No 10. not making payment in obedience to the diligence, could not be profitable to the heir, so as to keep the money still heritable.

'THE LORDS adhered.'

Act. *Lockhart.* Alt. *Bruce.* Clerk, *Gibson.*

J. M. *Fol. Dic. v.* 3. *p.* 270. *Fac. Col. No* 40. *p.* 82.

1761. *June* 25.

Sir JOHN STEWART of Grandtully *against* EXECUTORS of Sir GEORGE STEWART.

No 11.
If the possessor of an entailed estate sells the woods upon the estate, and dies before the whole is cut down, the price of that part of the wood which was cut before his death goes to his executor; but the price of that part which remained uncut goes to the next heir of entail.

BY contract, dated October 1758, Sir George Stewart, proprietor of the entailed estate of Grandtully, sold to Robert Stewart, &c. the trees growing on his wood of Cransie, for the price of 4205 merks, payable to Sir George, his heirs, executors, or assignees, at Whitsunday 1760. The purchaser became bound to commence cutting the 1st of May 1759, and to finish the whole the 1st of September 1760.

Sir George having died in November 1759, after part of the wood was cut, the question occurred, Whether the price belonged to his executors, or to his heir of entail? It was agreed, that the entail could not enter into this question. A contract of sale of growing wood is none of the deeds prohibited by this entail, or by any entail; and is therefore effectual against an heir of entail as much as against any heir. This point being adjusted, it was *urged* for the executor, that the price here being a moveable subject, belongs to the executor, even where the subject sold is heritable; witness a minute of sale of land, the price goes to the vender's executor though the land goes to the purchaser's heir. 2*do*, The executor at least ought to be entitled to that proportion of the price which corresponds to the trees actually cut during Sir George's life. For these trees became moveable, and the executors ought either to be entitled to these trees, or to their price as a *surrogatum*.

It was *pleaded* for the heir, That, by the law of Scotland, no subjects can fall under confirmation, but moveables that belonged to the deceased in property, including debts payable to him during his life, which for that reason are understood to be money in his pocket. Hence it is that a conditional obligation not purified during the life of the obligee goes to his heir, and not to his executor; and hence it is that an obligation having a *tractum futuri temporis* goes the same way. In short an executor has not a permanent office: He is appointed to levy what debts were due to the predecessor when he died, and he has no commission to wait for debts that shall become due. That rents, though becoming due after the proprietor's death, accrue to his executor, is not properly an exception. For none accrue to him but what are understood by law to be due before the predecessor's death, though the term of payment be post-

poned by paction. Nor is it any objection that the price of land contained in a minute of sale has been adjudged to the vender's executor, though it is incumbent upon his heir to grant a disposition of the land. For this only was found where the term of performance is past before the vender's death. The Court would be of a different opinion where the term of payment is after the vender's death. And the same ought to hold in the present case, where the vender died in November 1759, and the price of the wood was not taken payable till the Whitsunday thereafter. No. 11.

"Found, That a share of the price, corresponding to the trees cut before Sir George's death, belongs to his executors, and the remainder to Sir John Stewart his heir."

I cannot approve of the first branch of this interlocutor. For though the sum decerned to the executor was the price of a moveable subject; yet the price of a moveable subject payable after the vender's death ought not to go to his executor, more than the price of an heritable subject payable before his death ought to go to his heir.

Fol. Dic. v. 3. *p.* 265. *Sel. Dec. No* 180. *p.* 246.

*** This case is also reported in the Faculty Collection:

IN October 1758, a contract was entered into between Sir George Stewart of Grandtully on the one part, and Robert Stewart shoemaker in Dunkeld, and partners, on the other part; whereby Sir George sold to the said Robert Stewart, and others, all the oak-trees and timber of the woods called Cransie and Inchennans, (parts of the tailzied estate of Grandtully), for the agreed price of 4205 merks; these woods were to be all cut, and the ground cleared before 1st September 1760.

The purchasers entered upon their bargain, and cut about one half of the woods in summer 1759; and Sir George having died 1st November thereafter, Sir John his brother succeeded to the estate, and his creditors used arrestments in the hands of the purchasers of the foresaid woods, who being also distressed at the instance of Sir George's trustees, who claimed the whole price, they raised a multiplepoinding; and in the competition betwixt the arresting creditors of Sir John and the trustees of Sir George, the LORD ORDINARY, upon the 31st July 1760, pronounced the following interlocutor: "Finds, That the price corresponding to that part of the wood which was cut before Sir George's death, belongs to Sir George's executors; and that the price of what remained uncut belongs to Sir John Stewart, (Sir George's heir), and to Sir John's creditors; and, as the competitors seem to suppose, that the one half was cut, and the other half uncut at Sir George's death, finds the one half of the price of the woods belongs to the trustees nominated by Sir George for the ends and uses of the trust, and the other half belongs to the creditors of Sir John com-

No 11. peting; and decerns in the preference against the raisers of the multiplepoinding.

Against this interlocutor, a reclaiming petition was presented by Sir George's trustees. Upon advising of which, with answers, the LORDS ordered memorials in the cause.

In these memorials it was *pleaded* on the part of Sir George's trustees, 1*mo*, That however strictly an entail may be conceived, so as to restrain the several heirs from alienating the entailed subject itself; yet no entail was ever so conceived as to hinder the heir in possession from disposing of the fruits, when these fruits are ripe for use. That a *silva cædua* is as much the fruit of the ground wherein it grows, as any other fruit whatever, in so much that even a life-renter has a right to cut such woods down; *D. 7. T. 1. l. 9. § 7. De usufruct.*; and *D. 18. T. 1. l. 40. § 4. De contrahend. emp.* Considering then these woods as the fruits of the ground, the purchasers could have obliged Sir John Stewart to have implemented the contract, in the same manner as they could have forced implement, if Sir George had sold a crop of corn that became ripe at the time of his death, but happened then not to be cut down, or if he had in the same manner sold the ripe fruit of an orchard.

2*do*, Although these woods should not be considered as the fruits of the earth, but as a part of the ground itself; yet Sir John Stewart could not hinder this contract from taking full effect. An heir of entail is full proprietor of the estate, excepting so far as he is laid under restrictions, and the subsequent heirs, as representing their predecessors, are bound to make good all their deeds, in so far as they were not restrained from doing these deeds by the entail. As then there is no prohibition in this entail, prohibiting the cutting of ripe woods, Sir George had the full disposal thereof; and Sir John Stewart is as much bound to make good this contract, as if Sir George had been unlimited fiar of the estate; 23d July 1730, John Hope-Pringle of Torsonce *contra* Hugh Scott of Gala, No 2. p. 5413.; and 31st January 1755, Lord Cathcart *contra* John Stewart-Nicolson, *voce* TAILZIE.

But if this wood-contract is binding upon Sir John Stewart, the consequence is unavoidable, that the whole price of the wood sold must fall to his executors. And the case is the same, as if the proprietor of an estate had entered into a minute of sale, and died before he had granted a disposition, or the price had become payable; in which it cannot be doubted, that though the obligation would lie upon the heir to fulfil the bargain; yet the price would go to his executors.

Pleaded for the creditors-arresters; That it did not occur what rule there could be for regulating the interest of the heir of entail and the executors of the preceding heir, with respect to the tailzied estate, other than the period of the former heir's death: For, if it be once admitted, that the heir in possession may, by contracts of this kind, sell the whole woods upon the tailzied estate by a forehand-bargain, which is to receive execution after his death, it is im-

No 11.

possible to say where this should stop. If that liberty may be granted for two years, why not for twenty? And if the price of that whole wood was to belong to the executors, it is obvious that the most valuable part of the proceeds of a tailzied estate may be thus pre-occupied and withdrawn from the heirs of entail to the executors of the former heir.

Heirs of entail are not *in pari casu* with other heirs; they are so far creditors, that the heirs in possession can do no deed to hurt or prejudice their right: They are entitled to enter upon the estate *pleno jure* the moment their predecessor dies, and to enjoy every benefit arising from that estate from and after their succession. Was it not for this, heirs of entail would frequently be excluded from a great part of the produce of their estates, as the principle pleaded for the executors would stretch to many cases of the like kind. There are many contracts subsisting between some of our greatest families, and sets of merchants, for the sale of their farm-victual for a course of years; but it has not hitherto been doubted, that the benefit of these contracts would belong to the next heir during his incumbency.

The period of the predecessor's death, and the state and condition in which things then stand, is the criterion for determining the rights of all who claim interest in that estate, and particularly between the heirs of entail and the executors of the former incumbent. The heir's right takes place to the estate the moment his predecessor's breath goes out, and every benefit arising from that estate is from thenceforth his. Woods or trees standing then uncut, however ripe for cutting, if not actually cut, are heritable, and as *pars soli* belong to the heir; and this is the rule with regard to all the natural fruits, as laid down by Lord Stair, book 2. tit. 1. § 2.; 14th December 1621, M'Math *contra* Nisbet, *voce* TERM LEGAL and CONVENTIONAL; Lord Bankton, book 1. tit. 3. par. 17. and book 2. tit. 1. § 4. par. 36.; Lord Cathcart *contra* Nicolson, 31st January 1755, *voce* TAILZIE.

The creditors do not deny, that heirs of tailzie in possession may exercise every act of property that is not inconsistent with the obligation they are under by the entail; and this principle, no doubt, will go far to support a contract of sale of this kind. But the consequence will not follow, that the executors of the last possessor should therefore be entitled to so much of the price as corresponds to that part of the wood which remains uncut at the entry of the next heir. The trees themselves, as being then *pars soli*, become his property; and consequently the price must also be his.

"THE LORDS adhered."

Act. *David Græme.* Alt. *Lockhart.*

J. M. *Fac. Col. No 42. p. 90.*