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-