No 19.

"THE LORDS found, That Mr Hamilton, the heir, was preferable to Mrs Euphame Hamilton, the executrix of Miss Hamilton, the last apparent heir, to the rents falling due during the apparency, and remaining unuplifted."

Reporter, *Justice-Clerk.* For Mrs Euphame Hamilton, *Lockhart, Ferguson.*
For Dalziel, *And. Pringle.* Clerk, *Home.*

I. C. *Fac. Col. No 254. p. 465.*

*** The contrary was found after a hearing in presence, 24th July 1763, Lord Banff against Joass; See APPENDIX; See Ersk. B. 3. t. 8. § 58.—The case of Hamilton against Hamilton was then appealed, and the judgment of the Court of Session in that case reversed, April 8. 1767; the following declaration being made, that Mrs Euphame Hamilton, the executrix of Miss Hamilton, the last apparent heir, is preferable to Mr Archibald Hamilton the heir, to the rents falling due during the apparency, and remaining unuplifted. *See* APPENDIX. *Fol. Dic. v. 3. p. 258.*

1792. *June* 20. GEORGE SPALDING *against* REBECCA SPALDING and Others.

No 20.
The apparent heir of a person whose lands were sold judicially, transmits to his executors the interests arising from the reversion of the price during his apparency.

THE lands of Ashintully, in which David Spalding had been infeft, were judicially sold in 1766. As they afforded a considerable reversion, the creditors received what was due to them in virtue of warrants from the Court of Session, and without any decree of division.

Daniel Spalding, the only son of David, being fatuous, never made up titles to the reversion, though he received, by the authority of the Court, some small sums for his subsistence. After his death, in 1788, George Spalding expede a special service, and was infeft in the lands, as heir of David Spalding. On the other hand, Rebecca Spalding and others, as the nearest in kin to Daniel Spalding, expede a confirmation, for vesting in them the interests arising out of the reversion during his life.

For ascertaining the effect of these proceedings, an action of multiplepoinding was brought; when for George Spalding, the heir, it was

Pleaded; The right to the reversion of the price of lands sold judicially unquestionably belongs to the heir of the common debtor, ascertained in the usual form, by special service and infeftment; July 21. 1742, Stirling *contra* Cameron, *voce* SERVICE OF HEIRS. Nor can a distinction be made between one part of the reversion and another.

It is true, that in practice an apparent heir of lands, after the death of his ancestor, is authorised, until his titles are made up, to levy the rents; and it has been lately found, though after much difficulty, that upon his death, even without a service, he transmits to his executors those rents which he might have uplifted. But this privilege cannot be extended to such a case as the pre-

No 20. sent, where the apparent heir had no right to possess, and could not, until a final scheme of division was made out, lay claim to any thing.

On this principle it was found, that an arrestment was an inhabile diligence for attaching any part of the price of lands sold judicially, 30th November 1779, Bland Gardiner, No 59. p. 730. The decision in the case of Carnock, No 18. p. 5249., respecting the issues of an heritable bond during an apparency, is not contrary to it, the person in that case who was apparent heir to the original creditor, being also entitled to succeed as a *nominatim* substitute. In the subsequent case of Hamilton of Dalziel, the determination seems to have been viewed in that light, December 5. 1760, No 19. p. 5253.

Answered; If the common debtor had, till his death, continued in the unrestrained right of the lands, his son, though unentered, would have transmitted to his executors those rents which had accrued during his apparency; but the price of lands, after a judicial sale, is to be considered as a *surrogatum* for the lands; and the rights of the different parties laying claim to the succession, ought, in both cases, to be regulated in the same manner. The sale is truly incomplete till the price is paid; and the case here is to be viewed in the same light as if a part only of the lands had been sold, where undoubtedly, in a competition for the rents of the lands unsold, the executors of the apparent heir would be preferred to the heir of the common debtor.

It is of no consequence in the ordinary case, that the apparent heir has not, during his life, entered into the possession of the lands which belonged to his predecessor, and it ought to be as unimportant here. The want of a decree of division seems as little to affect the present question. Such a decree gives no new right; it is a mode only of ascertaining the situation of the parties; and where there is a surplus, it is seldom or never used, it being sufficient to shew, by discharges from the creditors, that the debts have been fully paid. Indeed it is impossible to distinguish the present case from that of an heritable bond, where, although the debt itself must, as an heritable subject, descend to the heir served and infeft, the arrears have been found to belong to the executors of the apparent heir dying unentered; 24th July 1765, Lord Banff *contra* Joass, (See Note, p. 5257.) April 1767, Hamilton *contra* Hamilton of Dalziel, (See the same Note.)

THE LORD ORDINARY'S interlocutor was in these terms:

"Finds, that George Spalding, the heir of David Spalding, who was the last person of this family infeft in the estate of Ashintully, is preferable to the surplus sum, and interest arising from the sale of the said estate in 1766, after payment of the whole creditors; and prefers the said George Spalding accordingly," &c.

But after advising a reclaiming petition, with answers, the Court pronounced this interlocutor:

THE LORDS find, "That the petitioners, the executors and next of kin confirmed to Daniel Spalding, the apparent heir, have right to the interests of the reversion of the price that fell due, and were not uplifted during his life." No 20.

Ordinary, *Lord Ankerville.* For George Spalding, *Solicitor-General, Mat. Ross.*
For Rebecca Spalding, *Rolland.* Clerk, *Menzies.*

C. *Fol. Dic. v. 3. p. 258. Fac. Col. No 218. p. 457.*

SECT. IV.

Effect of the Apparent Heir's interference, and extent of his Interest in the Estate.

1674. *February* 24. CHALMERS *against* FARQUHARSON.

No 21.
Found that the apparent heir's taking right to an apprising within the legal, and possessing the lands apprised, did not infer a passive title.

JAMES CHALMERS, advocate, pursues Farquharson of Inerveray for payment of 600 merks, wherein he was cautioner, and distressed for his father, and insists upon this passive title, that the defender had taken right to an apprising led against his father, of lands whereof he was apparent heir, and that within the legal. It was *answered*, That this was no relevant condescendence; for there was nothing to impede an apparent heir more than any other, to take right to any apprising against his predecessor, within or after the legal; for thereby he was only singular successor; and albeit by the late act of Parliament, all apprisings acquired by apparent heirs are redeemable from them by creditors, for the sums they truly paid, yet that cannot be done in this but in a separate process.

THE LORDS found that the apparent heir's taking right to an apprising within the legal, and possessing the lands apprised, did not infer the passive title; but allowed the pursuer in this process to purge the apprising, by payment of the sums truly paid out by the apparent heir; but found him not liable personally for the value of the lands above these sums, as being thereby *lucratus*, in respect of the tenor of the statute, bearing only the apprising to be redeemable.

Stair, v. 2. p. 268.

1682. *February* 2. GORDON *against* FRENDRAUGHT.

No 22.
An apprising acquired for the behoof of

IN an action of declarator, pursued by Adam Gordon, as creditor to the deceased Viscount of Frendraught, this Viscount's grandfather, against this Vis-