whereof the heir is only liable to perform; that the heir therefor was only liable for the feu-duties, and not the executors in relief." No 22.

Fol. Dic. v. 1. p. 366. Rem. Dec. v. 1. No 15. p. 28.

*** Lord Kames, in the Fol. Dic., after stating the import of this decision, makes the following observations upon it:—This seems to labour under some doubts; for, *1mo*, Bygone feu-duties go to the superior's executor, upon no other footing than as moveable. *2do*, The executor is liable to implement the feu contract as well as the heir. Suppose the price is not paid, the executor will be liable to pay the same, though the benefit accrue to the heir alone; and there is no doubt the superior may pursue the executor for bygone feu-duties. *3tio*, The superior is truly proprietor, in so far as the feu-duties extend, for he only gives away the property as to the superplus rents, therefore all intromitters with the rents are personally liable to the superior as intromitters with his rent, viz. the feu-duty. Bygone feu-duties then in the hands of an intromitter are truly a moveable subject which must go to executors, and for which the executors of the intromitter must be liable.

1755. *June* 26. GILBERT MARTIN *against* AGNEW of Sheuchan.

No 23.
Bygone feu-duties found to belong to the executor, not the heir.

THE question debated betwixt these parties, was, Whether bygone feu-duties accrue to the heir or executors of the deceased superior. By many decisions, these are found moveable. But these decisions notwithstanding, it was found, Wilson *contra* Bell and Grant, No 22. p. 5455. "That bygone feu-duties are a burden upon the heir, and that he has no relief against the executor, because they arise from the feu-contract, the terms whereof, the heir only is liable to implement." And this decision was urged as the latest precedent in this case; for if the heir of a vassal is liable ultimately for the bygone feu-duties, it must follow that they belong to the heir of the superior. This diversity of opinion in the Court, occasioned a hearing in presence, in order to settle the point ultimately. And for the heir, two things were chiefly *insisted* on, *1mo*, That the feu-duty, like personal service, is paid *in recognitionem feudi*; and therefore to the superior only. *2do*, That a *novodamus* by the superior in a charter to his vassal, is held by all our writers as a discharge of all the bygone casualties, including feu-duties; which shows the heir's right to such arrears, as no man can discharge what he has no right to.

The COURT, notwithstanding, preferred the executor. And the reasons which prevailed, follow:

The rule of law respecting arrears is, that they are considered as in the pocket of the creditor, and consequently as part of his executry. The law, in splitting the estate of a deceased betwixt his heir and executor, suffers not chance

No 23. to govern. It supposes every thing to be performed, which ought to have been performed; and will not put it in the power of a dilatory debtor to hurt the executor. This, in reason as well as good policy, makes it a rule that all arrears go to the executor of whatever kind these be.

A feu-holding is very ancient in our law. Originally the feu-duty was the full rent payable in corn, as all our rents originally were. A feu differed nothing from a location, except with regard to the time of endurance. In this view, there could be no question originally that bygone feu-duties, being arrears of rent, did belong to the executor. And if so, the same rule must obtain at present, though feu-duties be commonly paid in money, and in effect are a quit-rent.

Bygone blench-duties go to the executor of the superior, Lord Semple *contra* Blair, No 18. p. 5447. Bygone ward-duties, and bygone non-entry duties, limited to the new extent, go the same way; for neither of these require a declarator. In a feu holding, the feu-duty, during the non-entry of the heir, belongs to the superior *qua* non-entry-duty; and if non-entry duties belong to the executor, there is no reason that this particular non-entry-duty should belong to the heir. Why not also feu-duties arising when the lands are full. In England accordingly, there is no doubt that the arrears of feu-duties go to the executor of the superior. 32 Hen. VIII. *cap.* 37.

A superior is not by law obliged to enter the heir of his vassal, till the bygone non-entry-duties are paid up, and, in particular, the bygone feu-duties. Hence it is, that a precept of *clare constat* granted to the heir of a vassal, implies, that all the bygone non-entry-duties, which can be claimed by the superior himself, are transacted and discharged. This is the case of the Earl of Cassillis *contra* Lord Bargenie, Feb. 1682, *voce* IMPLIED DISCHARGE and RENUNCIATION. But this decision does not say, that a precept of *clare constat* implies a discharge of feu-duties, which were due before the right commenced of the superior who grants the precept. Stair, B. 2. tit. 3. § 15., handles a *novodamus* as implying a discharge of bygone casualties: But he does not say, that it will discharge any casualties due to a predecessor.

The argument for the heir, that feu-duties are paid *in recognitionem dominii*, is naught. Rents are paid *in recognitionem dominii*; so are blench-duties, ward-duties, &c. yet these, when in the superior's pocket, go to the executor; and they are supposed to be in his pocket after the term of payment.

Fol. Dic. v. 3. *p.* 265. *Sel. Dec. No* 88. *p.* 116.