1744. *November* 30.

MACWHIRRICH and CUTHBERT her Husband *against* MACKAY.

No 24.
An executor paying a debt, and stating the same to the heir, from whom he got heritable security, and becoming executor to him, it was found, he could not claim the debt out of his heritable subjects, having had the original debtor's executry in his hands when he paid.

An heritable bond on death-bed being reduced, except in so far as it should be supported by anterior debts, which were transacted at granting, and one of these debts being deducted as *aliunde* paid, it was found, the creditor could not have recourse to other grounds of debt to make up the sum deducted.

WILLIAM MACWHIRRICK, merchant in Inverness, having died in the year 1714, leaving John a son, and three daughters; Elspeth Fowler the relict intromitted with his whole effects, carried on the business, and, in a short time, intermarried with William Mackay, who, 1725, was confirmed executor-creditor to the defunct.

William Macwhirrich having, before his death, made a purchase of certain tenements, the full price whereof he had not paid; William Mackay paid up the same, and obtained from the seller a disposition, 5th November 1720, to John Macwhirrich, containing this clause, 'That William Mackay had, in 'name, and on the account of John Macwhirrich, eldest lawful son and heir 'served to the deceased William Macwhirrich, made payment of L. 1000 Scots 'as the remaining part of the price of the said acres, tenements, and shop, with 'the annualrent thereof from Whitsunday 1714, amounting to L. 1325 Scots.'

John Macwhirrich, on his majority cleared with William Mackay, and for the balance which came out in his favour, gave him an heritable bond for L. 300 Sterling, and afterwards executed a testament, wherein he named him and Elspeth Fowler his executors and universal legatars.

John died, and two of his sisters made up their titles to their brother's estate, and conveyed their share of it to William Mackay; but Elspeth, one of them, with concourse of Cuthbert her husband, raised a process against him and his wife, to account for the executry, and a reduction of the heritable bond on the head of death-bed, in which the bond was sustained only in so far as it was onerous; and this point being fixt, the Lord Ordinary, 18th July 1744, 'Having considered that William Mackay the defender, when he paid the L. 1000 in 'question, had William Macwhirrich's executry in his hands; and he having 'already got credit for that sum, in accounting for the said executry, found 'that he ought not to have stated that as a debt against John Macwhirrich the 'heir, or taken security therefor from him by the heritable bond now insisted 'on, and that he could not get a second payment thereof out of John's heritable subjects.'

Against this interlocutor Mr Mackay reclaimed, and prayed to have it found, that the heritable bond was a subsisting debt *quoad* the L. 1325, and that he was entitled to state it accordingly; for these reasons, that the seller was a lawful creditor, and had an action against John Macwhirrich, and might chuse to seek his money either from him, or the executors; and if the heir had, instead of payment, granted bond for the sum, it would have been an onerous deed: That in the present case, the petitioner interposed, and paid his own money, to prevent John from being distressed, and thereby came in the seller's place, and got the bond for what he had advanced: That the specialties mentioned in the

No 24. interlocutor did not vary the case; for the payment was out of William Mackay's own money, on account of John Macwhirrich, the creditor not being seeking the executors. Suppose John being pursued, had borrowed it from a third person, a debtor of the executry, he could not have defended himself against the bond, by alleging on the debt to the executry, which fund must at last pay it; but must have paid, and been left to operate his relief.

To the allegation, that he had already got credit for this sum, in accounting for William's executry, and therefore could not a second time get payment out of John's heritable subjects, he *answered*; It was true, that in the account of executry, the accountant employed had stated this as an article of discharge; but he pleaded that the article ought to be struck out, because the sum was advanced out of his own money, for the behoof of John Macwhirrich, and he admitted he had no claim out of the executry, having got security from his debtor.

It was true, that by the accident of his being named executor to John, he had, in his right, a claim upon William's executry, out of which the heir ought to be relieved of the moveable debt paid by him; but this could never be called double payment, since what he draws from John's heritage is as his onerous creditor; and his claim upon William's executry is as executor to John: Nor can the pursuers complain, who pay this debt but once, as they would have been bound to do, if John had made the payment with his own money.

"THE LORDS refused the petition."

1745. *July* 9.—WILLIAM MACKAY, merchant in Inverness, married the relict of William Macwhirrich, merchant there, who had intromitted with her husband's whole effects; and thereupon he obtained himself confirmed executor-creditor to him.

William Mackay paid a debt of L. 1000 Scots of William Macwhirrich's, and there were some other accounts between John the defunct's son and heir and him, which were transacted; and John gave him an heritable bond for L. 300 Sterling.

In a dispute which happened between William Mackay and John Macwhirrich's heir, the bond was reduced on the head of death-bed, except in so far as the creditor should support it, by shewing anterior grounds of debt; and he having insisted for that purpose on the debt of L. 1000 of old William Macwhirrich's paid by him, it was found, that he could not reckon upon it, as it was a charge upon William's executry, which he had then had long in his hands; and therefore ought not to have charged it on John the heir, especially considering he had since that time got credit for it in accounting for the executry.

Pleaded now for William Mackay; That though it was found he could not state this L. 1000, yet he could support the heritable bond by other debts of John due to him at the granting thereof exceeding the extent.

Pleaded for the Heirs of John Macwhirrich; All the claims William Mackay could pretend against him, including this L. 1000, were transacted for L. 300, and he has already got payment thereof, by being allowed it in the account of William Macwhirrich's executry. No 24.

The shape of the process being a count and reckoning, in which the accountant had made a report, disallowing of this L. 1000 stated by William Mackay;

THE LORDS, 28th June, approved of the report made by the accountant, in respect that William Mackay had credit for the L. 1000 out of the executry of William Macwhirrich: And this day adhered.

Reporter, *Lord Murkle.* Act. *A. Macdoual.* Alt. *Borwell.* Clerk, *Forbes.*

D. Falconer, vol. 1. *p.* 14. *and* 114.

1744. *December* 21. The CREDITORS of M'DOWAL *against* M'DOWAL.

No 25.
An executor-testamentary is preferable before all the creditors, for payment of debts where he is cautioner, and also for payment of debts due to himself.

AN executor nominate confirming after six months, and while no creditor had done any diligence, was, in the action against him at the instance of the defunct's creditors, found "to have right to retain for payment of what debts were due to himself, whether they had been originally due to him, or acquired by him before the confirmation."

And so far the Court was pretty unanimous, in respect that a confirmation, whether as executor nominate or *qua* nearest of kin, is considered partly as an office, partly as a step of diligence for recovering payment of whatever may be due to the executor himself before confirmation: For, as to the difficulty urged by some, that, at that rate, any executor nominate, or nearest of kin, intending to confirm, might prefer what creditors he pleased, by picking up their debts before the confirmation; the answer was, That every creditor has a remedy by confirming himself within the six months.

But there was another point in this cause which was of more dubiety, Whether the executor should also have preference for his relief of debts, wherein he stood cautioner for the defunct, and which were yet standing out unpaid? Several of the Lords were of opinion, That he ought not to have any preference for such relief, agreeable to the decision, Feb. 2. 1628, recited in the case, Adie *contra* Gray, No 193. p. 9866.; and gave this reason for the difference, That where the debt is in his person, he may pay himself without a decree, which he cannot take against himself, and the law does not require the circuit of an assignation; but that does not apply to the case where he is only creditor in relief.

It was notwithstanding found by the plurality, That the executor was in this case also preferable for his relief: As confirmation was the proper method for securing his relief, so the law was considered not to stand on so narrow a bot-