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

No 45.

to establish a right to such by a service. Yea, the Lords have found that even in heritable subjects an heir of provision's right might be ascertained or established, either by the acknowledgment of the contending party, or by a summary cognition that such a one was the heir of provision, respected in the destination; as was done in the case of John Carnegy against the Creditors of Kinfawns, See SERVICE AND CONFIRMATION.

Replied for the defender; Though the subject in dispute were of its own nature purely moveable, yet it being tailzied to the wife's heirs by the contract, no person could make up a title thereto without a service, cognoscing the person pretending right by a tailzie to be the heir. So that is of the nature of an heritable subject, to which confirmation is no sufficient title. The cited decision doth not meet the case, John Carnegy being the first heir substitute, whereas here it must not only be cognosced that such persons represent, but also that the heirs of the marriage failed, which can only be by service.

THE LORDS found that the tocher doth belong to the wife's heirs, and not to her executors.

Forbes, MS. p. 27.

1752. *November* 29. EUPHAN EWING *against* RALPH DRUMMOND.

No 46.
An assignation of a liferent right made by a daughter to her father, was found to fall, after the father's death, to his heir, and not to his executor.

IN a contract of marriage, a tenement of houses was provided to the husband and wife, in conjunctfee and liferent, and to the heirs of the marriage. The wife, who survived her husband, disponed her liferent to her father-in-law; and he having also died during the subsistence of the liferent, the question occurred betwixt his heir and executor, Whether the rents falling due after his death were heritable or moveable?

The argument *urged* for the executor was, That a liferent cannot be conveyed, so as to establish a real right in the person of the assignee. A liferenter is not a proprietor, so as to be entitled to give either a procuratory or precept; and therefore an assignation to a liferent stands upon no better footing than an assignation to mails and duties, granted by a proprietor. It entitles the assignee to claim the rents by a personal action against the tenants, when the rents fall due; and this claim, which is moveable, must descend to the executor.

On the other hand, it was *urged* for the heir, as a point established in law, that no subject descends to an executor, which has *tractum futuri temporis* after the proprietor's death. The reason obviously is, that the purpose of naming an executor, is to gather the defunct's effects without delay, and to make a distribution among the parties interested; which excludes subjects that have a course after the proprietor's death; and this is entirely independent of being heritable or moveable *sua natura*. Rights may be moveable *sua natura*, that have *tractum*