countess Dowager of Glencairn, now represented by Lady Elizabeth Cunningham, also used arrestments, on the 25th. In the multiplepointing, which became necessary in the state of the funds, an accountant preferred Lady Glencairn to the whole rents of the estate for the half year ending at Whitsunday 1796, allowing Wright only the arrears due by the tenants at Martinmas 1795, "in respect a day should have passed before the rents could be said to have become current."

No. 59.

The days *Whitsunday* and *Martinmas* respectively conclude, and are comprehended in, the preceding terms, and are not the first days of a new period.

To this preference, objections were offered, and the question was reported to the Court by the Lord Ordinary.

Wright

Pleaded : Those rents are arrestable, which are either already due, or which are payable for the term current, at the date of the arrestment; Erskine, B. 3. Tit. 6. § 9. To determine when the current term commences, whether with the days of Martinmas and Whitsunday, or not, becomes an important inquiry. These days are marked out for the common purposes of life; common sense, therefore, must regulate this inquiry, and fixes, that these days are synonymous with the corresponding days of the month on which they occur. If a moveable subject is, by agreement, to be delivered on a particular day, the person to whom the right is to be transferred lays his account with receiving it in the course of that day. If a number of cattle are to be delivered by one farmer to another at Martinmas or Whitsunday, the purchaser will expect delivery on 11th November or 15th May; and it will be the duty of the seller to make this delivery at such an hour of the day as will enable the purchaser to secure the property after it is in his possession; and the seller would be guilty of a breach of bargain, if he did not transfer the