

the crop, and that it was in the tenant's will still to retain the possession of the room, or to leave the same, if he liked, after that ensuing Whitsunday, and ay and while he were warned by one having right to the land, which a naked donatar to the simple escheat could not do, albeit that donatar would also have had right to the stailbow goods : And this was found, in respect that the defender was but a naked tenant without tack, whereas, if he had obtained tack of this room in writ, with the stailbow, the donatar *eo casu* could not have pursued for delivery of the goods, while the tack was expired, albeit he might have sought *declaratoriam juris* thereupon, before the expiring of the tack.

No. 4.

Actor, *Advocatus et Nicolson.*

Alter, *Mouat,*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 393. Durie, p. 853.

1638. December 4. LADY WESTMUIRLAND against LADY HOME.

Lady Westmuirland, as executrix decerned to the umquhile Lady Hume, her daughter, who was the spouse of umquhile James Earl of Hume, and who was his relict, surviving him, pursues the Lady Hume, mother to the said umquhile Earl James, for payment of the prices of certain goods, such as kine, oxen, and sheep, which were upon the lands of Old-Cambus, and pertained to the said umquhile James Earl of Hume, as his proper goods, and consequently the just equal half whereof should pertain to his relict, by the laws of this kingdom; and which, being sold and disposed by this Lady, defender, the Earl's mother, she ought to pay the half of the price thereof to the pursuer, as having the relict's right; and the defender alleging, That the lands of Old-Cambus, with the stailbow goods thereon, being disposed by John Arnot to umquhile Alexander Earl of Home, husband to the defender, and father to Earl James, and to this same defender, and longest liver of them two, and to his heirs, these goods now pursued for must be reputed the same, and none other, which were disposed in stailbow, as said is; except the pursuer will libel, and offer to prove, that Earl James had the goods libelled upon the said lands by and beside the other foresaid stailbow goods disposed to Earl Alexander and this defender; and if the pursuer will not allege the same, (as indeed it cannot be alleged), then she has no right to claim any part of these stailbow goods; because the same, pertaining to Earl Alexander, and the defender for her lifetime, as said is, the same must pertain, after her decease, to Earl Alexander's executors, likeas they are confirmed in his testament; conform whereto she must be countable therefore to the executors confirmed to the said umquhile Earl Alexander; and the heir of the said umquhile Earl Alexander could never have right to the said stailbow goods, and, by consequence, neither the pursuer's daughter, his relict; specially also, seeing this Lady, defender, has the life-rent use of these goods, against whom, during her lifetime, neither the

No. 5.
Stailbow belongs to the executor, not to the heir.

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heir nor executors of Earl Alexander, or relict of Earl James, could move any action against her for the same; the Lords found this exception relevant to purge the defender's intromission with the goods libelled, except the pursuer will reply, that umquhile Earl James had these goods libelled, now pursued for, besides the goods disposed in steilbow to Earl Alexander, and confirmed in his testament, and that the said goods libelled are other goods distinct from the same; for if the pursuer would not reply the same, the Lords found, that it behoved necessarily to be presumed, that the goods libelled were the same, which were steilbow, or else the brood coming of the same, which was all alike; and being steilbow, the same was found by the Lords to pertain to the executors of umquhile Earl Alexander, and that they could not belong to his heir; which heir could not have right to the same, as the pursuer alleged he ought to have, seeing steilbow was *pars fundi et cedunt cum fundo proprietario fundi*, as *instrumenta fundi*, which the Lords repelled, and sustained the exception; for the steilbow goods were found to pertain to the executors of the defunct, and not to his heir, as they will fall under the gift of the defunct's simple escheat. In this process, divers other sums being acclaimed by the pursuer, as due to her for the relict's part of the same, and the defender alleging, that the pursuer could have no right, except that she would libel, that the sums were owing to the relict's husband by moveable bonds, the Lords repelled the exception, and found it enough to the pursuer to say, that they were owing to the husband; for it was to be presumed, that they were addebted by moveable bonds; except that the defender should *positivè* offer to prove, that the same was owing by heritable bonds and securities; as, in arrestments, it is enough to arrest the sums, except that the party will say it is not arrestable, being heritable.

Act. Nicolson, Mowat, & Hog.

Alt. Advocatus & Stuart.

Clerk, Gibson.

Durie, p. 863.

No. 6.

Found in conformity with the above.

1642. January 28.

DUNDAS against BROWN.

One Patrick Dundas, being confirmed executor to the goodman of Newliston, convenes George Brown, occupier of the lands of Philipston, and haver of some steilbow corn and straw due upon the said lands, given to the tenant by the said umquhile Dundas of Newliston, for payment of the prices thereof; and it being alleged, That the said steilbow corn and straw being set by the defunct to the tenant, for a conjunct duty for the said lands, with the said steilbow corn and straw, if the steilbow foresaid were taken from the tenant, the tenant could not pay that duty, conditioned to be paid by him for the ground; and the steilbow must pertain to the heir, or to him who succeeds to the land, by right from the defunct, as *pars fundi*, and cannot pertain to the executors of the said defunct; the Lords repelled this allegiance, and found this steilbow corn and straw pertained to the