the first bond, or pay it to him; and therefore he having failed in the first, it was just to decern him in the second: 3*tio*, Though the donatar must have a decreet, yet that can never excuse his extraordinary litigiousness: 4*to*, That there was no *pluris petitio*; for, at commencement of Sir John's process, the full L. 55 was due; but it having depended long, Sir John in the interim recovered L. 36 by a furthcoming, and fairly in his oath acknowledged and allowed the same. No 28.

THE LORDS restricted the penalty of the bond granted to the treasurer of Aberdeen; wherein the charger was bound with Douglas the bastard, to the sums paid by the charger to the creditor.

Act. *Graham.* Alt. *Horn.* Clerk, *Justice.*

Bruce, No 85. *p.* 102.

1740. *December* 19.

LORD NAPIER, *&c. against* MR THOMAS MENZIES of Lethem, and his Cautioners.

No 29.
The cautioners for an executor, must have credit for debts paid by the executor before confirmation, although he should be also heir.

LORD NAPIER, and other creditors of Sir William Menzies of Gladstanes, brought a process against Mr Thomas Menzies, eldest son and heir to Sir William, and who was also confirmed executor *qua* nearest of kin to him, and against Mr Thomas's cautioners in the several eiks made to the principal confirmed testament.

The defence offered for the cautioners was, That Mr Thomas had paid many moveable debts due by his father, partly before the several confirmations and eiks, and partly after; to some whereof he took assignations, and as to others discharges; by which the sums in the eiks were exhausted.

Answered for the pursuers, That by the act 76th, Parl. 6th, James IV. the heir has the benefit of discussion against the executor for year and day; and after that, he is entitled to demand caution from the executor, to relieve him of moveable debts, to the extent of the free moveables; that this is the sole foundation in law for the heir's claim of relief of moveable debts against the executor: That the heir, by making payment of moveable debts due by the defunct, does not become creditor to the defunct, being *eadem persona* with him, and thereby liable to his debts of whatever kind; and by payment, he discharges a debt due by himself; but as he does not contract with the defunct, nor becomes his creditor, so neither is he a proper creditor upon the defunct's moveable estate; and from hence it is, that he has not the privilege competent to the other creditors of the defunct; *e. g.* a creditor of the defunct may pursue a vicious intromitter, and he will be liable *in solidum* for payment of his debt, though far exceeding the extent of the intromission; yet an heir who has paid his predecessors moveable debts, will have only action *in valorem* of the intromission.

No 29. Again, the heir's relief against the executor is confined to the free gear, neither can he compete with the defunct's moveable creditors: for while there are moveable debts outstanding, there can be no free moveables, and therefore no relief to the heir; which arises not singly from this consideration, that the heir, as such, is himself liable to the moveable debts, but because he is no creditor of the defunct's, nor has any claim of relief upon the moveables, except in as far as they exceed the moveable debts; so that while there are moveable debts unsatisfied, he is not creditor upon the executry. It is indeed a different case, where the heir is a proper creditor of the defunct; for in such a case, whether he confirms upon his title as creditor, or *qua* nearest of kin, it may be argued, that his confirmation is a proper diligence, and will give him preference in competition with the other creditors to the subjects confirmed, however he may be personally liable as heir to pay their debts; but as his claim of relief is no debt due to him by the defunct, and where there are no free moveables, is no claim at all, it is therefore, with submission, impossible that he can plead this right of relief in competition with, and much less in exclusion of, the defunct's creditors. Which doctrine, as it applies to the debts paid by Mr Menzies before the several confirmations and eiks, it holds, *a fortiori*, with respect to the debts paid by the heir after the confirmation; for however a confirmation may be available to the executor *quoad* the debts standing in his person at the date of the confirmation, yet, as to after acquisitions, he can plead no compensation, or to exhaust the inventory thereby; it is not in the executor's power, by private transactions with the defunct's creditors, to alter their preference, but each creditor is preferable according to the diligence done by himself. *See* Stair, tit. EXECUTOR, § 76.

Replied for the cautioners, That they having become bound for Mr Menzies as executor confirmed, upon the faith of his being creditor to the defunct in moveable debts, to the extent of the sums eiked to the principal testament; and he being creditor for the debts he had paid for the defunct, the inventory is thereby exhausted, at least, so far as to procure an exoneration to the cautioners. It is true, the executor is likewise heir, and, in that character, liable to the whole debts of the defunct; and consequently cannot plead against any of them, that the testament is exhausted by debts already paid, so as to avoid judgment against him as heir. But the cautioners in the confirmation have no concern with him as heir, but only as executor confirmed; and therefore, if the testament is exhausted, and would be found so, in case the executor had not been heir, the cautioners must go free. It cannot be doubted, but in the common case, if an executor, though confirmed as nearest of kin, is creditor to the defunct the time of such confirmation, in sums equal to the subjects confirmed, he will have retention or compensation upon account of those sums, and be thereon preferable to all the other creditors of the defunct, who did not cite him within six months of the defunct's death. *See* Stair, tit. EXECUTOR, § 73. and 76. In the present case, Mr Menzies the executor must be consi-

dered entirely abstracted from his being heir, and, in such view, it cannot be doubted the testament would be exhausted by the debts of the defunct, to which he had either right by assignation, or paid and taken discharges of the same before confirmation; and consequently, whatever might be the operation of law in a question with the executor himself, who is liable in the other character as heir, the cautioners must be entitled to the defence to which he would be entitled, were he merely executor confirmed. The law has provided, most justly, that an executor should not be exonered otherwise than by payments upon decreets, to avoid collusion betwixt the executor and certain of the favourite creditors, and that it might not be in the power of the executor to prefer one creditor to another. But where the payments are made before the confirmation, there is no ground for the supposition of collusion; for as these creditors, to whom such payments are made, might have confirmed themselves executor-creditors, and thereby have preferred themselves to the other creditors; so the payments made to them by the person who afterwards confirms, state him in their place. According to the pursuer's argument, cautioners for an executor, who is likewise heir to a defunct, would be universally liable to all the defunct's debts, though ten times more than the value of the subjects confirmed; and as the executor could never plead an exoneration from any of those debts, so neither could his cautioners; which would be absurd. An heir, no doubt, has relief against the executor, as to the moveable debts due by the defunct, and paid by him; and he can only plead this relief against the free executry, and not in competition with the creditors of the defunct. But that cannot touch the present case; for, though the heir had paid such moveable debts upon lawful sentences, his relief would not be competent against the executry, in a question with any of the defunct's creditors. But as such payments would infallibly exhaust the testament, as the heir was likewise executor confirmed, and be available to the cautioners in the confirmation; so must the payments made by him, before confirmation, exhaust the testament, and so exoner the cautioners. *See* Spottiswood, tit. EXECUTOR, p. 114.; and 26th January 1628, Aldie *against* Gray; Durie, p. 332. *voce* PASSIVE TITLE. No 29.

THE LORDS found, That the cautioners in the eiks of Sir William's testament, ought to have credit for such debts as were paid by Mr Thomas Menzies before confirmation, and of which debts he took assignations and discharges; and that, notwithstanding Mr Thomas Menzies the executor was also heir.

C. Home, No 159. p. 269.

1757. *February* 27.

HUGH M'LEOD of Genies, *against* HENRY ALLAN, Writer. No 30.

By the vesting act, the Crown was not liable for

UPON the 18th November 1743, Lord Balmerino and Henry Allan became bound, conjunctly and severally, to Hugh M'Leod, for the sum of 2000 merks.