

No. 40. relict surviving mid-day had right, she must necessarily have it by her surviving any part of that day, because the only foundation of the decision is, that *dies cepit pro completo habetur*, which holds as well in this case as in that; for if her title did not arise by the out-running of the whole day, which is indeed the only proper ground of debate about the term, it must necessarily arise from surviving the commencement of that day; and there is no shadow of reason for fixing mid-day to be the period more than any other hour.

“The Lords found that the pursuer as in the liferentrix’ place had right to the Martinmas term.”

*Dalrymple, No. 52. p. 67.*

1710. June 28. EARL of MARCH against The EARL of LEVEN.

No. 41.

The Governor of a garrison whose commission from the Sovereign was recalled after Whitsunday, entitled to half of that year’s rent, though payable in victual only betwixt Yule and Candlemas thereafter, and the succeeding Governor was expressly assigned in his commission to that whole year’s rent.

The deceased Earl of March having procured from the Queen a commission under the Great Seal, to be Governor of the Castle of Edinburgh, *durante beneplacito*, dated December 31, 1702, and sealed the 14th January, 1703; and having served in that station till after Whitsunday 1704; the present Earl, as deriving right from his father, pursued the Earl of Leven, the succeeding governor, for payment of the first half year’s victual rent, payable to the Governor of the Castle for the crop 1704, that had been uplifted by the defender.

Answered for the defender: The pursuer hath no right to any part of the crop 1704, in respect the same was payable only betwixt Yule and Candlemas thereafter, and his father’s commission was revoked long before, and a new one granted to the Earl of Leven, assigning expressly to him the whole Castle rents for the crop 1704.

Replied for the pursuer: The Queen’s gift to the defender is only to be understood *civiliter*, that he should have the crop 1704, from the time he began to be Governor; and the recalling the Earl of March’s commission cannot wrong him of the pay and perquisites due for his service. It is notour, that military commissioned officers are paid to the day of their death, or deprivation; yea, crops of victual are divided according to the interest of parties between the heir and executor; so ministers serving the cure after Whitsunday, or life-renters surviving that term, have unquestionable right to half a year’s stipend or life-rent.

Duplied for the defender: The rents being only assigned to the Governor for his service, as payable betwixt Yule and Candlemas; and a power reserved to recal the assignation at pleasure any time before the rent is due, *i. e.* before the term of payment; no part of the rent is due, unless the Governor serve till the term of payment, as is clear from a decision in the parallel case, June 24, 1630, Scrimzeour against Dean-Miln, No. 12. p. 15881.

The Lords preferred the Earl of March to the half of the crop 1704.

*Forbes, p. 415.*