

1633. February 16. HARPER *against* COCKBURN.

No. 14.

A comprising upon a denunciation after Whitsunday, though perfected by infestment before Martinmas, carries only right to the half of the rent for the crop on the ground ; and therefore an arrestment of that year's rent, though posterior to the denunciation, is preferable for the other half, though the whole, as being victual-rent, be not payable till between the Yule and Candlemas after the comprising.

*Fol. Dic. v. 2. p. 457. Durie.*

\* \* This case is No. 10. p. 139. *voce* ADJUDICATION.

1635. February 21. L. WEST-NISBET *against* L. SWINTOUN.

No. 15.  
Miln-rent,  
how it di-  
vides ?

The L. West-Nisbet pursuing L. Swintoun, for the tack-duty of the miln of ———, which miln was set in tack to the tenant for certain years, by the umquhile L. Swintoun, to whom West-Nisbet was executor, for payment of 30 bolls of meal yearly for the miln and miln-lands, betwixt Yule and Candlemas yearly ; the entry of the tenant was by the tack appointed to be at Whitsunday, and so to continue from that Whitsunday to the next Whitsunday, and so yearly thereafter, till the expiring of the tack. The L. Swinton, setter of the tack, dies in the second year of the tack, after the Martinmas in that second year, and before Yule, which was the term appointed by the tack for payment of the tack-duty ; whereupon it being controverted before the Lords, whether West-Nisbet, who was executor to the defunct, or Swintoun, who was his heir, and heritor of the miln, should have that year's tack-duty, or, if it should divide betwixt them ; the Lords found, that the executor ought to have the whole year's tack-duty, and that the heir ought to have no part thereof ; albeit the heir alleged, that the least he could be found to have right to of that year's duty, behoved to be the just half thereof, because the first year of the tack behoved to rule the whole subsequent years, (as was agreed on betwixt the parties) and if Swintoun had died after the Martinmas in the first year, and before the term of payment, viz. before Yule, as he did the second year now controverted, the executor could never have had right but to the half duty, because the entry being at Whitsunday, the miln-lands could never have been tilled by the tenant, while the Martinmas thereafter ; for at the said term of entry, the crop was then sown, and pertained to the preceding tenant, and the entering tenant could not enter, while that crop was off the ground, which could not be till the Martinmas after his entry : Likeas, the miln libelled is but a winter miln, so that betwixt his entry thereto, and the Martinmas, whereat the heritor died, the tenant had not made any profit of the miln, seeing the whole profit thereof behoved to be in the winter after that Martinmas ; neither were the

No. 15. terms of payment come when the heritor died ; and if the heritor had kept the miln in his own hands, unset out to tenants, the executors could not have had the whole year ; for the whole profit thereof could not have been uplifted by the heritor at that time, and so the executor could get no more than the defunct would have gotten, and the half of the year was but expired when he died ; for albeit he died after the Martinmas, yet that ought not to be considered as in farm of lands, where the heritor dying after the Martinmas, the whole year's duty will pertain to the executor ; the reason whereof is, because the whole crop is then off the ground, and both the legal terms are by-past, viz. Whitsunday and Martinmas ; but in this case it is not so, where at the heritor's decease, neither was the miln libelled, nor the multures of the miln payable, nor the whole year past, nor the legal terms both come ; for the entry of the tack being at Whitsunday, as said is, the legal terms behoved to be esteemed, not Whitsunday and Martinmas, but Martinmas and Whitsunday ; so that the first term was Martinmas, and the other term, viz. Whitsunday, was not yet come ; which allegiance was nevertheless repelled, and the executor found to have right to the whole, *nemine contradicente*.

Act. *Cunningham*.

Alt. *Nicolson & Craig*.

Clerk, *Hay*.

*Durie*, p. 757.

\* \* This case is reported by Spottiswood :

There was a controversy betwixt the Laird of West-Nisbet, executor confirmed to the Laird of Swintoun, and the Laird of Swintoun the defunct's brother and heir, about the duties of a miln, the year of the defunct's decease. The tenant had a tack of the miln for eleven years, his entry was at Whitsunday 1632, the duty was 30 bolls of meal payable betwixt Yule and Candlemas thereafter, and so forth every year. The defunct deceased in the beginning of December 1632 ; so the executor contended, that he having out-lived the term of Martinmas, the whole belonged to him, as is accustomed in all other farms payable betwixt Yule and Candlemas. The heir alleged, that he could have only the one half, for the duty of a miln is not like other farms which have relation to the crop preceding, which is past at Martinmas, and so justly due to the executor, if the defunct out-live that term ; but the duty for a miln is paid for the use of a miln from year to year, and so the defunct having only out-lived the half year, there belonged only to him the half of the duty, and the other half should fall to his heir. The Lords found that the whole pertained to the executor.

*Spottiswood*, p. 122.