

S E C T. III.

Rights and powers of an apparent heir, as to removing tenants, uplifting rents, selling the predecessor's estate, &c.—To whom rents unlifted during apparenacy belong.

1628. February 29. ROSE *against* His TENANTS.

No 10.

AN apparent heir is neither served nor seised heir to his father divers years after his father's decease, and yet pursues the tenants for the duties since his father's decease, as if his seising should be drawn back to the time of his father's decease.—THE LORDS grant no action until he be seised.

Auchinleck, MS. p. 2.

1633. February 19. OLIPHANT and AUCHTERLONY *against* TENANTS.

No 11.

ONE Oliphant, and Auchterlony his tutor-testamentar for his interest, pursue the tenants of the lands of ———, to pay to the said minor, as apparent heir to his father, the mails and duties of his lands, wherein the LORDS found, that seeing this pursuit was moved by the pursuer only as apparent heir, he not being infeft in the lands, nor yet retoured heir to his father, and his father's sasine produced, nor yet it being *answered*, That these defenders had ever acknowledged the pursuer to be their master, by paying of mails and duties to him of before, therefore that they could not be convened in this pursuit by the apparent heir: And found this defence competent to the defenders, although they were only naked tenants, and had no right in their own persons to the saids lands. Thereafter, upon the 26th of February, the LORDS sustained this pursuit at the instance of the apparent heir, he finding caution to relieve the defenders, who alleged no right in their persons for retention of the farms, and to make the same furthcoming to all parties having interest, which was done the rather, least the tenants should become *non solvendo*.

The Lords refused to sustain action of mails and duties at the instance of an apparent heir not infeft, though the tenant pretended no right; but upon the pursuer offering to find caution to make the rents furthcoming, they sustained the pursuit.

Clerk, *Hay*.

Fol. Dic. v. i. p. 358. Durie, p. 675.

* * * Auchinleck reports the same case :

AN apparent heir cannot pursue for the mails and duties of his father's lands till he be retoured.

Auchinleck, MS. p. 6.

No 11.

* * This case is also reported by Spottiswood :

IN an action of mails and duties pursued by John Oliphant against his tenants, as heir apparent to his father ; *alleged*, No process at the pursuer's instance as apparent heir, unless he were seised. *Answered*, It is sufficient against the tenants who pretend no right. This allegiance found relevant.

Next the pursuer offered to find caution to make the same farms furthcoming to all parties having interest, which should be granted against the tenants who may become *non solvendo*. This offer of caution was sustained.

Spottiswood, (HEIR.) p. 142.

1664. February 13.

WEIR against DRUMMOND.

No 12.

The tenants of a *hereditas jacens* may safely pay to the apparent heir, though he cannot pursue them, unless they have acknowledged him by payment. The bygone rents may be arrested for the debts of the apparent heir, and the decree of furthcoming will be effectual, though he die without entering.

IN a process betwixt Mr William Weir, servitor to the King's Advocate, and Mr Henry Drummond of Balloch and his tenants, against which tenants Mr William had obtained a decret to make their duties furthcoming, as arrested in their hands, and belonging to the deceast ——— Drummond of Balloch, who was cited ; it was *alleged* by Balloch, That the decret could not be respected, being for duties not belonging to the defunct, seeing he was never infest as heir to his father, and consequently the duties of all years since his father's death do appertain to him. It was *answered*, That the defunct being apparent heir, as the tenants might safely pay their duties to him, though he were not infest ; so his creditor might lawfully arrest the duties so payable ; for albeit an apparent heir cannot pursue an action of mails and duties, yet the tenant may lawfully pay him ; yea, and if the tenant hath once acknowledged him by payment, he may pursue without an infestment ; nor is there any other *habilis modus* for the apparent heir's creditors to affect the by-run duties, but by arrestment ; for neither comprising nor adjudication, which are the ground of infestments, can carry duties owing before they be deduced ; and consequently the only proper way to affect the same is by arrestment, whether it be for the apparent heir's debt, or for the debt of the defunct to whom he is apparent heir ; whereupon a charge to enter heir being raised, and an arrestment thereupon used, that arrestment, after sentence, (the apparent heir getting condemnator, or absolvitor upon a renunciation to be heir), will be a ground to make the duties furthcoming.

Which the LORDS found accordingly.

Fol. Dic. v. 1. p. 358. Gilmour, No 94. p. 72.