

No 15.

probability, but a reasonable measure of certainty of design, arising from the acts of the proprietor, is required to effectuate that change. The doctrine of Mr Erskine is accordingly subscribed to. But though in the case supposed by that author, the mere collecting of rude materials for building would not infer an alteration of their moveable nature, yet no sooner should the building have been begun, than the change must have instantly taken place; the probability of intention thus rising to certainty; Stewart's Answers to Dirleton's Doubts, Tit. Executry. In like manner, had the timber, iron, or brass, which compose the doors and windows in question, remained, though in the possession of Mr Johnston, in their rude, unwrought, or unfinished state, whatever high degree of probability of design they might have evinced, their nature, it may be allowed, would not have been altered; but by their having been completely formed, fitted, and adjusted to their peculiar places in a particular tenement, the absolute destination of them for the use of that tenement becomes unquestionably ascertained. The *animus destinandi* is then as fully expressed as it possibly can be *rebus et factis*.

Some of the Judges seemed to be of opinion, that even the simple collecting of materials for building might often sufficiently denote the *animus destinandi* of the proprietor, so as to render them heritable. Others appeared to admit no other rule but the then actual state of the subjects. The opinion of the majority was, that in cases like the present, where the will of the proprietor, so strongly marked, is actually carrying into execution by overt acts, such *animus* should have full effect,

The Lord Ordinary had 'found, that the articles of unfixed work were to be considered as parts and pertinents of the house, and that the same do fall and belong to the heirs at law.'

The judgment of the COURT was, 'To find that the articles of unfixed work destined for the house fall to the heir, and not to the executor, and in so far adhere to the interlocutor of the Lord Ordinary.'

In a reclaiming petition it was farther *argued*, That as Mr Johnston could undoubtedly have effectually alienated *in lecto* the subjects in question, as being, at any rate, heritable *destinatione* only; so in fact, his disposition being reduced as to the proper heritage alone, ought, with respect to them, to be understood as still subsisting. But this petition was refused without answers.

Lord Ordinary, *Alva*.For Margaret Johnston, *Henry Erskine, Moribland*.Alt. *R. Dundas*.Clerk, *Home*.

S.

Fol. Dic. v. 3. p. 267. Fac. Col. No 98. p. 156.

No 16.

The executors of a tenant not liable for the

1791. *March 8.* The DUKE of GORDON *against* JOHN LESLIE, and Others.

WILLIAM LESLIE was the tacksman of a farm belonging to the Duke of Gordon. He was also creditor to his Grace by a bill for L. 220.

At William Leslie's death, his moveable effects descended to John Leslie, and his other younger children, as his nearest in kin; while the lease, which was a beneficial one, and did not expire for many years after, devolved to his eldest son as his heir.

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rents of these
years of which
the heir was
entitled to
reap the crop.

An action of multiple-pounding, brought by the Duke of Gordon soon after William Leslie's death, for the purpose of enabling him to pay with safety the contents of the bill already mentioned, was not brought to a conclusion till 1790. At this time, not only the rent for crop 1788, but that for the following year, was unpaid; and for these, as well as for the rents of the subsequent years, the eldest son of the original tacksman having become bankrupt, his Grace claimed retention out of the sums due by him. In support of this claim, he

Pleaded; Those engagements which in this case the original tacksman came under to his landlord were a burden, while he lived, on his whole funds, whether heritable or moveable. Had these funds never been appropriated by his family after his death, his landlord would have been authorised to attach any part of them for his payment; and so too, although the funds have been regularly transmitted in succession to the legal heirs, every one of those heirs, in representing him, must be liable; Stair, book 3. tit. 5. § 13; b. 4. tit. 22. § 22; Durie, 17th Feb. 1633, Kinnaird *contra* Yeaman, Sect. 7. *b. t.*; 19th July 1637, Lord Innerwick *contra* Lady Smeiton, *IBIDEM*.

Answered; The general principles which have been stated are unquestionably just; but they fail in their application to the present case.

A lease is in its nature an agreement founded on a *delectus personæ*, and therefore should be at an end when the lessee dies. From equitable considerations, however, the benefit of this contract is now held to transmit to the heir of the lessee. But as no part of this benefit can be claimed by the executors, no reason can be given why they should be exposed to any risk.

In the case of mercantile partnership, where the share of a deceased partner is, by special agreement, given to one of his sons *nominatim*, his other children, if the concern was a lucrative one at the time of his death, have never been considered as liable for any part of the subsequent loss. So too, in the case of a feu-right, although the executors of the vassal may be required to pay the feu-duties incurred before the succession opened, no instance can be shown, in which, upon the subsequent bankruptcy of the heir, the superior has attempted to render them liable.

The present claim is not founded in the meaning of the parties, the lessee and his heirs alone being debtors in the obligation, If listened to, it would be attended with very unjust consequences, the executors having no way of securing themselves against the loss arising from the heir's bankruptcy. Neither is it necessary for the landlord, if he is sufficiently attentive, by exercising in due time his right of hypothec.

No 16.

The LORD ORDINARY found 'the Duke of Gordon entitled to retention out of the sum in his hands, as craved.'

A reclaiming petition was given in, which was followed with answers.

The COURT, considering the crop of 1788 as belonging to the executors, were of opinion, that they were liable for the rent of that year.

But as to the rents of the subsequent years, a great majority were of opinion, that the heir alone, after being acknowledged by the landlord as tenant, could be sued for these rents.

THE LORDS 'found the Duke of Gordon entitled only to retention of his rent for crop 1788.'

Ordinary, *Lord Dreghorn.* Act. *Tait.* Alt. *Dickson.* Clerk, *Gordon.*
C. *Fac. Col. No 176. p. 359.*

1796. February 10.

MRS ANNABELLA WIGHT, and Others, *against* WILLIAM INGLIS, and Others.

No 17.

Hay produced from seed sown along with barley and wheat in spring 1794, and cut down in summer 1795, was found, in a competition between the heir and executor of the proprietor, who died in December 1794, to belong to the heir.

IN spring 1794, William Simpson sowed clover and rye-grass along with wheat and barley, on about 70 acres of land belonging to him. He died in December following, and Mrs Wright and others, his executors, afterwards brought an action against William Inglis, and his other heirs, concluding that the hay-crop in summer 1795, produced from the seeds sown in 1794, should be found to belong to them as an artificial fruit.

The arguments used by the parties were, in substance, the same with those to be found in the case of Dame Sydney Sinclair against Dalrymple, No 6. p. 5421.

The Lord Ordinary reported the cause.

Observed on the Bench; The hay in question is to be considered as a second crop, and as such belongs to the heir. It is true, the first crop would, in this case, be of little, or perhaps no value; but that arose entirely from wheat or barley having been sown along with the grass seeds; and as the crops arising from the former were reaped by Mr Simpson, the executors are by that means fully indemnified for the deficiency or loss of the first crop of grass.

THE LORDS unanimously assolizied the defenders.

Lord Ordinary *Eskgrove.* Act. *Cullen.* Alt. *Davidson.* Clerk, *Pringle.*
Fac. Col. No 201. p. 482.