longed to the heir or executor of the superior? And the Lords unanimously found, *dissent. tantum Præside,* that they went to the executors. They thought that a feu-duty was no more than a perpetual tack or location, executed after the feudal form; and therefore that bygone feu-duties were to be considered as bygone tack-duties.

Kaimes laid down this general principle, that, in the matter of a succession, every thing that was due was, in the eye of law, considered as paid; and therefore, the feu-duties, being due, were to be considered as in the pocket of the defunct superior,—in which case they would no doubt have been the property of his executor.

In the year 1718 the contrary was found, or, which was the same thing, it was found that the byrests of feu-duties were a burden upon the vassal's heir, without relief against his executor. But this decision the Lords paid little regard to; and Kilkerran informed the Court that it proceeded upon report of my Lord Royston, who, observing Mr Dundas of Arniston at the bar, asked him if he was in the cause? And upon his telling him that he was not, my Lord next asked him what he thought of the question? He answered by asking his Lordship a question, Whether he had ever heard that when a man purchased lands holding of a subject-superior, and got a charter from that superior, with a *novodamus,* there ever was a question betwixt that purchaser and the executors of a former superior about the bygone feu-duties? This hint Lord Royston immediately communicated to the Lords,—upon which the decision went unanimously in favour of the executor.

1755. *June 27.* Sir Michael Stewart *against* Executors of Sir John Houston.

[Kaimes, No. 90; *Fac. Coll.* No. 181.]

In this case there was a hearing in presence, and the thing was considered in several views:—1*mo,* Rents of lands unuplifted, whether they belong to the executor of the apparent heir, or to the next heir entering? 2*do,* Annualrents of heritable bonds, whereupon infeftment has followed; 3*tio,* Annualrents of sums heritable, not by infeftment, but *destinatione*; and, 4*to,* Annualrents of sums that were *in obligatione,* as was the case here, but the obligation not implemented.

As to rents of lands, the President was of opinion, that by our law, as laid down by Stair in the title, *Rights Real,* there is a great difference betwixt the right of property and right of possession, not only in lands but in moveables: that the right of property in both did not transmit from the dead to the living without service or confirmation, but the possession transmitted without either; nor was there any fact or deed required of the person in whose favour they transmitted, nay not so much as the *animus;* and therefore the right of possession went to infants, idiots, and persons out of the country, for whom it was usual for the Lords to name factors to uplift the rents of estates devolving to

them by succession: that accordingly apparent heirs exercised every act of possession, forced the tenants to pay them their rents, had a right to sue everybody that intruded into the possession, the rents were arrested as their property during their life, and confirmed after their death by their creditors: and, if so, it follows of consequence, that they must have been *in bonis* of the heir, and go not only to the executor-creditor, but to the executor *qua* nearest of kin, whose right must, in every respect, be as broad as the right of the executor-creditor. This right of apparent heirs, the President confessed, had grown by degrees, for at first the Lords would not give him an action against the tenants, but found that the tenants might pay safely to him; then they gave him an action if the tenant had once acknowledged him by payment; and, lastly, they gave him an action simply, without any such acknowledgment.

Lord Kaimes said that the apparent heir's right to the rents proceeded from the indulgence of the superior, who did not exact them, which he might have done, the lands being in his hands, and considered as his property during the non-entry; so that if he took a part of them by a declarator of non-entry, viz. the retour-duty, which, in law, is understood to be the rent, before declarator, the remainder will belong to the heir, or, if he takes no part of them, the whole: And he said further, that as it was admitted the apparent heir had a right of action and might have levied the rents, such of them as were due but not uplifted, were to be considered, in construction of law, as paid, and consequently would go to the apparent heir's executor.

The Lords, on the other side, said that the apparent heir had no more than the faculty or privilege of apprehending possession, which, if he did not use, he could not transmit to his representatives.

As to bonds heritable by infeftment, or *destinatione*, both the President and Lord Kaimes considered them as *feoda pecuniæ*, and subject to the same rules as *feoda terrarum*; but the Lords, upon the other side, asked by what action an apparent heir in such bonds could get payment of the annualrents? And the President answered, by an ordinary action, not by a charge on the bond, which he could not use without making up titles to the principal sum.

As to the obligation not being implemented in this case by Lady Houston, the lawyers for the executor said that this was favourable for him; because Sir John, being creditor in the obligation, had no occasion to make up titles by service, neither to the principal sum nor annualrents.

The President said that it was not necessary in this case to determine whether a service was required or no: for his own part, he always thought it an absurdity to require a service only to ascertain a fact, as in this case to ascertain that Sir John was heir of tailyie to his mother, not to convey a right, which in this case could not be conveyed, being not in the lady but in Sir John. But others of the Lords observed that the right was in my lady, in so far as she was first heir in the substitution, and who therefore was first entitled to the benefit of the subject, being, in this respect, creditor as well as debtor in the obligation; and in all such cases, they said, a service was necessary, though without a service, and even during the life of the first heir, they admitted that an action was competent at the instance of any of the heirs, even the remotest, but not to lay hold of the money, but only to have it secured in terms

of the obligation; and though the decisions of the Court had varied on this point, about the necessity of a service, yet Kilkerran observed that the latest decisions had found that a service was necessary to an heir of such an obligation in a contract of marriage, by which a father is bound to provide a sum of money to himself and the heirs of the marriage.

The decision went for the executor.

This interlocutor adhered to, 2d December 1755, by a great majority. The President put his opinion wholly upon the right of possession, which transmitted to the heir *ipso jure*, and by virtue of which he had a right to the rents and to every benefit of possession, and to defend himself in the possession, and to recover it, when lost, by every method known in the law.

1755. *July* 2. M'GILLIVRAY *against* M'BEAN.

AN heritable bond bore a provision of this kind,—That if the creditor should enter to possess, he should account for the victual at the rate of the fiars of the county. Upon this heritable bond the creditor adjudged, and then entered to possess. The question was, By what rule he should account for the victual-rent of the lands about thirty years back, during which time he did possess; whether by the fiars or the current prices? And the Lords found, That, as he had not entered to possess upon the heritable bond, but had taken the advantage of legal diligence, by adjudication, he could not also take the benefit of the stipulation in the contract; and therefore found that he must account by the current prices. This they determined rather upon principles of equity than of strict law, according to which there seems to be nothing to hinder the creditor to take advantage both of the legal diligence and the stipulation in the contract.

1755. *July* 2. THE MINISTER of ——— *against* COLLEGE of ST ANDREW'S.

THE minister of this parish pursued an augmentation against the College of St Andrew's, as titulars of the teinds, setting forth that his stipend was only 600 merks, and craving that it might be augmented to 800 merks, the least stipend allowed by law to ministers. The defence was,—That the teinds of the parish were, by an old mortification, confirmed by the Pope, given to the Provost of the Old College of St Andrew's, and had always been possessed by him as parson; so that the minister was no more than his vicar, and upon the same footing with the ministers in the mensal churches of the bishops; and therefore had no claim for a stipend but such as the College, his parson, was pleased to allow him. But, *2do*, This stipend is already augmented, by a decree of modification and locality, in the 1710, obtained at the instance of the minister,