

1681. July 7.

M'BRAIR *against* ROME.

THERE being an apprising of the lands of Netherwood deduced against M'Brair, now of Netherwood, as lawfully charged to enter heir to his grandsir, goodsir, and father; he raiseth reduction, on this reason, that the apprising being on sums due by the grandsir or goodsir to Sir Robert Crichton, the same was extinguished in whole or in part by compensation; in so far as, Sir Robert having taken a tack from the pursuer's father of the lands of Netherwood, he was yet resting the tack-duty, which is a liquid sum, which infers compensation against his assignee, and therefore did deduce so much of the grandfather's debt; as for the father, he was never infeft, and the apprising being led against the pursuer when minor, he doth now renounce to be heir to his father, and is served heir to his goodsir, and thereby hath right to the rent due by Sir Robert as remaining in *hereditate jacente*; and the pursuer being now infeft as heir to his goodsir, hath right to all the bygone rents unpaid, as well in his father's time who was never infeft, as since his father's death; for his infeftment *fictione juris* is drawn back as if it had been the next day after his grandfather's death. It was *answered*, That there could be no compensation on Sir Robert's tack for the years of the pursuer's father's life, nor could the same be compensated with his grandfather's debt; because Sir Robert was never debtor to his grandfather, or any representing him, nor were these rents in *hereditate jacente*, nor could the pursuer's service and infeftment be drawn back to his goodsir's death; because he could not possibly have been served then, his father being alive, and therefore the rents unuplifted in his father's time belong to his father's executors, and would fall in his father's escheat, though he was never infeft, mails and duties being a mere possessory right, which heirs apparent may recover, though they be not entered; so that there is here not only a formality of law, but a point of material justice, that creditors who contract with apparent heirs possessing their fathers estates, who were never accustomed to look registers to see if they were infeft, seeing they are cut off from access to the fee, should have access to the bygone mails and duties, which are moveable and belong to the heir apparent.

THE LORDS found, that the rents unpaid during the life of the apparent heir belong to his executors, and could not compensate his grandfather's debt, unless the pursuer confirm himself executor to these rests, in which case the Lords allowed recompensation to Sir Robert, for any debt due to Sir Robert by the pursuer's father, before Sir Robert was denuded of the bonds on which the apprising was led.

Fol. Dic. v. 1. p. 358. Stair, v. 2. p. 887.

No 13.

Rents unuplifted by the apparent heir found to belong to his executors, and not to remain in *hereditate jacente*. This judgment was afterwards altered. See the reports of the case by Fountainhall, and Harcarst, *infra*.

No 13.

* * * Fountainhall reports the same case :

1683. November 20.—M^r Brair of Netherwood *contra* Rome, was advised ; but not reported till next day. ‘ THE LORDS found, though the *bona* were *in hæreditate jacente*, yet the apparent heir’s intromission with the mails and duties behoved to be ascribed in payment *primo loco* of his goodsir’s debt, (who stood last vest, and seised in the lands,) and that he could not first ascribe it to pay his father’s debts who was never infest ; and that the creditors of him who was infest ought to be in a better case than those of him who was never infest ; but if there was any superplus, then they allowed it to be imputed in the next place for payment of his own or his father’s debts.’ But by this they extinguished a comprising led for his father’s debt, by which he sought to bruik the lands.

Fountainhall, v. I. p. 243.

* * * This case is also reported by Harcarse :

IN the reduction of an act, wherein the LORDS found, that unuplifted mails and duties were *in bonis* of the apparent heir, and might be confirmed in his testament, upon a review, they were very clear to alter the interlocutor, and to find, ‘ that all unuplifted mails and duties were *in hæreditate jacente*, and belonged to the heir served to the person dying last vest and seised in the lands.’ But the new debate proceeding *super iisdem deductis*, they were loth to rescind expressly that interlocutor, and contented themselves to explain and clog it thus, That in the competition of debts due by the defunct last infest, and the debts of the apparent heir, the mails and duties should be liable, *primo loco*, to satisfy the former ; which explanation served the pursuer’s turn for extinguishing an apprising led upon debts by the defunct last infest.

Harcarse, (HEIR.) No 44. p. 10.

1685. *March* LAIRD OF WEDDERBURN *against* LONGFORMACUS.

No 14.
Found t^{ia}.
an apparent
heir might
pursue for
teind-duties,
of which his
predecessor
died in pos-
session.

THE LORDS found an apparent heir might pursue for teind duties, whereof his predecessor died in possession, seeing the decret will secure the payment. But this seems to be an erroneous decision, and a consequence of the decisions finding current mails and duties to belong to apparent heirs, and to fall under their testaments ; which decisions are irregular, as Castlehill observes, Pract. tit. AIRES, No 81. For though tenants paying their rents to an apparent, are excused, the apparent heir, not being *nomen juris*, should have nothing but his aliment, and cannot transmit any rents to his executors ; and in a competition, the next heir will be preferred to the former’s creditors, not being creditors for