

his aliment. And the question in the Lady Tarsappie's case, *anno* 1662, No 9. p. 5206. was only about satisfaction to her for the apparent heir's aliment, whom she entertained till his death; and it was expressly found, That unuplifted mails and duties did not fall under an apparent heir's executry, but were *in hæreditate jacente*, and belonged to the person served heir to the defunct last vest and seized; Jan. 1683, Ballantyne *contra* Bonnar's relict*; and in Balgony's case, February 1688, No 15, *infra*.

Fol. Dic. v. 1. p. 358. Harcarse, (AIRES GESTIO, &c.) No 60. p. 11.

No 14.

1688. February. BALGONY *against* JAMES HAY.

FOUND that the executors or assignees of apparent heirs dying un-entered, had no right to mails and duties of lands, or to annualrent of heritable bonds, resting unuplifted the time of the apparent heir's decease; though payment made to apparent heirs would exoner tenants: And it was not material here to consider, if the apparent heir's executors would be liable to restore what was consumed of that which he uplifted.

Fol. Dic. v. 1. p. 358. Harcarse, (AIRES GESTIO, &c.) No 71. p. 13.

No 15.

1733. February 28. BLAIR *against* STEWART.

THE privilege competent to apparent heirs by act 1695, to sell the predecessor's estate at a public roup, found competent notwithstanding the pursuer had behaved as heir, and become thereby liable to all the debts of his predecessors. See APPENDIX.

Fol. Dic. v. 1. p. 359.

No 16.

1743. July.

EXECUTORS *qua* nearest of kin to DOUGAL CAMPBELL, *against* ALEXANDER CAMPBELL of Skirven.

ANNO 1728, Dougal Campbell of Skirven, by his bond of tailzie, obliged himself to resign his estate in favour of Archibald Campbell in liferent, and to Dougal the eldest son of Archibald, &c.; which failing, to Alexander Campbell.

Anno 1737, by another bond of tailzie, the said Archibald obliged himself to resign the estate to himself in liferent, and to Dougal his son, &c.; which failing, to the said Alexander Campbell.

After the death of Dougal Campbell elder, and Archibald his son, the estate

No 17.
The rents of an entailed estate fallen due, but unuplifted at the death of a substitute, were found to belong to the executors of his son, who died ap-

* Examine General List of Names.

No 17.
parent heir
of entail;
and not to
the next sub-
stitute.

devolved on Dougal, the son of Archibald, who dying likewise in February 1737. the same devolved on the said Alexander Campbell, against whom the sisters of Dougal Campbell younger, as executors *qua* nearest of kin to him, brought an action for payment of the half of the year's rent crop 1737, which he had intromitted with, as being *in bonis* of their brother, and so falling under his executry.

The *defence* offered for Alexander Campbell was, That Dougal younger, having died an infant, without making up any titles in his person to the estate, the same was never vested in his person; and that, however his apparency, or the personal right that was in him, might have been a lawful title of possession, had he actually apprehended the same, and uplifted the rents; yet as, in fact, he uplifted none, the rents were *in medio* at his death, and of course belonged to the defender, the next substitute, who came immediately to have the same title of *interim* possession that Dougal younger might have used; and who, upon completing his title, and executing the procuratory of resignation, will become the immediate successor to the person last infeft, and granter of the procuratory.

In a word, the principle on which the defence is founded, is, that the imperfect right of an apparent heir can go no further than to make those rents become his which he had actually uplifted; and that he was by no means to be considered as in the same state with a person vested in the fee, whose executors are no doubt entitled to take the rents that were due and payable, at or before the legal term immediately preceding his death.

And if the law so stand with respect to Dougal Campbell younger his title to these rents as apparent heir of the former investiture, the defender is advised that his other title is no better, or more complete, which consists of the personal rights above recited, by the procuratories of resignation in Dougal's favours made by his father and grandfather, with design to vest the fee in him by way of purchase or conveyance: For still it is true, that the feudal right to the lands remained with the person last infeft in the lands, granter of such procuratory; and that the estate and rents thereof, arising from his death, are still as *fructus pendentes in hereditate jacente* of him who was last infeft in the lands, and will therefore be carried by the defender, whenever he, by executing the procuratory, shall connect his title by infeftment with the last vassal who so died infeft, and who granted this procuratory to himself in liferent, and to Dougal, and the heirs substitute to him, in fee. See Ross against his Tenants, No 10. p. 5243.; M'Brair against Rome, No 13. p. 5245.; M'Brair against Rome, No 13. p. 5246.; Balgony against Hay, No 15. p. 5247.; and Oliphant against his Tenants, No 11. p. 5243.

THE LORDS found, That the pursuers have right to the half of the year's rent libelled, and preferred them, &c. they always confirming before payment.

N. B. It is said this judgment was founded on this, that Dougal Campbell was fiar of the estate. See No 16. p. 5213.

Fol. Dic. v. 3. p. 257. C. Home, No 249. p. 401.

No 17.

1755. June 27.

JOHN STEUART-NICOLSON of Carnock *against* GEORGE HOUSTOUN of Johnston.

DAME ELEANOR NICOLSON executed an entail of her estate in favour of Margaret Schaw, her only daughter, and the heirs-male of her body; whom failing, &c.; and with respect to the produce of certain funds, which afterwards were made effectual to the extent of about L. 2000 Sterling, taking her daughter bound to purchase land with the same, and to annex the land purchased to the tailzied estate; or to lay out the same upon sufficient security till a purchase of land should offer. Margaret Schaw, after her succession, lent the sum to Lord Napier upon an heritable bond; and the money being returned to her, she was forced to lend it out upon personal security. Margaret Schaw, afterwards Lady Houston, died 31st January 1750, leaving a son, Sir John Houston, her heir of entail in her land estate; and in that quality also heir to the said sum of L. 2000 destined for augmenting the entailed estate. Sir John survived his mother not above a year and a half; and having bequeathed all his moveables to George Houston of Johnston, he died without making up titles to the designated sum. This produced a question betwixt Johnston, the executor, and John Steuart-Nicolson the heir of entail, with respect to the interest of the designated sum, arising betwixt the death of Lady Houston and that of her son Sir John.

It was *pleaded* for the heir of entail, That his predecessor Sir John having died in apparenacy, had no title either to rents or annualrents arising during his possession; that however the tenants or debtors paying to an apparent heir may be safe upon their *bona fides*, yet as to rents or interest unuplifted, these are not *in hereditate jacente mobilium* of the apparent heir, but remain as part of the stock not separated from it, and of course accrue to the next heir who makes up a title to the stock.

It was premised for the executor of the apparent heir, That this entailed money, though lying out upon moveable bonds, must, with respect to the present question be considered as actually laid out in terms of the destination; upon this principle, that in dividing the defunct's estate betwixt the heir and executor, chances are not regarded, but every thing is supposed to be done that ought to have been done. Supposing now the entailed money to be lying upon real security, as it once was in the hands of Lord Napier, it was urged for the executor, that by the analogy of law, the interest arising during Sir

No 18.

The executor of an apparent heir was preferred to the next heir entering, as to the annualrents of an heritable sum, which fell due during the apparenacy.