1663. *February* 5. MR NINIAN HILL *against* MAXWEL.

No 43.
An annual payment as to terms after the debtor's death, found a burden on the heir, not the executor.

MR NINIAN HILL pursues Maxwel as heir to his father John Maxwel, for payment of a sum due to be paid to Maxwel's relict yearly after his death, and assigned to the pursuer. The defender *alleged* absolvitor, because the pursuer's cedent being executor herself to the defunct, was liable for this sum, *et intus habuit*. It was *answered* for the pursuer, That this being an annual payment after the defunct's death, it was proper for his heir to pay the same, not for his executor, and if his executor had paid it, he would get relief off the heir.

Which the LORDS found relevant.

Fol. Dic. v. 1. *p.* 368. *Stair, v.* 1. *p.* 171.

1705. *June* 13.

JANET and ISOBEL ROBERTSONS, Daughters and nearest of Kin to BAILLIE ROBERTSON in INVERNESS, *against* WILLIAM BAILLIE Commissary there.

No 44.
Payment of an annuity for years subsequent to the debtor's decease, made by his executors without distress, not sustained as an article of exoneration in the executor's accompts, as being an heritable debt, of which the heir was bound to relieve the executor.

JANET and Isobel Robertsons, as nearest of kin to Baillie Robertson their father, having pursued Commissary Baillie, who married their mother, as executor confirmed to the said Baillie Robertson, for their share of the inventory, the process resolved in a count and reckoning, wherein one of the articles of the Commissary's discharge was three years and a half's annuity of 400 merks, extending to 1400 paid to the defunct's mother, conform to his obligment.

It was *objected* against this article, That it could not be allowed, because the payment was made without distress, for terms subsequent to the defunct's decease, which were heritable *quoad* the debtor.

Answered, By law it is optional to the creditor to affect the executry *primo loco*; and payment in such a case, even without distress or decreet, furnisheth action of relief to the executor and nearest of kin against the heir; Hill against Maxwel, No 43. p. 5473; Falconer against Blair, 7th March 1629, *voce* PROOF; and therefore the article ought to be allowed.

Replied, 1*mo*, It may be denied, that an executor, so long as there is an heir and heritage, can at all be decerned for terms after the defunct's decease, of a simple annuity not accessory to a stock. For albeit where there is is an obligement for a stock or principal sum, that as pre-existing to the debtor's decease, may oblige the executor for annualrents thereafter in consequence; yet *in annuo legato dies nec cedit, nec venit*, till the person to whom it is due survive the term: And *quot anni tot sunt debita*, *L.* 4. *ff. De Annuis Legatis*. So that such a simple annuity may be said not to have been properly a debt upon the defunct at his decease; and consequently should not burden his executry. And my Lord Stair observes, Instit. lib. 3. tit 8. § 64, That the heir only, and not the execu-

No 44. tor, is liable for annualrent, not accessory to a stock, for years after the debtor's decease, unless there be no heritage. *2do*, The executor's paying officiously without distress, argued some fraudulent design, and was a *negotium gestum* for the heir bound in relief, and not for the nearest of kin whose interest it was not to quit their money without necessity, upon expectation of relief; nor yet was the *negotium* perfected by actually working out the relief against the heir; and *negotiorum gestio* doth not oblige where the affair is neither necessary, profitable, nor perfected, but merely spontaneous, and *novum negotium*. *3tio*, The executor being *curator bonis*, or a trustee, could not by an ultroneous payment burden the nearest of kin with the expenses of a process of relief, more than a curator to a minor engaged in cautionry, could warrantably pay the debt without distress. *4to*, The decisions cited by the defender touch not the present case, which is not, whether an executor paying an heritable debt may recur against the heir? but, whether an executor doing this without distress, and thereby understood to act rather for the heir than the nearest of kin, without compleating the matter by recovering relief, should be left to seek his relief off the heir? *5to*, There is no ground for the executor to say, that the forehand payment was a piece of frugal or provident administration, whereby any needless expense to the nearest of kin was saved; for *non constat*, that ever the executor would have been pursued; and if he had been pursued, he would have been assoilzied in the case of a simple annuity for terms after the debtor's decease. Nor do the creditors get expenses from executors.

Duplied, *Utcunque dies non cedit* in the legacy of an annuity, till after the term of payment; yet in the case of annuities due by stipulation or contract, (such as is the subject of the present controversy) the obligement takes effect, and is binding from the date, § 3. *Instit. de Verborum Obligat.* And even a liferent annuity not accessory to a stock, may burden and exhaust the executry, if the creditor pleases, *quoad* terms subsequent to the debtor's decease, though with the benefit of recourse for relief against the heir, if there was any heritage, and that is all which my Lord Stair saith in the place cited by the pursuers. *2do*, An executor's paying without a decreet for his warrant, can only be quarrelled by a creditor of the defunct who is disappointed by the executor's partial payment, and not by his nearest of kin, who have only relief of heritable debts against the heir. Neither can the payment made by the executor be understood as a voluntary, but as a necessary and profitable deed. For *quorsum* should he have been at the expense of warding off the annuity till he was decreeted, when no defence was competent to him; seeing *decernendus habetur pro decreto*; according to the rule, *cingendus habetur pro cincto*; and the executor's want of a decreet cannot hinder the nearest of kin's recourse against the heir, nor could his having such a decreet forward it. Neither doth any law oblige the executor after the inventory is exhausted, to commence any process of relief for the nearest of kin against the heir, in order to repeat what was paid

to creditors; because, the office ends with exhausting of the inventory. 3*to*, The inference doth not hold from that of a minor's curator ultroneously paying a cautionry for the minor, *intuitu* of the minor's recourse for relief; because the executor after he is once lawfully exhausted of the defunct's means, is no further concerned; but the curator is concerned in the minor's estate. And yet the minor being obnoxious to payment as cautioner bound conjunctly and severally, the curator should not oppose it by ineffectual resistance. The executor is not here demanding repetition as a *negotiorum gestor*, but allowance of what he acted warrantably in the terms of his mandate, by the nomination and confirmation for negociating the inventory, as should accord of the law, which expressly subjects the inventory to heritable debts, if the creditor please. No 44.

THE LORDS refused to allow, as an article of exoneration, the payment of the annuity for years subsequent to the debtor's decease, as being an heritable debt.

Forbes, *p.* 2.

1714. *February* 19.

ANDREW SIMPSON Clerk of Dunfermline *against* ROBERT WALKER, Son to the deceased WILLIAM WALKER, late Provost there.

No 45.
A sum was provided to a husband and wife in liferent, and to their children in fee, whom failing, to the wife's heirs and assignees. The husband and wife having died without issue, it was found that the sum belonged to the wife's heirs, and not to her executors.

MR GEORGE WALKER, in his daughter Janet Walker's contract of marriage with William Walker, obliged himself to pay to them, and to the longest liver of them two in liferent, and to the heirs to be procreated betwixt them in fee, which failing, to Janet's heirs or assignees, the sum of 1000 merks, at the terms therein mentioned. Both William Walker and Janet his wife having died without children of the marriage, Andrew Simspon, as deriving right from her executors, pursued Robert Walker, heir to William Walker the husband, to whom the tocher had been paid, for re-payment.

Alleged for the defender; The tocher being payable to the husband and the wife, and the longest liver of them two in liferent, and to the heirs of the marriage in fee, (which is a plain tailzie) it is of the nature of an heritable subject, which can only fall to the wife's heirs, and not to her executors.

Answered for the pursuer; By act 1661, cap. 32. all bonds are declared moveable except in two cases, viz. where infeftment hath followed, or where executors are excluded; neither of which can be pretended in the present case; so that the subject being *sua natura* moveable, the tailzieing of it does noways alter it. And in all moveable subjects, any substitute's right upon the failure of the persons premised in the destination, is established by a summary cognition before the Commissaries or other proper judges, that the persons premised in the destination are deceased; for it were impracticable by our law and form