

No. 5.

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

executors of the defunct, and neither to the heir nor to the successor in the right of the land; and did not respect, that thereby the rent of the lands should decrease; for the defunct had not set any tack, or other right in writ, to the tenant of these lands, with these steilbow goods, but only had verbally set the same from year to year, during the tenant's occupation; so that the set could not endure any longer than the setter lived; after whose decease the heritor might use the ground as he pleased, and the executor might seek the steilbow.

No. 6.

Fol. Dic. v. 2. p. 393. Durie, p. 889.

See APPENDIX.