

1561. *March 21.* The LAIRD OF ELPHINGSTOUN *against* The LORD GLAMIS.

No 6.

The executor may be called by the heir for his relief.

GIF the air of ony persoun that is deceist be callit for the deidis debtis aucht and be him the time of his deceis, he hes just actioun and titill to call the executouris that intromettit with the movabill gudis, to warrand and relieve him thairant, in sa far as thay ar responsal *de bonis defuncti*. And thairfoir, gif the air be persewit for the saidis debtis, he sould have ane day assignit to him to call the executouris for his relief.

Balfour, (HEIR.) No 8. p. 220.

1567. *June 5.* PRIOR OF PLUSCARDIN *against* The SHERIFF OF MURRAY.

No 7.

THE executouris may not be callit nor decernit to warrand ony heritabill infestment or dispositioun maid be the deid befor his deceis.

Balfour, (HEIR.) No 12. p. 221.

1630. *July 22.* L. CARNOUSIE *against* L. MELDRUM.

No 8.

Found, that the heir should have his relief from the executor, of all moveable bonds, and the executor should be relieved by the heir of all such as are heritable.

IN a pursuit made by the bairns of the L. Meldrum, executors confirmed to her, against the executors of her umquhile husband, and the intromitters with his goods and gear, for payment of that part of their mother's goods confirmed, which belonged to her, and consequently to them, as her executors, and wherein her husband would have been debtor to them, they being her bairns of an anterior marriage,—the LORDS found, that albeit there were executors confirmed to the umquhile husband, yet that thereby the pursuers were not excluded, but that they might also pursue the intromitters with the goods, to make their part thereof due to them in law furthcoming; for this is not, as when the creditor pursues a vicious intromitter to pay the debt, seeing here the intromitter is only pursued to make payment of the very particulars, wherewith he should have been proven to have intromitted; and which he had no reason nor right to retain; yet usually where executors are confirmed, no process is granted against intromitters, as is done 14th July 1626, and November 23. 1630, Gray *contra* Smith, *voce* LITIGIOUS—PASSIVE TITLE; and November 25. 1630, Miniman, *voce* PASSIVE TITLE. And even in a wife's testament confirmed, albeit her husband be living, defalcation ought to be of such particulars, which ought not to come in testament, viz. which of their own kind and nature are heirship; albeit the husband, to whom the goods confirmed belonged, cannot have an heir to claim the same, he being on life the time of the confirmation, and therefore that the wife's executors had no right to any particular of that kind.

July 30.—The heir desiring defalcation against the executors of the wife of the defunct, of the defunct's moveables, for sums owing by the defunct by heritable bonds, which the heir alleged ought to be paid for the heir's relief, out of the readiest of the moveables; and the executor alleging, that the heir ought to have no relief for debts owing by heritable bonds, upon the defunct's moveables,—the LORDS found, that the heir ought to have no relief against the executor, nor upon the defunct's moveables, for any sum owing by heritable bonds; and found, that obligations bearing the debtor to be obliged to pay annualrent for the money borrowed, albeit not bearing a clause of infestment, were heritable bonds, which the heir was liable to pay, and not the executor; for the LORDS found, that heritable bonds ought to be paid by the heir, and moveable bonds by the executor; so that albeit the creditor may seek payment either from the heir or executor as he pleased, yet betwixt the heir and executor, when any of them seeks their relief off others, they are obliged to relieve others of the debts as said is. Also the LORDS found, that where the debtor by an heritable bond dies before the term of payment, after the which the annualrent begins to take effect, to be paid as use is, that *eo casu* albeit both the debtors, heirs, and executors be obliged in the sum to the creditor, yet in the relief betwixt the heir and executor, the heir ought to have relief thereof off the moveables; and, in that case, the moveables are properly liable therefor, even as when the creditor dies before the term of payment in an heritable bond, the same will pertain to his executor, and not to his heir; but if, where the debtor dies before the term of payment, and the money lies over after the term divers other terms, and that the creditor exact his principal sum and annualrents from the heir, albeit by this decision the heir will get his relief off the executor for the principal sum, yet it is a doubt if he can get relief off the annualrents paid by him; which appears ought not to burden the executor, who can be subject in no further but what was owing by the defunct the time of his decease; and which, as appears, cannot make him liable for the course of annualrents running after his decease. See HERITABLE and MOVEABLE.

Act. *Nicolson & Baird.*

Alt. *Mowat & Burnet.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 356. Durie, p. 534, & 536.

* * * Spottiswood reports the same case :

IN an action pursued by the Laird of Carnousie against the Laird of Meldrum, there was a question concerning certain debts of the umquhile Laird of Meldrum, whether they should light upon the heir or executor? The heir *alleged*, That he ought to be relieved of all his father's debts by the executor, so far as the moveables will extend. The executor *alleged*, He ought only to relieve the heir of all moveable debts owing by the defunct; but as for debts owing by him on heritable bonds, he owed no relief thereof to the heir, but he

No 8. should be liable therefore, and relieve the executor thereof, *quia quem sequuntur commoda, eundem etiam incommoda*. Next *ab identitate rationis*, the executor is obliged to relieve the heir of all moveable bonds; therefore the heir is obliged to him in the like for heritable. *3tio, Hæredes succedunt in universum jus defuncti, tam hæres mobilium, quam immobilium*, and should be heirs *respective in suo genere, tam active quam passive*.—THE LORDS found, that the heir should have his relief off the executor of all moveable bonds, and the executor should be relieved by the heir of all heritable bonds. And this after they had thought upon it two or three days, 30th July 1630. Found likewise, that if as well the debtor die before the term of payment in a bond, as the creditor, the bond is moveable, and the executor only liable to it without relief off the heir.

Spottiswood, (EXECUTOR.) p. 121.

1662. December 20. LADY TARSAPIE against LAIRD of TARSAPIE.

No 9.

The question whether the heir is liable to aliment the defunct's family till the next term after his decease, was superseded till diligence should be done against the moveables.

THE Lady Tarsapie pursues the Laird of Tarsapie, who succeeded as heir to his brother, her husband, for the aliment of the defunct's family, till the next term, after his death, and specially for the aliment, and ——— to the pursuer's son, heir apparent to his father. The defender *alleged*, Absolvitor; because the libel was no ways relevant against him as heir, but, by the constant custom, the entertainment of the defunct's families was ever a burden on their moveables, and upon their executry. The pursuer *answered*, Though it was ordinarily retained off the moveables, yet the heir was also liable, seeing the defunct was obliged to entertain his servants and children, at least to a term, but much more when there were no moveables, or where the defunct was rebel, and the donatar intromitted. The defender *answered*, That it was *novum* to convene an heir on this ground, and that the allegiance of there being no moveables held not here; neither is it relevant that the moveables were gifted, unless it had been declared before the defunct's death and possession obtained, otherways the relict ought to have alimented the family out of the moveables, which would have liberated her from the donatar, and is yet ground against the donatars. The pursuer *answered*, She could not retain; because the donatar, with concurrence of the defender, did put her *brevi manu* from the defunct's house, and all the moveables.

THE LORDS having amongst themselves considered this process, did put difference between the aliment of the apparent heir, and the rest of the family: As to the heir, they found, that albeit he was never infest, yet, as apparent heir, he had right to the mails and duties from his father's death, until his own death, though the terms had been to run before he was born, being *in utero*, and that the defender, in so far as meddling with the rents, was liable for the apparent heir's aliment; but, for the rest of the family, the LORDS superseded to give