pearance was made for Scotscraig's heir, who was donatar to the old Earl of Marr's escheat and liferent, and concurred.—The defender *answered*, That the concourse could not be effectual, because their bygone feu-duties being moveable, belonged to Scotscraig's executor, and not to his heir; and though the concurrer was both heir and executor, yet these bygones belonging to Scotscraig as donatar, being for years wherein Scotscraig lived, they are moveable, and ought to have been contained in the inventory of his testament, as they are not.—It was *answered*, That a liferent escheat having *tractum futuri temporis*, belongs not to the executor, even as to the bygones, before the donatar's death, unless they had been liquid and established in his life; but the gift, and all following thereon, belongs to his heir. N o 19.

THE LORDS found, That the bygones of the liferent preceding the donatar's death, did belong to the executor, albeit in his life he had obtained no sentence therefor.

Stair, v. 1. *p.* 709.

1673. *July* 11.

FAA *against* The LORD BALMERINO and the LAIRD of POWRIE.

No 20.
Found, that bygone feu-duties belong to the executor of the defunct's superior.

THE Lord Lindsay having acquired from the Lord Speinzie the barony of ———, and having gifted the non-entry of the vassals to Robert Faa, he pursues declarator of non-entry against the Lord Balmerino and the Laird of Powrie, two of the vassals, who *alleged*, 1*mo*, That the non-entry duties cannot be craved further than forty years before intenting of the cause.

THE LORDS restricted the process to the forty years.

The defenders further *alleged*, That the pursuer had no interest to pursue non-entry, as to the years when the superiority remained in the person of the Lord of Speinzie, because the casualities of superiority preceding Speinzie's disposition were not disponed; and though they were, yet the Lord Speinzie could have no right thereto, as to the years which had run in his father's life, which would belong to the deceast Lord Speinzie's executors, and not to this Lord as heir. It was *answered* for the pursuer, That his interest is sufficient; for it is an uncontrovertible maxim in our law, that where a barony or tenement is sold, and is disponed, that disposition carries the superiority of all the vassals; which superiority doth imply and include all casualities of the superiority; and albeit they be not exprest, and that not only for the obventions thereof after the disposition, but for all time preceding, in so far as the same hath not been separated from the superiority, by gifts or assignations, before the disposition; and as to bygones of non-entry, or any other casuality which required declarator, so long as the same are not declared, they remain inseparate from the superiority, and do never belong to the executors of the superior, but only to his heir; for the superior's right doth include his *directum dominium*, whereby the lands be-

No 20. long to him, and the vassal hath only *dominium utile;* by which *directum dominium* the superior hath the benefit of the feu-duties and blench-duties, which are not casualities but fruits, and do require no declarator, the bygones whereof belong to the superiors executors: In like manner, the vassal being dead during the minority of his heir, the superior possesses the lands by the ward, without declarator, *ex directo dominio*, and therefore the bygone ward-duties before his death belong to his executors. But as to those benefits of the superiority, which proceed not *ex dominio directo*, but do arise out of the property of the vassal, by such casualties as give no immediate access to the vassal's fee, until the same be declared, these remain with the superiority as parts thereof, as *jura inseparata;* and the obventions or profits arising thereby, of whatsoever time, are carried therewith, unless they be separated from the superiority by a gift in favours of a donatar, or otherways be consolidated with the *directum dominium* of the superiority by a declarator; in which case they are no more as obventions of the casuality, but as the fruits, and the superior hath *plenum jus*, as *dominus fundi*, to set and raise, and the possessors become his tenants; but such casualities as require declarator, before declarator remain as parts of the superiority, such as the marriage of the vassal's heir, which requires declarator, and though it cannot become as a fruit of the superiority, yet by declarator it becomes a liquid debt, modified to a special sum, and so is separated from the superiority, and innovated by the sentence from its former nature, and so would fall to the superior's executors. In like manner, the casualities of non-entry, liferent escheat, recognition, &c. which do require declarator, they remain as involved in the superiority, and are carried therewith until they be separated by the superior's gift or declarator, which hath been the common opinion and practice of this kingdom in all time past; for it cannot be shewn that ever an executor did confirm the bygones of any casualty which was not declared and redacted in a liquid sum; and if it were otherways, all the securities of the people, which are settled by charters, containing *novodamus*, expressing all the casualties of superiority, and renouncing the same, would be unhinged, and might still be quarrelled by the executors of the superior, as to all obventions that might be due for years before his death. 2*do*, Non-entry and most of the casualties of superiority do proceed upon the delinquency of the vassal lying out unentered when he is capable, falling in rebellion, or doing deeds of ingratitude incurring recognition; and it is in the option of the superior to quarrel, or not quarrel, these delinquencies, which none can do but his heir or assignee, who is his donatar, or singular successor, but an executor cannot; for, in the case of deforcement, or contravention of lawborrows, the party's heir can only insist, and not his executor; but, if the same were past into a sentence, they become a liquid debt befalling to the executor; so it is in these feudal casualties which are penal, and ariseth upon the fault of the vassal. It was *replied* for the defenders, That *declaratoria juris nihil juris tribuit sed declarat*, so that the obventions of the casualties of superiority, if they do belong to the supe-

rior's executors, after they are declared, they did belong to the executors, before they were declared; and there is a great difference betwixt a casuality and the bygone profits thereof; for the casuality may still remain with the superior's heir, but the bygone profits belong to his executor; and, to show the difference, it is evident that prescription of the yearly profits will run by the course of 40 years from every several year, so that every annual prestation is a several right; as, in this case, the bygone non-entry duties for years before the forty last years are prescribed, and yet the non-entry remains: And as to the common opinion, it is of no moment, for so the common opinion in clauses of absolute warrandice was, that it imported the solvency of the debtor, and yet the Lords found it a common error, contrary to law; neither doth it import that such rights have not been confirmed, which flowed from the error and mistake of parties, but it cannot be alleged that ever there was a decision as to this point, much less a judicial consuetude; so that the case being new and undetermined, the Lords should proceed according to equity and expedience, and to the analogy of our law in other cases, and should consider that heirs carry the whole right of their predecessors by our law, and little falls to their other children, so that the executry should not be straitened; and, in like manner, the *jus mariti* of a husband, which is most favourable, will not carry the casualties of the wife's superiority if they be not declared in her life; neither will they fall under escheat, and so the King is prejudged; and as to the inconvenience to clauses of *novodamus*, that holds if the bygones belong to executors, when there is declarator; neither doth the declarator of a judge import more than the declarator of law, by which ward is declared to belong to the superior, without sentence; and it is acknowledged that the bygones of ward belong to the superior's executors. No 20.

THE LORDS found, that the profits of all casualities of superiorities, which require declarator, were carried, and implied in the superiority, and belonged only to the superior's heir or singular successor, if the same was not separated either by a gift to a donatar, or consolidated and liquidated by a decreet of declarator; and therefore sustained the pursuer's interest, not only for the non-entry duties after his disposition, but for all preceding, both in Speinzie's own time and his father's, for the space of forty years before the citation.

Fol. Dic. v. 1. p. 366. Stair, v. 2. p. 208.

*** Gosford reports the same case:

IN this action, wherein there was an interlocutor the 12th day of June 1673, (*voce* UNION.) the debate was this day again resumed as to the bygone non-entry duties of lands, for which there was no decreet obtained in the superior's lifetime, if it did fall to his heirs or executors; and it was farther *alleged* for the heirs, That they did only contend, that where there was never any declarator of a non-entry obtained in the superior's lifetime, finding the vassal's lands to be in non-entry,

No 20. then the right did remain entire a real right of superiority, and so could not fall under executry; whereas, after declarator only, it was *jus ad fructus percipiendos*; and then the right being found good in law as to all years after decreet, during the superior's lifetime, they became moveable and fall under executry; likeas this hath been the constant opinion of lawyers and practice, never any having offered to confirm himself executor to non-entry duties before declarator, seeing they are looked upon as penal actions, and given to superiors by law for neglect or contempt, and therefore ought to be regulated by such, viz. deforcements or contraventions, which before decreet obtained, liquidating the same, can never be reputed to be *in bonis defuncti*, or to fall to an executor; as likeways, where the avail of the marriage in ward holding, or liferent escheats, fall to the superior, there must be a decreet declaring the same to have fallen, before they be *in bonis defuncti*, or can be confirmed; and the said decreet not being obtained, the heir only can pursue for the same. It was *answered*, That, notwithstanding of these reasons as to all bygone non-entry duties, during the lifetime of the superior, they ought to belong to the superiors, and may be confirmed, because non-entry duties are liquidated from the first beginning of the non-entry to be the retoured duty contained in the charter, which is a certain sum of money, in place of the duties of the lands; and the declarator is only made use of, that, after decreet, the full duties of the lands may belong to the superior ay and while the vassal be entered; so that all retoured duties being certain and liquidated, and payable *annuatim*, as the duties of the lands are, by the analogy of our law, being of their own nature moveable sums, ought to fall to executors, and under testament, as heritable rights by service and retours fall to the heirs, against which we have neither law, nor reason, nor practice; and undoubtedly, if the younger children, beside the heir, should offer to give up the same in inventory to be confirmed, the commissaries could not refuse the same; and if the heir of the superior, after his death, should pursue a declarator of non-entry during his predecessor's lifetime, the effect of it would be, to hear and see it found, that, since the beginning of the non-entry, there was a certain sum of money yearly due to the superior during his lifetime, for declarators *nihil novi juris tribuunt sed prius debitum declarant*; and that debt being liquid, and a yearly duty in the person of the predecessor, ought in law to belong to his executors as being *in bonis defuncti*, and the heir could only be decerned to have right after his father's death: Neither is this right of the nature of a penal action, which cannot take effect before sentence, or is of a like nature with the avail of the marriage, which is never liquid before a sentence; but the true reason of non-entries is from the feudal law, whereby, the heir of the vassal not entering, the superior is considered as proprietor of the lands, and is not denuded, and so hath right to the duties thereof, either as retoured or natural; and as by the death of a vassal of ward lands without any declarator, he may remove tenants or possess, so, where the lands hold blench, upon that same principle, he hath right to the retoured duties, as undoubtedly, without decla-

rator, the yearly duties of ward lands will fall to the superior's executors; so, upon that same reason and principle, the retoured duties ought to have belonged to them; and albeit the superior's right is *jus reale*, as the vassal's right of property is, yet the effects of both being to give them right to yearly duties, the same are moveable as to all bygone years, and fall under the testament.—THE LORDS did find, after much reasoning upon this debate, being a new case, never decided, and there being no declarator, the non-entry duties did belong to the heir, or a singular successor, and not to the executor; albeit I was of a contrary judgment, conceiving the reasons for the executor to be stronger and better founded, but the case was very disputable on both sides. No 20.

Gosford, MS. No 623. *p.* 360.

1676. *February* 17. WAUGH *against* JAMIESON.

No 21.
Found in conformity with Keir against Nicolson, No 19. p. 5448. See Sect. 18. *h. t.*

DR BONAR, being to go out of the country, did dispone a right of lands, and of an annualrent, to Mr John Smith, his near relation, upon a back bond granted by the said Mr John, bearing that the said right was granted partly in trust, and partly for surety to the said Mr John for sums due for the time to him by Bonar, and of such sums as Smith should advance to Bonar, or his creditors; and that the said right should be redeemable by Bonar or his sister, if she should survive him, by payment of the foresaid sums.

Thereafter the Doctor did grant a bond of 5000 merks to the said Mr John Smith, bearing no relation as to the said surety; and bearing, as to the conception, a simple moveable bond to the said Mr John his heirs and executors. And, after the said Mr John Smith's decease, there being a competition betwixt Dr Jamieson his heir, and the executor, as to the said sum of 5000 merks, and the question being, whether it should be thought to be heritable, in respect of the said surety, or moveable, in respect of the conception of the said bond,

THE LORDS did consider the case as of great moment, as to the consequence and interest of the people; and upon debate at the bar *in præsentia*, and among themselves, they came to these resolutions, viz. that it was consistent that a sum should be moveable, and yet that it should be secured by an heritable surety, as in the case of bygone annualrents due upon infeftments of annualrent, and of bygone feu-duties or taxations, the same being unquestionably moveable *ex sua natura*; and yet there being a real surety for the same, and a real action for poinding the ground even competent to executors; and likeways in the case of wadsets loosed by requisition, and bearing a provision, that, notwithstanding of requisition, the real right should stand unprejudged until payment; in which case the sum would be moveable, though still secured by infeftment. 2*do*, That, as to these qualities of moveable or heritable, in relation to the interest of succession, and question betwixt heirs and executors, the design of the creditor *et ani-*