N. B. It is said this judgment was founded on this, that Dougal Campbell was fiar of the estate. See No 16. p. 5213. No 17.

Fol. Dic. v. 3. p. 257. C. Home, No 249. p. 401.

1755. *June* 27.

JOHN STEUART-NICOLSON of Carnock *against* GEORGE HOUSTOUN of Johnston.

No 18.
The executor of an apparent heir was preferred to the next heir entering, as to the annualrents of an heritable sum, which fell due during the apparency.

DAME ELEANOR NICOLSON executed an entail of her estate in favour of Margaret Schaw, her only daughter, and the heirs-male of her body; whom failing, &c.; and with respect to the produce of certain funds, which afterwards were made effectual to the extent of about L. 2000 Sterling, taking her daughter bound to purchase land with the same, and to annex the land purchased to the tailzied estate; or to lay out the same upon sufficient security till a purchase of land should offer. Margaret Schaw, after her succession, lent the sum to Lord Napier upon an heritable bond; and the money being returned to her, she was forced to lend it out upon personal security. Margaret Schaw, afterwards Lady Houstoun, died 31st January 1750, leaving a son, Sir John Houston, her heir of entail in her land estate; and in that quality also heir to the said sum of L. 2000 destinated for augmenting the entailed estate. Sir John survived his mother not above a year and a half; and having bequeathed all his moveables to George Houstoun of Johnston, he died without making up titles to the destinated sum. This produced a question betwixt Johnston, the executor, and John Steuart-Nicolson the heir of entail, with respect to the interest of the destinated sum, arising betwixt the death of Lady Houstoun and that of her son Sir John.

It was *pleaded* for the heir of entail, That his predecessor Sir John having died in apparency, had no title either to rents or annualrents arising during his possession; that however the tenants or debtors paying to an apparent heir may be safe upon their *bona fides*, yet as to rents or interest unuplifted, these are not *in hæreditate jacente mobilium* of the apparent heir, but remain as part of the stock not separated from it, and of course accrue to the next heir who makes up a title to the stock.

It was premised for the executor of the apparent heir, That this entailed money, though lying out upon moveable bonds, must, with respect to the present question be considered as actually laid out in terms of the destination; upon this principle, that in dividing the defunct's estate betwixt the heir and executor, chances are not regarded, but every thing is supposed to be done that ought to have been done. Supposing now the entailed money to be lying upon real security, as it once was in the hands of Lord Napier, it was urged for the executor, that by the analogy of law, the interest arising during Sir

No 18. John's apparency, must be regulated in the same manner with the arrears of land rent.

This led to the general point; upon which it was observed, that rents arising during the apparency of the vassal, do not in strict law belong to the heir apparent, but to the superior as non-entry duties; and therefore can neither descend to the next heir nor to the executor of the apparent heir. The apparent heir indeed has an interest in the rents by favour of the law. In competing with the superior before declarator of non-entry for these rents, he is protected from being further liable than for the retour duties, these by a favourable construction being supposed the full rents. This is a legal transaction betwixt the superior and the heir apparent of his vassal, which of course must entitle the latter to hold for his own use, the benefit he makes by this transaction. In this view it makes no difference whether the whole rents be levied yea or no. The whole belongs to the superior in strict law; and the legal transaction transfers from the superior to the heir apparent, the rents so far as they exceed the retour duties.

2*do*, It is admitted, that an heir apparent has an action of mails and duties against the tenants, and by that action can compel them to pay the rents to him. If so, the right which the heir apparent in possession has to the rents, is not in any circumstance inferior to that of an heir entered; for what has the latter more than a process for payment? In particular, the rents unuplifted must belong to the former as well as to the latter, because in every question betwixt the heir and executor, every sum is supposed to be uplifted which ought to have been paid; and it would be absurd that a delay of payment, perhaps after a process, should have the effect to diminish the executor's claim.

Suppose an apparent heir assigns his rents to his creditor, and dies before the rents are levied by the creditor; what if the apparent heir die after he has commenced process against his tenants, or after obtaining decreet?

Does not the Court every day give factories to uplift the rents of apparent heirs who are infants or abroad? This would be rash, if such a step were to affect the interests of the heir and executor.

The Lords found, That the bygone interest of the entailed money from the death of Lady Houstoun to the death of Sir John her son, belongs to Sir John's executors; and therefore preferred George Houstoun of Johnston to John Steuart-Nicolson.

Fol. Dic. v. 3. *p.* 257. *Sel. Dec. No* 90. *p.* 119.

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

In the 1711, Lady Schaw executed a strict entail of her estate of Carnock, in favour of her daughter Lady Houston as institute, and a certain series of heirs.

Of the same date, she assigned over to her daughter certain annuities owing by her son Sir John Schaw, and took an obligation from her, that these annui-

ties should be employed in purchasing of lands, or laid out upon good security to the same heirs, and under the same provisions, as the estate of Carnock. No 18.

In the 1740, Lady Houston recovered by a law-suit L. 2026 of these annuities, and lent them to Lord Napier upon his heritable bond, payable to herself, her heirs and assignees; but this sum being afterwards paid up by Lord Napier, it was lent out to different hands, upon personal bonds taken to Lady Houston, her heirs and assignees.

Lady Houston executed a general disposition of all her effects to her daughter Mrs Cunningham of Enterkin, burdening her with payment of her debts, and with employing the L. 2026, in terms of the above obligation and entail.

Lady Houston, in her son Sir John Houston's contract of marriage, disponed to him the estate of Carnock, and died in January 1750. Sir John lived till July 1751; but never made any demands upon Mrs Cunningham of Enterkin for the L. 2026, either principal or interests, nor made up any title to them. Upon his death a competition arose between Houston of Johnstone his executor nominate, and the heir of entail of Carnock, concerning the interests of that sum, which had become due during Sir John's apparency; the heir contending, that they were *in hæreditate jacente* of the Lady Houston, and now carried by his general service to her; and the executor, that Sir John had the right to these interests; which right is now transmitted to him.

Pleaded for the heir; Sir John died certainly in the state of apparency with regard to this money. A service was necessary to vest it in him. Lady Houston was first fiar and institute, and the next heir could not take but by a service to her. By bare existence they could not come into her right, without making up a title to show that they were the heirs called by the destination; the foreign axiom, *mortuus sasit vivum*, has no place in the law of Scotland. Had the money remained with Lord Napier upon heritable security, or if it had been employed in purchasing land in terms of the entail, it could not be vested in Sir John without a service; and its being upon personal security will make no difference.

The rents of lands, and the interests of bonds unpaid during the life of an apparent heir, do not go to his executors. A feudal right cannot be established without infeftment, and when once established, it cannot be transmitted but by particular forms. The heir neglecting these forms, and dying in a state of apparency, is no more regarded in questions concerning the estate than if he never had existed. But the heir complying with these forms, and making up his title by service, connects with the predecessor last vested and seised, and his infeftment is drawn back *fictione juris* to that predecessor's death, and carries all right which was in him.

Upon this principle it is, that an adjudication *contra hæreditatem jacentem* has been found to carry the rents which fell due, during the time of an intermediate apparent heir. And likewise, that adjudications upon a special charge do carry bygones from the death of the predecessor last infeft, 13th February 1740, Dooley against Dickson, in the Appendix to the title ADJUDI-

No 18. CATION. If these rents go to the executors of the apparent heir, they could not be carried by these adjudications; the creditor adjudger must pursue the executor for them, though the apparent heir neither represented the debtor, nor was liable in the debt; and the adjudger would be liable to repeat these rents to any person who shall confirm executor to the apparent heir. But such rents are carried by these adjudications, and must likewise be carried by a service, which has been found to be equal to an adjudication.

As an apparent heir is considered in law to have no connection with the estate, any privileges indulged to him with regard to that estate are *invita jurisprudentia*; the progress of the law in admitting such privileges may be seen in the Dict., *voce* HEIR APPARENT. So far as he possesses and uplifts the profits, he cannot be challenged; but there the law stops; the rents unuplifted do not transmit to his executors, because his privilege of possession cannot be transferred to them. In the same manner as in heirship moveables, possession is a complete title without service; but if the heir die without attaining possession, they do not belong to his executor, but pass to the next heir. And, in like manner, possession is a complete title in other moveables possessed by nearest of kin, without confirmation; but, if they have not possessed, they do not transmit to their executors.

These principles have been established by repeated decisions, observed in the Dict. *voce* HEIR APPARENT, particularly in the case of M'Brair, No 13. p. 5245.; and by the opinion of our best lawyers, *vide* Stair, B. 2. tit. 3. § 16.; Bankton, B. 3. tit. 5. § 1.; and Ersk. B. 3. tit. 8. § 58. And as these decisions and opinions have been universally understood, and men have accommodated their settlements to them, it becomes highly dangerous to deviate from them, even though they were erroneous.

Pleaded for the executor; There was no *feudum pecuniæ* here constituted, to which Sir John could make up titles by service. He was directly creditor to Lady Houston by her obligation granted to her mother; and after her death he was creditor to her representatives. He could have pursued upon that obligation, without producing any service, which is never necessary *ad factum demonstrandum*, and where no subject is to be carried by it. The case is similar to the obligation in a contract of marriage to secure a sum to the heirs of the marriage. If the obligation is implemented, the heirs must take by service; but if the sum is not secured in terms of the obligation, the children are creditors, and need no service, 3d February 1732, Campbell *contra* Duncan, *voce* PROVISION TO HEIRS AND CHILDREN; 16th February 1737, Keith *contra* Coutts*. Here, if a service was necessary, it was supplied by the disposition of the estate of Carnock to him.

But allowing that a service was necessary, and that Sir John died in a state of apparency, it was still contended that the interests in question belonged to his executor. The law has given to apparent heirs many important rights and privileges. The most important of all these is the interest he has in the rents

* Examine General List of Names.

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.