1718. *July* 29.

DAVID WILSON, now of Park, *against* BELL and GRANT, Executors to the deceased Wilson of Park.

No 22.
Bygone feu-duties found a burden upon the heir, for which he had no relief against the executor; since they arise from the feu-contract, the terms of which the heir only is liable to perform.

IN a pursuit at the instance of David Wilson, now of Park, as heir to his brother, against his brother's executors, for relief of certain bygone feu-duties due to the superior out of the estate; it was for the pursuer *contended*, That bygone feu-duties are of their nature, both in the person of the superior and vassal, considered as moveable, and fall to executors; and also burden them in the same manner as bygone tack-duties; and the difference, with respect to the superior's heir and executor, of feu-duties, from other casualties of superiority which pass to the heir, lies here, that other casualties need declarator, which feu-duties do not. It is certain, in all obligations for annual payments, the bygones before the debtor's decease affect the executor, and so must feu-duties: The reason is, if they had been paid annually, as they ought to be, the executry would *in tantum* have been diminished. This point will yet be more clear, if it be considered how intromitters are liable *personali actione*, at the instance of superiors for feu-duties, in which this difference is established by manifold decisions, That singular successors to the vassal, are only liable for those years feu-duties during which they did intromit with the rents; and if the ground should be poinded for more, would have relief against the former intromitters: *Quæ ratio*, but that the feu-duties are understood an annual burden upon the fruits? If which be, then the feu-duties must come off the vassal's executor who represents him, as intromitter with the bygone rents, upon which the feu-duties are a burden. And accordingly it appears to be the practice, from the records of testaments confirmed by the Commissaries of Edinburgh, that bygone feu-duties are in use to be given up, and confirmed by them.

In *answer* to this it was *pleaded*, That the question here will be, not so much, whether bygone feu-duties are in their nature, and *vi sua*, heritable or moveable; but, whether there is any evidence of the intention of parties, that they should only go to heirs, and be prestable by them? Thus a simple bond, perhaps wanting a clause for annualrent, though in its nature moveable, if executors be excluded both of the debtor and creditor, without question is prestable only by the heir of the debtor, and to the heir of the creditor: And here it was contended from the nature and design of the feudal contract, that the intention of parties is equally clear, that feu-duties should only be a burden upon, and payable to the heir. The feu contract is entered into, betwixt the superior and vassal, and their heirs allenarly; there is a *delectus personarum* made by the superior, *sciz.* the vassal and his heirs; they allenarly are designed to have benefit by the contract, and they alone must bear the reciprocal prestations, whether of personal services, or pecuniary payments; so that this case comes to be the same, as if the executors both of superior and vassal were expressly excluded. It is indeed true, that for the greater security of the supe-

No 22. rior, the law has made his feu-duties not only a burden upon the land, but upon the fruits; whereby intromitters with the fruits are liable for feu-duties. It is also true, that executors will be liable for bygone feu duties, as well as any other heritable subject; but let us examine, if relief is competent to them against the heir; for there lies the point: And there is no doubt they will have relief, as having paid a debt to which the heir was principally and properly liable. As to the footing of equity, which the pursuer endeavours to put his case upon, *sciz.* 'That feu-duties being regularly payable out of the fruits, in 'so far as the feu-duties are unpaid, in so far the fund of executry is increased; 'and that the executor ought not to profit by this neglect,' the answer is ready, That accidental additions or diminutions of the fund of executry, from the nature of the thing, must affect the executor: If the defunct has changed his executry into heritage, or his heritage into executry, he may do this at his pleasure, and the executors and heirs interests must be regulated accordingly: And hence it is, if one shall enter into a purchase of land, his heir will have the benefit of the purchase, though his executor be bound to pay the price; which is a case as much against the executor, as the one in dispute is in his favours; to shew there is no room for arguments of favour or inconvenience, where the determination is founded upon *media* drawn from the nature of the thing. That feu-duties have sometimes been confirmed in the Commissary-courts, is no surprise; they have no proper interest to refuse the confirmation of any subject; on the contrary, the more executry, the greater composition: But, on the other hand, as an argument that bygone feu-duties have always been considered as belonging to the heir; was it ever doubted, that a charter with a *novodamus* from a superior to a vassal, was a good discharge even for the feu-duties that fell due before the superior's own time? And was there ever a pursuit at the executor's instance, notwithstanding such a *novodamus?* which shews at least the general sense of the nation as to this point.

It is this specialty alone that distinguishes bygone feu-duties, from bygones upon infeftments of annualrent, and all other *debita fundi.* The law has determined in general, all bygones even of land and other real rights to be moveable, and to go to the executor, unless the contrary be expressed: This determination of the law takes place in bygone tack-duties, bygone annualrents, even where there is infeftment, &c. because there appears no intention of parties, from the nature of these rights, or otherwise, to make any deviation from the legal succession; whereas from the nature of the feudal contract, there is a *delectus personarum,* the heir *qua* such is chosen by the superior to be his vassal; and, on the other hand, there is none bound in the mutual prestations to the superior, but the heir; the feu-duties therefore are properly his debt, and he can have no relief off the executor.

"THE LORDS found the feu-duties, by reason they are a debt which most naturally affect the ground, and do arise from the feudal contract, the terms

whereof the heir is only liable to perform; that the heir therefor was only liable for the feu-duties, and not the executors in relief." No 22.

Fol. Dic. v. 1. p. 366. Rem. Dec. v. 1. No 15. p. 28.

*** Lord Kames, in the Fol. Dic., after stating the import of this decision, makes the following observations upon it:—This seems to labour under some doubts; for, *1mo*, Bygone feu-duties go to the superior's executor, upon no other footing than as moveable. *2do*, The executor is liable to implement the feu contract as well as the heir. Suppose the price is not paid, the executor will be liable to pay the same, though the benefit accrue to the heir alone; and there is no doubt the superior may pursue the executor for bygone feu-duties. *3tio*, The superior is truly proprietor, in so far as the feu-duties extend, for he only gives away the property as to the superplus rents, therefore all intromitters with the rents are personally liable to the superior as intromitters with his rent, viz. the feu-duty. Bygone feu-duties then in the hands of an intromitter are truly a moveable subject which must go to executors, and for which the executors of the intromitter must be liable.

1755. *June* 26. GILBERT MARTIN *against* AGNEW of Sheuchan.

No 23.
Bygone feu-duties found to belong to the executor, not the heir.

THE question debated betwixt these parties, was, Whether bygone feu-duties accrue to the heir or executors of the deceased superior. By many decisions, these are found moveable. But these decisions notwithstanding, it was found, Wilson *contra* Bell and Grant, No 22. p. 5455. "That bygone feu-duties are a burden upon the heir, and that he has no relief against the executor, because they arise from the feu-contract, the terms whereof, the heir only is liable to implement." And this decision was urged as the latest precedent in this case; for if the heir of a vassal is liable ultimately for the bygone feu-duties, it must follow that they belong to the heir of the superior. This diversity of opinion in the Court, occasioned a hearing in presence, in order to settle the point ultimately. And for the heir, two things were chiefly *insisted* on, *1mo*, That the feu-duty, like personal service, is paid *in recognitionem feudi*; and therefore to the superior only. *2do*, That a *novodamus* by the superior in a charter to his vassal, is held by all our writers as a discharge of all the bygone casualties, including feu-duties; which shows the heir's right to such arrears, as no man can discharge what he has no right to.

The COURT, notwithstanding, preferred the executor. And the reasons which prevailed, follow:

The rule of law respecting arrears is, that they are considered as in the pocket of the creditor, and consequently as part of his executry. The law, in splitting the estate of a deceased betwixt his heir and executor, suffers not chance