

1634. July 25.

CRAUFURD *against* MATHESON.

James Matheson being charged and decerned, as executor confirmed to his father, to pay 3000 merks to Lillias Craufurd, which his father was addebted to her, who suspending, and reducing this decree, upon this reason, that he could not be obliged *ultra vires inventarii*, and that the free gear in the testament would not extend to so much as would satisfy her; and, in special, he craved to be defalked an article of £.1000 given up in the testament, owing to him by the Earl of Roxburgh, because that sum was owing by an heritable bond, and so pertained to the heir, and was not testable; so that the up-giving thereof by the defunct in his testament, nor the confirmation of the testament, which was done by the suspender's mother in his pupillarity, cannot prejudice him, to make it fall under testament: It being answered by the charger, That the up-giving thereof by the defunct, and the confirmation thereof by the mother, who was tutrix to the party, who was executrix nominated by the father in the said confirmed testament, and the mother contracting since with the same reducer, wherein he has received satisfaction from her for all the goods contained in the testament which he might claim from her, and his intromission with the profits of the same money continually from the Earl of Roxburgh, should make the sum forthcoming to the creditors, so that he cannot object the same to be heritable; and though it were, yet the same would be subject to the creditors' debt, whether it be heritable or moveable; likeas he is heir to the defunct, in the second marriage, and so must pay his debt; and there being no person extant of the defunct, by his first marriage, who are *solvendo*, but, by the contrary, this party bruiking his father's heritage, and being infest therein *post contractum debitum*, therefore he must be counted universal successor to him: The Lords found this article of defalcation relevant; and, seeing the sum was heritable, the up-giving thereof by the defunct in his testament, nor the confirming thereof sensyne, made not the sum change the nature thereof, and to become moveable, but that it pertained to the heir; and seeing there was an heir of a prior marriage extant, this suspender being but a son of the second marriage, they found, that he could not be reputed as universal successor to the defunct in his land, and so *hac nomine* that he was not liable to the creditor. *Item*, The suspender craving deduction of a debt of 3000 merks paid to another sister of this same charger, and contained in the defunct's testament foresaid, given up by himself, being a testament testamentar, because she hath obtained sentence against him, and he has paid her; likeas he craved deduction of 500 merks, left in legacy to the defunct's oye, and which the oye's assignee had recovered by sentence against him, and he had also paid to the assignee: *Item*, A legacy of 100 merks left to the kirk of Edinburgh, and which, being left *ad pios usus*, ought to be allowed, seeing he had also paid it; and craved defalcation also for the funerals: These defalcations the suspender alleged ought to be allowed, seeing he had paid them all *bona fide*; and this charger's cessation for the space of sixteen

No. 3.

An heritable sum given up by a defunct in his testament as moveable, was found not to prejudice his heir.

No. 3. years, doing nothing all this time, ought not to make him liable to her. The charger answered, That legacies cannot be allowed, so long as there is any debt; and as to the debt paid to the sister, that cannot make defalcation, nor be allowed, seeing that same writ whereupon the sister recovered sentence contained expressly, that the like sum was owing to this charger, so that he could not have mis-known both the debts to be alike, and to have paid fully the one sister to the prejudice of the other; but he ought to have taken *cautionem mutianam* for his own security, to repay the sums paid by him, in case he should thereafter be distressed, by other emergent creditors, albeit this acclaimed cannot be called emergent, being known to him, as said is, when the other sister pursued him; so that he ought not to repeat what he has paid to others, that the same may be made forthcoming by him to this charger, according to the proportion of her just debt with the other creditors, without respect to the legatars, as long as there is not enough to pay the defunct's debts. And the suspender answering, That her cessation for the space of sixteen years, and his payment *bona fide* after sentence, ought to free the executor; neither was there necessity of caution, seeing the whole persons to whom he has paid are *solvendo*, which supplies the caution; and albeit her debt was contained in the same writ, whereupon the other sister obtained decree, yet that ought not to put him *in mala fide*, for he was not obliged to know more than in law he was holden to know; and the rather, since she took no notice thereof herself, never pursuing therefor; so that he ought not to be put to repeat the same from the creditors or legatars, whom he has paid, and whose decrees he could never have staid; for the proponing, that there were other creditors, would never have been admitted by the Judge, there being no other creditor pursuing him, to have staid sentence; so that the most that this charger can claim is, to pursue the creditors and legatars whom the executor has paid; and the executor ought not to be put to that pursuit, as is expressly statuted, L. Scimus 22. § Etsi præfatum. 4. et deinde per totum Paragraphum, C. De jure deliberandi. This was controverted, If the executor should repeat, or if the other creditors should repeat from the creditor satisfied, or if both should concur to repeat, to the end that the gear in the testament should be proportionally divided; but it was not decided.

Act. Nicholson.

Alt. Stuart & Hope.

Clerk Gibson.

Durie, ft. 734.

1663. February 21. WARDLAW against FRASER.

No. 4.

A legacy of an heritable subject contained in a testament found null.

Stair.

* * * This case is No. 86. p. 5703. *voce* HOMOLOGATION.