

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

No. 59. property till midnight. A tenant who is to enter to his farm at Whitsunday or Martinmas, is just in the same situation as if his entry were declared expressly to be on 15th May or 11th November; so that if he do not receive possession till the subsequent day, he must be held to have been kept out of his farm longer than was stipulated. If, then, the tenants on the estate of Finlayston had commenced their possession on 11th November, 1795, this possession must have been ascribed to a right which had just commenced, and thus the rent which they are to pay to the landlord at the next term would then have been current, and an arrestment used on that day would thus carry these rents. It does not alter the case that the tenants did not commence, but continued a possession formerly commenced on that day: The commencement of each year's possession, during the currency of the longest lease, continues always the same.

When a day is fixed, on which one man is to perform something to another, the period of performance must be at the usual hours for transacting business: It cannot be held, that the tenant obliged to quit his farm at Martinmas ought to do so at midnight, and that the new tenant is then to be ready to enter into possession. A term-day is introduced for the purposes of active life; and if a precise hour for the performance of an obligation on that day is to be fixed, the middle of the *day* is much more natural than midnight: and accordingly, where a previous decree of removing has been obtained, practice has sanctioned its being enforced at noon of the term-day. The acts 1690, C. 39. and 1693, C. 24. declaring the legal term of removal to be the 15th day of May, upon warning forty days preceding the same, rather supports the plea of the new term commencing at midnight of 14th May, than from the 15th at the same hour, as the Legislature prescribed that the tenant should have forty, and not forty-one days warning.

But such a rigorous interpretation as this would be attended, in practice, with many inconveniencies; and therefore, it is only pleaded, in the present case, that the term-day should be divided, part of it at least being ascribed to the new term. Though this was argued in *Creditors of Craigforth*, 1799, (See APPENDIX), and divided the Court, and though it was not then decided, yet it seems to be the understanding of the law that this should be the case, as has been manifested in questions between the fiar and the executor of a liferenter. A widow's annuity commencing at Martinmas, if she survive midday, her executors draw for the current half year; *Craig*, L. 2. D. 9. § 12.; *Mackenzie*, B. 2. Tit. 9.; *Lady Brunton*, 16th February, 1642, No. 16. p. 15885. As the computation of minute portions of time was troublesome, it came next to be held enough, if the liferenter survived to any hour of the term-day, to vest his right; 8th December, 1704, *Paterson against Smith*, No. 40. p. 15902.; *Executors of Lady Tolquhoun against the Creditors*, 22d February, 1740, No. 45. p. 15907. Questions between the heirs and executors of a landlord, as to the rents current at his death, illustrate the bias of the law to hold the term-day as the commencement of a new period; *Elliott's Trustees against Elliott*, 28th November, 1792, No. 58. p. 15917.

Answered: The *day*, or *term-day*, in all judicial discussion, and civil proceedings, is understood to run from midnight to midnight; L. 8. D. De fer. et dit. The question occurs, if the term-day begins to run from 12 o'clock at night of the day preceding the term-day, or from 12 o'clock at night of the term-day? if it concludes a past, or commences a new period of time? *Term-day* appears, from the expression itself, to be considered as the last or concluding day of a certain period of time; and by 1690, C. 39. and 1693, C. 24. the tenant is to remove on the 15th May, at any time before that day is expired, beyond the expiration of which he is not to remain a single moment. It is the day which concludes the term of possession of the old tenant; it is a *dies finiens*; concluding, not commencing, a portion of time. In computing time, it is necessary to fix upon a point of commencement, or *terminus a quo*; and it is equally indispensable to have a point of determination, *terminus ad quem*. The first is always excluded, while the other is included to the last moment, in the computations of portions of time, which shows that the term of Martinmas is the last day of a period. In diligences and securities, when preferences were regulated by priory of time, the date was by the hour; which is considered as an indivisible point. Where the day of the date, as in contracts, is the *terminus a quo*, there too no fraction of a day is computed, but it is held as one undivided space of time, and never is included in a computation of time *in futuro*; Mercer against Ogilvie, 10th December, 1793, No. 114. p. 3336. The term-day must necessarily be accounted the last day of the period, as it is excluded from the first. Thus, a lease lets a farm "from and after Martinmas," that is, at its expiration; "from" being privative, excluding the term-day. A bond also stipulates repayment at the term of Whitsunday, and "the legal interest from the said term of Martinmas first, to the foresaid term of payment," &c. The preposition *to*, includes the term-day, as *from* excludes it:—(a) vel (ab) est dictio significativa primi termini a quo, sicut est dictio (usque) termini ad quem; et a vel ab accipitur exclusivè; these are the words of the English law; Hall in Viner, voce TIME. It follows, That the point of determination includes the last moment of the time computed; and so our law holds it. In all obligations undertaken to be performed on a certain day, that day is considered to belong to the debtor, who fulfils his engagement in any one hour of it: Till the whole day elapse, no interest is due, and no diligence can be used against him, nor could a penalty be exacted; § 2. Inst. De verb. Oblig. L. 42.; D. De verb. Oblig.; Charles against Skirving, 2d July, 1788, No. 172. p. 1614. A tenant need not quit possession, nor can the landlord demand rent, till the last hour of the last day of his lease; Viner, voce TENDER. The rent payable by the subsequent tenant cannot be current till the day be elapsed on which the old tenant be removed; and it is a matter of voluntary accommodation, if the outgoing tenant leaves it at the term-day, for the whole day must be elapsed before a Judge can receive any application for a warrant of ejection. Letters of horning on a tack require the term-day "to be first come and bygone," previous to the rents being charged for; and the act of sederunt 1756, grants authority to eject within six

No. 59. days "after the term of removal." Ersk. B. 3. Tit. 6. § 9. explains the current rent attachable by arrestment, to be the rent "which has begun to run *from* the term preceding the arrestment." The innovation in favour of executors, whereby the liferenter or landlord, living on any hour of the term-day, vests the right to the rent of that term, took place upon the principle, *dies inceptus pro completo habetur*; Bank. B. 2. Tit. 6. § 24.

The Lords were unanimous in preferring Lady Elizabeth Cunningham, holding, that the whole term-day must elapse before the new term commences, and that an arrestment used on that day to affect the next term's rent is premature.

Lord Ordinary, *Craig*.
Alt. *Tod*.

For Wright, *Douglas*.
Agent, *John Tod, W. S.*

Agent, *J. O. Brown, W. S.*
Clerk, *Home*.

F.

Fac. Coll. No. 49. p. 100.

See HERITABLE AND MOVEABLE.

See APPENDIX.