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But supposing the door were still open for an enquiry into the reason of fixing the legal terms in corn-rooms, it could not be admitted that the reason is that assigned by the heir; for it is known, that, in corn-rooms, the tenant enters to the houses and yards at Whitsunday, before he begins to labour, and removes again at Whitsunday before his crop is ripe; and yet, after he is a year in possession, only half a year's rent is due by him to the heritor, who, dying after Whitsunday, transmits but half a year's rent to his executor.

It is true, the Roman law made but one legal term in a corn-room, namely, when the fruits were fully reaped; but ours has proceeded on different maxims; 1*st*, It has divided the rents of the year into two terms; and 2*dly*, It has considered the year and the crop as the same thing; and therefore, in whatever year the crop is reaped, the two terms of Whitsunday and Martinmas of that year are the legal terms, without respect to the tenant's entry or convenal terms: And therefore, as in corn-rooms, the tenant entering at Whitsunday reaps no crop till Martinmas in the year following, therefore, the Whitsunday and Martinmas of the following year are the legal terms; and in the same manner, in grass-rooms, the tenant entering at Whitsunday, reaps his crop of grass between and Martinmas the same year; and therefore Whitsunday and Martinmas in the year of his entry are the legal terms.

And as to the argument from house-mails, as they yield profits *quotidie*, by the Roman law they were due from day to day; but, in our law, as there are two legal terms, so, as there is no crop, the tenant entering at Whitsunday, the first legal term is Martinmas, and the second Whitsunday thereafter: Such is our custom, and therefore, it ought to be followed in house rents, upon the same principle that Whitsunday and Martinmas are the legal terms in land-rents.

THE LORDS found, that the defunct having outlived Martinmas 1737, his executors were entitled to that whole year's rent; and therefore, that Alison Pringle has right as executrix confirmed to her father, to the half-year's rent that was payable at Whitsunday 1738. *See* TERM LEGAL and CONVENTIONAL.

Fol. Dic. v. 3. *p.* 266. *C. Home, No* 165. *p.* 277.

1744. DAME SIDNEY SINCLAIR *against* SIR WILLIAM DALRYMPLE.

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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 after that period by the executor, upon repaying the expense of seed and labour; and as for the grass and growing hay, the

No 6. 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.

Fol. Dic. v. 3. *p.* 266. *Kilkerran*, (HEIR AND EXECUTOR.) *No* 2. *p.* 229.

*** Lord Kames reports the same case:

1744. *December* 7.

SIR JOHN DALRYMPLE, after settling his moveable estate upon his spouse, died 24th of May 1743, having the land about his house of Cranston in his natural possession, most of it in grass, partly natural and partly sown. One field of seven acres was sown the year before his death, and the first crop was not cut when he died; of the other sown grass he had reaped several crops. Toward the end of the year 1742, he had sown a field with rape-seed; but that failing, his purpose probably was to plow the field in June 1743, and to sow it with turnip. But, the day after Sir John's death, it was tilled by his relict and sown with barley.

His heir, Sir William, took possession of the farm, as well as of the rest of the estate, and cut down the said barley crop. In a compt and reckoning betwixt him and Sir John's relict, she claimed the value of the barley-crop, and of the artificial grass crop, as being moveable and falling under her disposition. The heir endeavoured to support his right to the same as heritable subjects, by the following chain of reasoning: 1*mo*, It is one of the privileges of the heir to continue his predecessor's possession; and when the possession of an estate is apprehended either by an heir or a purchaser, it is a rule of common sense as well as of law, that every thing that is *pars soli* must go with the land. 2*do*, As this rule may appear to be hard and rigorous when applied to some special cases, it has been softened in the practice of England and of this country. A liferenter ought not to be discouraged from making profit to himself, by taking land into his natural possession, in order to cultivate the same; yet he runs this seen danger, that, if he die when his corns are ripe, and ready for the sickle, his right dies with him; the corns as *pars soli* go with the land to the proprietor. This hardship has probably at first been remedied by particular pactions, and afterwards it has grown into universal practice, that the representatives of the liferenter should have the benefit of the liferenter's industry, so far as to be allowed to reap the corns growing at the liferenter's death. It is probable that this practice has first obtained betwixt liferenters and fiars, whose interests are commonly distinct, and where the hardship must have appeared great. It has afterwards been extended by analogy for the benefit of younger children, who are but scantily provided by our law; and now it is established, that they shall have the corns growing upon the land in their father's natural possession, though really and truly not a moveable subject. 3*tio*, This right introduced in favour of the representatives of a liferenter, and of the executors of a proprie-

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tor, which, for the sake of utility, deviates from the principles of law, has never been extended further, either in our practice or in the practice of England, than to corns actually sown and growing at the time of the liferenter's or proprietor's death. Nor could it well be extended further, if the rules of law be at all regarded; for, as the proprietor's right is at an end with his life, as well as that of the liferenter, no mortal can be entitled to throw seed into the ground, except in the right, or by allowance of the present proprietor; after his right commences, seed thrown into the ground makes the crop as much his, as where it is sown 20 years after the predecessor's death. 4*to*, The exception has never been extended further than to industrial fruits, which are sown and reaped annually. With regard to plants which remain longer in the ground than a year, neither the industry nor the expense are so great as to preponderate the rule of law and of common sense, that whatever is fixed to the land must go along with the land. And were the exception to be extended beyond annual plants, we should have no resting place; it behoved to be extended to every thing growing upon the ground that is the effect of industry, at whatever time sown or planted; and, at that rate, all planted trees would go to the executor, were they a hundred years old.

"Found, the defender Sir William Dalrymple, heir in the estate, hath right to the whole grass and hay the year libelled, it not being alleged that any grass seed were sown that year. And found, That the pursuer has not right to any part of the barley-crop sown by her after Sir John Dalrymple's decease; but that the defender is liable to the pursuer for the expense of the labour and of the seed."

Rem. Dec. v. 2. *No* 60. *p.* 94.

*** This case is also reported by C. Home:

June 1744.

SIR JOHN DALRYMPLE made several deeds in favours of the pursuer, (his relict) in one of which he disponed to her the whole corns, cattle, horse, nolt, &c. and all other moveables that should happen to belong to him at the time of his death, which happened on the 24th May 1743, at which time, and for several years preceding, he had in his natural possession a considerable farm, lying about his mansion-house of Cranston. On the day Sir John died, several ploughs were set to work to till up part of this farm; and the whole operation of tilling and sowing it with barley, in consequence of orders from Sir John, (as the pursuer alleged) was completed the third day thereafter.

The pursuer, as executrix confirmed to her deceased husband, upon her disposition to the moveables, brought a process against Sir William, heir to Sir John, to account for the said crop of barley, which he cut down and reaped, and likewise for the grass crop, which he also took possession of.

No 6. In support of this action it was *pleaded*, That if the farm had been let to tenants, the pursuer, as executrix to Sir John, would have been entitled to the half of the rents payable for the crop and year 1743, in respect of the defunct's surviving the term of Whitsunday, because, as Dirleton says, the lands are then fully laboured and sown: That the law was more favourable to the executors of a liferenter or fiar who died in the natural possession, and gives them a greater interest, *pro cura et cultura*, than what they would have had by the mere civil possession held by a defunct, by means of his tenants, and that it would not be agreeable to the spirit or equity of the law, that the pursuer should be put in a worse condition, in respect of these lands, than if they had been possessed by tenants. In other cases, the practice of this Court has been very different, and gone so much farther on the other side, as to give the executors, even of a liferenter dying before Whitsunday, the whole fruits of the ground in his or her natural possession; and it is supported on this solid ground, that as it is lawful for a lifereuter or fiar to possess any part of his lands he thinks fit, it would be harsh and absurd to hold that, upon his death, during the currency of a year, the succeeding fiar or heir may instantly enter to the possession, and abruptly turn off all the goods or cattle which the defunct necessarily had as the stocking of that farm. To prevent this inconvenience, and to encourage the owners of the ground to occupy the same as farmers, the immemorial custom has obtained, that this natural occupancy may even serve to prorogate the right of the liferenter's executors somewhat beyond the term of her natural life; that is, so as to entitle them to reap the whole fruits of the ground for that year in which she died, and this, without paying any rent for the same, even for the terms within that year, subsequent to the death of the liferenter. It is likewise observable, that, by the practice of the Court, no distinction has been made betwixt the corn and the grass ground of which the total farm or possession consisted; neither is there any just reason for making a distinction: for, as it would be a bad farm that had not grass sufficient at least to maintain the labouring cattle, would it not be absurd to maintain, that a liferenter or fiar dying after Whitsunday, and supposing all the corns, as usual, fully sown, the executors should be entitled to reap and bring in that crop of corn; and yet they shall be liable forthwith to carry off all the beasts that were in the defunct's possession, as the necessary stocking of that farm; and that these must not be allowed to take a pluck of grass after the proprietor's breath goes out? For, so far it will go, the heir may drive them off the ground, and the relict or younger children must find pasture for them elsewhere.

In the *next* place, with respect to the barley crop, it is true, that in our law books, stress has been laid upon the sowing of the lands, in order to give the executors of the liferentrix a title to the crop, supposing her to die before Whitsunday; so that the beginning of the operations of the spring, by tillage merely, shall not be sufficient to give the liferenter a title to that year's crop of the possession, unless the *cura et cultura* has gone so far as the sowing of the

land where there was to be any sowing that season; and therefore, on a life-renter's dying before Whitsunday, provided it be after the sowing, her executors take the whole crop. But from this it does not follow, that, if the liferenter survive Whitsunday, though he or she die before actual sowing, that the executor shall take nothing. The culture, so far completed as the sowing, is rewarded, as it were, with a dispensation from the necessity of surviving the legal term. But if the liferenter or proprietor shall actually survive that term, there is no necessity for that circumstance; for now, without actual sowing, it must be true *quod annus est cæptus*, the year of the liferent is actually begun, for the half of the legal year is already elapsed, and the half of the rents due by the tenants would necessarily go to the executor; and to put them in a worse case, by reason of natural possession, would be highly incongruous. See 14th Dec. 1621, M'Math, *voce* TERM LEGAL and CONVENTIONAL; July 25. 1671, Captain Guthrie, IBIDEM; Stair, B. 2. T. 6. Sect. 9. No 6.

Answered for the defender, That when a proprietor dies, his right dies with him. In countries where the rule obtains *quod mortuus sasit vivum*, the property devolves directly upon the heir; he is entitled directly to enter into possession. With us more solemnity is required, viz. by precept and sasine. This completes the real right in the heir, and that from the death of the ancestor. 2*dly*, When an estate is taken by an heir or a purchaser, every thing goes along with it which is *pars soli*. 3*dly*, As this rule was found to be rigorous, when applied to particular cases, so it has been softened both in our practice and in that of England. A liferenter ought not to be discouraged from taking land into his own possession; yet he runs this seen danger, that if he died when his corns were ready to be cut down, the same went to the proprietor. This has introduced the practice, that the representatives of the liferenter should have the benefit of the liferenter's industry, so far as to be allowed to reap the corns growing at the liferenter's death; and which was afterwards extended by analogy, for the benefit of younger children who are but scantily provided by our law, to give them the corns growing at the predecessor's death, though really and truly not moveable. 4*thly*, This right, introduced in favours of the representatives of a liferenter, and of the executors of a proprietor, which is plainly deborder from the principles of law, has never been extended further, either in our practice or in that of England, than to corns actually sown and growing at the time of the liferenter's or proprietor's death. Nor could it well be extended further, if the rules of law are at all to be regarded; for, as the proprietor's right is at an end with his life, as well as that of the liferenter, no mortal can be entitled to throw seed into the ground, except in the right of, or by allowance of the present proprietor. After his right commences, seed thrown into the ground makes the crop as much his, as it were sown twenty years after the predecessor's death. *Lastly*, This exception has never been extended further than to industrial fruits, which are sown and reaped annually. With regard to plants which remained longer in the ground than a year, nei-

No 6. ther the industry nor the expense are so great, as to preponderate, in our imagination, the rule of law, and indeed of common sense, that whatever is fixed to the land must go along with the land.

Now, to apply these principles: There cannot be a doubt that the barley-crop, which was not only sown after Sir John's death, must belong to the defender, but the ground actually laboured after his death, in order to prepare it for seed. Neither is there any evidence, but rather the contrary, that the defunct intended this ground for barley; but supposing he had given such orders, the rule is, *morte mandantis perit mandatum;* and as the defender is now infeft in the estate, his infeftment must be drawn back to the time of his father's death, to give him all the benefit he could have, had he been then invested.

In the next place, with respect to the grass crop; the only thing that can admit of a doubt is, the few acres sown with rye-grass and clover the year before Sir John's death, and whereof it must be acknowleged the first crop was reaped after Sir John's death. And as to this it must be observed, that the giving of growing corns to the executor is introduced by practice against principles; but this practice has never gone beyond growing corns: Neither is there any reason from analogy for extending it to sown grass; for the rule is, that nothing growing upon the land goes to the executor, but what is produced annually by labour and cultivation; and were we to pass over these bounds, there would be no reason to confine the executor's claim to biennial or triennial plants. As to the observation made for the pursuer, that she ought not to be put in a worse situation than if the lands had been set to tenants; it was *answered*, That there was no manner of analogy betwixt that and the present case. The executor sometimes gains, and sometimes loses by the defunct's having land in his natural possession. If it be a grass farm, and mostly in hay, the executor will draw little; but if it is wholly a corn farm, and the corn all sown by the defunct, the executor will have the whole benefit, and be entitled to much more than the half year's rent. And, as to the argument, that the executors of a fiar or liferenter should be allowed to continue the defunct's possession till the common term of removing, that they may have an opportunity in the interim of disposing of the stocking; it was *answered*, That this was pleading in the face of the common law and practice, as it was the heir's right, and not the executors, to continue the predecessor's possession. It is true, that the tenants of liferenters, by the 26th act, Parl. 1491, are protected in their possession till the next term of Whitsunday, they paying their rents to the fiar; but this privilege has never been extended, either by the law or practice, to the liferenter's taking up the natural possession; which is clear from many authorities. See D. 33. T. 1. l. 8. *De annuis legatis.* D. 22. T. 1. l. 25. *de Usuris.* Bacon's Abrdgment, p. 421. Craig, *Lib.* 2. *Dieg.* 8. § 38. *Lib.* 2. *Dieg.* 9. § 13. Sir Thomas Hope's Major Practics, *voce* Liferenter. Stair, B. 2. T. 9. § 38.

THE LORDS found the defender, Sir William Dalrymple, heir in the estate had right to the whole grass and hay the year libelled, it not being alleged,

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that any grass-seeds were sown upon the ground that year; and that the pursuer had not any right to the said grass or hay, or any part thereof: And found, That the pursuer had not right to any part of the barley crop sown by her, the pursuer, upon the lands after Sir John Dalrymple's decease; but that the defender is liable to make payment to the pursuer of the expense of the labour, and of the seed sown on the grounds after her husband's death; and that the defender has right to the said barley crop, with the burden of the said expense of seed and labour.

C. Home, No 266. p. 428.

*** This case is also reported by D. Falconer:

SIR JOHN DALRYMPLE, Clerk of Session, having died 24th May 1743, leaving his Lady his executor, she brought a process against Sir William his son and heir, claiming a crop of barley sown after his death, and a crop of hay, in which the Lord Ordinary, 13th January 1744, 'Found the defender Sir William Dalrymple, heir in the estate, had right to the whole grass and hay the year libelled, it not being alleged that any grass seeds were sown upon the ground that year; and found that the pursuer had not any right to the said grass or hay; and found that the pursuer had not any right to any part of the barley crop sown by her upon the lands, after Sir John Dalrymple's decease; but that the defender was liable to make payment to the pursuer of the expense of the labour, and of the seed sown on the grounds after her husband's death; and that the defender had right to the said barley crop, with the burden of the said expense of seed and labour.'

A petition was presented, shewing, That the field where the barley grew, had been sown with rape-seed; but Sir John had changed his mind, and resolved to sow it with barley, and given orders accordingly; in consequence whereof, it was laboured by his servants, and sown within some hours of his death. The respondent affirmed, that the rape-seed not answering, he had intended to sow it with turnip in June; but the very day of his death, a number of ploughs were by the executor provided, and set to work, and the sowing completed on the third day. This difference in fact was so far adjusted at advising, as that it was agreed the sowing was some days after Sir John's death.

Pleaded for the petitioner, That when lands are set in tenantry, if the heritor outlive Whitsunday, his executors have right to one half of the rent; and the law is more favourable to the executors of a liferenter or fiar dying in the natural occupancy, giving them a greater share *ob curam et culturam*. THE LORDS found, 14th Dec. 1621, Macmath against Nisbet, *voce* TERM LEGAL AND CONVENTIONAL, That the whole profits of what was in a liferenter's actual possession, belonged to him, dying after Whitsunday, agreeably to this pursuer's claim; but, 25th July 1671, Guthry against Mackerston, IBIDEM, they went further, and found a liferenter had right to the profit of the whole lands sown

No 6. by himself, though dying before Whitsunday. There are no decisions contradicting these; and the opinions of our lawyers agree with them. Stair, B. 2. t. 6. § 9.; Dirleton and Stewart on the word LIFERENTER; and on the word GRASS-ROOMS, Dirleton asks, if in a grass-room, a tenant in a liferent-tack, or a liferenter dying after Whitsunday, the tack or liferent will not endure for that year, seeing their executors cannot remove the goods after that time, and the year is begun? Here a solid reason is intimated for the above decisions, to wit, that it being lawful for a fiar or liferenter to take the land in their own hand, it were hard, and a great discouragement to improvement, if their cattle should be turned off immediately on their deaths, to the prejudice of their executor.

In all these cases and authorities, there is no distinction made betwixt corn and grass rooms. It were a bad room that had no grass; and as when the liferenter or fiar dies after Whitsunday, the corns are supposed fully sown, and their executors are entitled to reap them, it were hard the whole cattle should be turned off. Surely it is much more consistent, that the farm should not be divided, but the cattle kept for the bringing in the crop, which Dirleton supposes, in saying they cannot be disposed of after Whitsunday; and if this is the rule, it will make no variation, if there is more or less left in grass, which depends on the proprietor's notions of labouring.

The second part of the interlocutor ought to be altered, because the barley was sown by orders of the defunct; and though, in our law books, stress is laid on the sowing before the death, and this circumstance is noticed in the above decision of Mackerston; yet it has not been found that the surviving Whitsunday does not give a right to the crop, though unsown; but that the being sown is sufficient, when the death is before. At the term the sowing is presumed to be over, and then the year is begun; and it were absurd to put the real occupier in a worse case, than him who has set the subject to tenants.

Answered, The moment a man's breath goes out, his estate goes to his heir, with all that is *pars soli*. By the Roman law, a liferenter does not transmit the fruits not reaped to his heir, *D.* 33. *t.* 1. *l.* 8. *de annuis legatis*, *D.* 7. *t.* 4. *l.* 13. *quibus modis ususfructus amittitur;* and Julian elegantly says, *D.* 22. *t.* 1. *l.* 25. *de usuris, omnis fructus non jure seminis, sed jure soli percipitur.* This obtains in the English law, Bacon's New Abridgment of the Law, title, EXECUTORS, p. 241.; and the case is the same with a purchaser, Craig, l. 2. Dieg. 8. § 38.

This rule has been limited in the law of England, and our's, with regard to corn sown, in the case of the executors of liferenters, and also of proprietors, though the reason is not so strong in that case as the former. But the executor's interest has never been extended further; for when the right is at an end by death, no body is entitled in virtue of it to put any thing into the ground, Craig, l. 2. Dieg. 9. § 13.; Hope's Major Practicks, word LIFERENTER; Spottiswood, word REMOVING; Stair, b. 2. tit. 1. § 2.

The exception has also never been extended further than to industrial fruits, which are sown annually, else all trees would be carried. By the application

of these rules, both the subjects in question belong to the respondent; and if the petitioner is in a worse case than if the lands had been set, it does not vary the argument, since it will sometimes happen that executors will lose, sometimes that they will gain, by land being in the natural possession. No 6.

THE LORDS adhered.

Act. *W. Grant.* Alt. *H. Home.* Clerk, *Forbes.*

It was thought by some of the Lords, That the grass being a moveable subject, and poindable, belonged to the executor whenever sown.

D. Falconer, v. 1. p. 19.

1745. *June* 5. DUFFS *against* DUFF.

No 7.
A bond granted to a person and his heirs and assignees, failing whom, to a series of heirs *nominatim*, was found moveable in the creditor's person, and transmissible by him on death-bed.

ALEXANDER DUFF of Drummuir gave a bond of provision of L. 500 Sterling to Katharine his daughter, payable the first term after his death, in these terms: 'To Katharine Duff, or the heirs of her body, or her assignees *respective*; 'which failing, to fall in and accresce in manner after-mentioned;' which manner was, That if she happened to decease without heirs of her body, or without uplifting or disposing of the provision, 'He willed, ordained, and appointed the same to fall in and return to the heirs-male of the body of Robert 'Duff younger of Drummuir, his eldest son, and to John and William Duffs 'his sons.'

Katharine having no children, disponed the bond on death-bed to William Duff of Kilmuir, for uses expressed in the disposition; and a reduction on the head of death-bed being brought by Archibald the son of Robert Duff of Drummuir, and Alexander son of John Duff of Culbin, it was *pleaded* for the pursuers, That the bond was heritable *destinatione*, and not assignable on death-bed; that the proper way to make up titles to it was a service, and the pursuers were served heirs of provision; from which it appeared it could not be transmitted by testament, nor consequently on death-bed.

Answered, There was in this case no substitution, but a conditional institution, in case Katharine should not uplift nor dispose of the money; and if the case had happened, the pursuers needed no service; but the case had not happened, she having disposed of it to the defender, who became thereby her assignee, in whose favour the bond was granted.

In the next place, taking it for a proper substitution, that does not make the bond heritable, since such are only bonds secluding executors, or having a clause of infeftment; but bonds containing substitutions are moveable, so far as to be transmissible by testament.