SECT. III.

Bygone Feu-duties.

1671. *January* 24. KEIRIE *against* JOHN NICOLSON of Tillicoultrie.

No 19.
Bygone feu-duties belong to the executor of the defunct's superior.

JOHN KEIRIE pursuing the tenants of Tillicoultrie, as assignee by the deceased Earl of Marr, to the feu-duties payable out of their lands for several years preceding 1649, it was *alleged* for the defender, That the duties of these years did belong to the Earl of Marr's father, whose liferent was reserved in his son's right, who was cedent to the pursuer; and he being year and day at the horn, his liferent escheat did fall to the king, and his donatar the Laird of Scotscraig. —It was *answered*, That the pursuer had right by progress from Scotscraig's heir and executor, and did concur for Arther Forbes of Skellitower, who derived right from them.—It was *alleged*, That the gift of liferent, in so far as it might be extended to bygone years before the rebel's decease, could only belong to Scotscraig's executors, who were never confirmed, but only decerned executors.—It was *replied*, That the heir had good right to dispone the said gift, seeing never any thing followed thereupon but a general declarator; and gifts of that nature having *tractum futuri temporis*, unless the donatar had obtained a special declarator in his own time, bearing *quid*, *quantum*, *et quale*, did belong to the heir, and not to the executor; for which, a practique was cited in November 1609, the Earl of Cassillis against the Laird of Glainnes *, where a gift of ward was found to belong to the heir, and not to the executor.——THE LORDS, notwithstanding, did find that the executors of Scotscraig had right to the whole duties libelled, because they were all due before Scotscraig the donatar's death; and that the Earl of Marr, the liferenter, did survive him; and that gifts of escheat, and other casualties, as to all years after the donatar's decease, did belong to his heirs; but as to bygones due before his decease, they did belong to his executor; and therefore decerned in favour of the pursuer, as having right from the executor, he confirming before sentence.

Fol. Dic. v. 1. *p.* 366. *Gosford, MS. No* 318. *p.* 141.

1671. *January* 28. *** Stair reports the same case:

JOHN KEIR, as assignee by the Earl of Marr to some feu-duties, pursues a poinding of the ground against Nicolson of Tillicultrie, who *alleged* no process, because the Earl of Marr his cedent had no right to these feu-duties, which were due in his father's lifetime, whose liferent was reserved; whereupon com-

* Examine General List of Names.

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-