of his predecessor's estate; he can force the tenants to pay; his creditors can affect them by arrestment, either during his life or after his death, 20th Dec. 1662, Tarsapie, No 9. p. 5206. These powers can arise from no other principle, than that the rents belong to him, as they fall due, whether they be uplifted or not; and of consequence go to his representatives. No 18.

This interest of an apparent heir is a right in him distinct from the right of property, both as to its constitution and effects. The right of property can only be constituted and transmitted by particular forms, and these may not be supplied by equivalents; but the right of possession arises *ipso jure* to the heir by the operation of the law. No form or act on his part is necessary. It devolves upon him without his knowledge, as in the case of an heir abroad or an infant, Sir Alexander Ogilvie against Sir Alexander Reid, No 9. p. 5242.; if therefore the rents are carried by this possessory title, and if an apparent heir has a right to them, that right, with every other moveable right, passes to his executor.

This distinction between the right of property and of possession, is laid down by Lord Stair in many places of the Institutes, B. 2. tit. 1. § 22. tit. 3. § 16. B. 3. tit. 5. § 2. The decision M'Brair, as collected by Stair, No 13. p. 5245.; and by President Falconer, No 13. p. 5246., stands with the executor. Lord Harcarse indeed makes an addition to this decision; but this rests upon his single authority, and is in some measure an abstract point, not in the case; and the other decisions collected in the Dictionary rest too upon his evidence, which will not be held sufficient authority to set aside a system of law founded on principles supported by Lord Stair, and confirmed by decisions.

'THE LORDS preferred the executor.'

For Executor, *Craigie, Lockhart. et Wallace.* For Heir, *Ferguson et W. Stewart.*

W. S. *Fac. Col. No* 181. *p.* 268.

1760. *December* 5.

EXECUTRIX of Mr HAMILTON of Rosehall *against* Mr ARCHIBALD HAMILTON.

No 19.
An heir dying in apparency, the arrears of rent found to belong to the succeeding heir. Reversed on appeal. *See* Note on p. 5257.

AN heir apparent dying in possession, the rents which had become due, but not levied, were decreed to the next heir, and not to the executors of the deceased.

That the executors ought to be preferred, is made evident in the Historical Law Tracts, Tract 5. And there is an additional reason, namely, That in regulating the succession of a person deceased, the law has no respect to chance or accident, but supposes every thing to be done that ought to have been done. Had the rents in arrear been paid as they ought to have been, the heir would have had no claim. And it would be unreasonable that a tenant by his neglect or obstinacy should have the power to benefit the heir and to hurt the executor.

Fol. Dic. v. 3. *p.* 257. *Sel. Dec. No* 170. *p.* 231.

No 19.

*** This case is reported in the Faculty Collection:

Upon the death of Sir Hugh Hamilton of Rosehall, a competition arose concerning his estate of Rosehall, betwixt his daughter Miss Marion Hamilton, and his nephew Mr Archibald Hamilton of Dalziel. Before this competition was concluded by a final interlocutor, Miss Marion Hamilton, who had entered into possession as apparent heir to her father, died in a state of apparency, and without having uplifted the whole rents which had fallen due during her possession.

After her death, Mr Archibald Hamilton served himself heir of tailzie to Sir Hugh, the person last infeft in said estate; and obtained decreet in his baron-court against the tenants, for the rents remaining in their hands, and which had become due under Miss Hamilton's apparency. Mrs Euphame Hamilton, as executrix confirmed to her, likewise brought a process against the tenants for payment of these rents; upon which the tenants raised a multiplepoinding, and the competing parties having appeared for their interest, the cause was taken to report.

Pleaded for Mrs Euphame Hamilton; Though by the strict principles of the feudal law, certain formalities were requisite to transmit and vest the feudal right of lands, and some of these forms are still kept up; yet the genius of the law of Scotland, especially in later times, has been to make the transmission of property from the dead to the living as easy as possible, and to throw off every unnecessary superfluity. Thus, though by the former practice, confirmation was necessary to transmit moveable succession, and any subject omitted out of the inventory was held to remain *in hæreditate jacente*, it is now established, that possession alone, by the nearest of kin, is sufficient to vest and transmit the subjects possessed; and confirmation of one particular suffices to vest the whole. In heritable succession, even by our most ancient law, apparent heirs enjoyed many rights and privileges, particularly that of continuing the predecessor's possession; from whence arose their right to the interim rents of the predecessor's estate during their own possession. This right requires no overt act of the apparent heir, but is the operation of the law itself, which holds him to be in possession from the moment his predecessor dies; and in this respect he is supposed to be *una et eadem persona cum defuncto*.

The apparent heir's possession has received so much countenance from the statute-law of this country, that by act 24. Parl. 1695, he can charge the estate, *in valorem*, with all his onerous debts and deeds; and if this possession has so strong an effect with regard to the fee of the estate, how much more strongly ought it to operate with regard to the interim rents? The apparent heir gets credit, from a belief, that the rents belong to him during his possession; but it would be attended with fatal consequences, if this right evanished upon his death. Accordingly, it is understood to be undoubted law, that his credi-

tors can attach the unuplifted rents after his death, which can only be upon this principle, That the right of apparency and possession of the estate is a legal title to the rents, whether uplifted or not. And indeed the very point now in question was solemnly determined in the late case of Houston against Nicolson, No 18. p. 5249.; where the decision went in favour of the apparent heir's executor. And a variety of decisions and authorities were there adduced, all tending to shew, that the apparent heir's power over the rents is not a bare personal privilege or faculty, which he may exercise, and which dies with him; but that it is a *right*, and, as every other right, must transmit to his representatives. No 19.

Argued for Mr Hamilton; By the law of Scotland, all land-property is understood to be held of a superior, who retains the *dominium directum*, and the vassal acquires the *dominium utile*. No vassal can have a right to lands, without a charter or warrant to infeft from the superior, and instrument of possession following thereon. Hence the maxim, *Nulla sasina, nulla terra:* And hence also, when this precept or warrant is once executed, the effects of it cannot be transmitted by the vassal, either to heirs or singular successors; but the latter must obtain a new precept from the superior, and the feudal right is not effectually vested in the former, till such time as having brought a proof that he is the heir in the investiture, he obtains a renovation of the feu from the superior, and precept for infeftment; upon which he is accordingly infeft.

From these principles, it clearly follows, that as an apparent heir has no title to the lands themselves, so neither has he to the rents. These rents belong to the superior by the casualty of non entry, if he chuses to claim them; and if he does not, they remain a part of the inheritance, to be taken up by the next heir who shall make up proper titles to the estate. And therefore, if an heir dies unentered, it is contradictory to the rules of law, that he should transmit to his executors a right to the rents, which did not belong to himself. That the rents arising after the vassal's death are transmitted with the lands themselves, is ascertained by the effects given to adjudications led against the deceased vassal's estate, whether *cognitionis causa*, or upon a charge to enter heir: For, by the *first*, the rents fallen due after the vassal's death, are always carried as part of the *hæreditas jacens*; and by the other, a charge to enter being equivalent to a service, that service, by taking up the *hæreditas jacens* of the predecessor, is understood likewise to carry the rents that have arisen after his death. These things are altogether inconsistent with the notion, that the rents belong of right to the apparent heir; for if the right was once in him, how could he be divested of it, so as to reinstate it in the defunct, to pass as part of his inheritance?

It is true, the law, or rather the decisions of the Judges, have, on account of the intimate connection the apparent heir has with the estate, given him, step by step, certain privileges, viz. to continue in possession of the mansion-house, defend against intruders, and, lest the rents should perish in the tenants

No 19. hands, he may likewise uplift the rents, if the tenants are willing to pay. But these were introduced *præter juris regulas*; it being anomalous, that a person who has no right to the lands, should, without deriving right from any proprietor, be entitled to the rents and profits. To extend them farther, would be extremely dangerous; since departing from principles is productive of confusion, uncertainty, and arbitrary decisions. However far these privileges have gone, which were at first but sparingly indulged, there is no decision granting a full and absolute property to an apparent heir, in the rents unuplifted during his apparency. In the case of Oliphant against his Tenants, No 11. p. 5243., the Court at first refused to allow the apparent heir to uplift the rents, and only indulged it, lest the rents should perish, and upon the heir's finding caution to warrant the tenants at all hands. The case of Tarsappie, No 9. p. 5206. proceeded upon principles of equity and favour; and as it only found the mother entitled to her son the apparent heir's aliment out of the unuplifted rents, which, during her lifetime, she might have uplifted and applied to that purpose, it does not prove, that the heir's right to the rents was so complete as to transmit them to his representatives. The case of Macbrair in 1683, No 13. 5246., makes for Mr Hamilton; and the Court decided upon the same principles, in the cases, Ballantyne against Bonnar, No 14. p. 5246.; and Balgony against Hay, No 15. p. 5247. The two authors of the latest Institutes have given their opinion in the same way; Lord Bankton, B. 3. tit. 5. § 1.; and Erskine, B. 3. tit. 8. § 58. Lord Stair, indeed, seems to waver a little, upon account of the decision in the case of Tarsappie; but his opinion in the main is agreeable to the principles above laid down. See b. 2. tit. 3. § 16. *in fine*. Neither does the decision in the case of Houston of Johnston against Stewart Nicolson, establish a contrary doctrine; for the executor was there preferred, not entirely upon the general point of law, but upon specialties which occurred in that particular case. Mr Houston *pleaded*, That the *interests* were *in bonis* of Sir John Houston, not only as apparent heir in Lady Houston's obligation, but also as creditor in the obligation; neither was any service necessary to vest the right to them in the apparent heir; and the decision proceeded upon a complex view of the case.

Supposing the apparent heir to have a 'right of possession,' which entitles him to the rents, still this right can go no further than the possession itself, otherwise it would become a right of property. A *bona fide* possessor, if he loses possession of a subject, has no claim to the rents of it. In like manner, an apparent heir can only be entitled to such of the rents as he possesses and uplifts: For it is in vain to contend, that the right of possession devolves upon him *ipso jure*, and without his knowledge; since, at that rate, every heir must, without any act of his, necessarily incur the universal passive title of *pro hærede gestio*. Neither can any argument be drawn from the act 1695; for that correctory statute does not give any new right to an apparent heir three years in possession; it only makes the next heir liable *passive* for his onerous deeds; but the apparent heir's legal right in the estate is not thereby increased.

No 19.

"THE LORDS found, That Mr Hamilton, the heir, was preferable to Mrs Euphame Hamilton, the executrix of Miss Hamilton, the last apparent heir, to the rents falling due during the apparency, and remaining unuplifted."

Reporter, *Justice-Clerk.* For Mrs Euphame Hamilton, *Lockhart, Ferguson.*
For Dalziel, *And. Pringle.* Clerk, *Home.*

I. C. *Fac. Col. No 254. p. 465.*

*** The contrary was found after a hearing in presence, 24th July 1763, Lord Banff against Joass; See APPENDIX; See Ersk. B. 3. t. 8. § 58.—The case of Hamilton against Hamilton was then appealed, and the judgment of the Court of Session in that case reversed, April 8. 1767; the following declaration being made, that Mrs Euphame Hamilton, the executrix of Miss Hamilton, the last apparent heir, is preferable to Mr Archibald Hamilton the heir, to the rents falling due during the apparency, and remaining unuplifted. *See* APPENDIX. *Fol. Dic. v. 3. p. 258.*

1792. *June* 20. GEORGE SPALDING *against* REBECCA SPALDING and Others.

No 20.
The apparent heir of a person whose lands were sold judicially, transmits to his executors the interests arising from the reversion of the price during his apparency.

THE lands of Ashintully, in which David Spalding had been infeft, were judicially sold in 1766. As they afforded a considerable reversion, the creditors received what was due to them in virtue of warrants from the Court of Session, and without any decree of division.

Daniel Spalding, the only son of David, being fatuous, never made up titles to the reversion, though he received, by the authority of the Court, some small sums for his subsistence. After his death, in 1788, George Spalding expede a special service, and was infeft in the lands, as heir of David Spalding. On the other hand, Rebecca Spalding and others, as the nearest in kin to Daniel Spalding, expede a confirmation, for vesting in them the interests arising out of the reversion during his life.

For ascertaining the effect of these proceedings, an action of multiplepoinding was brought; when for George Spalding, the heir, it was

Pleaded; The right to the reversion of the price of lands sold judicially unquestionably belongs to the heir of the common debtor, ascertained in the usual form, by special service and infeftment; July 21. 1742, Stirling *contra* Cameron, *voce* SERVICE OF HEIRS. Nor can a distinction be made between one part of the reversion and another.

It is true, that in practice an apparent heir of lands, after the death of his ancestor, is authorised, until his titles are made up, to levy the rents; and it has been lately found, though after much difficulty, that upon his death, even without a service, he transmits to his executors those rents which he might have uplifted. But this privilege cannot be extended to such a case as the pre-