

pains, yet Mr John should have the fifth part. Which seems hard ; his charges and pains being the cause of the obligation.

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1676. November 21. ELIZABETH SMITH *against* JANET MORISONE.

MR James Smith, minister at Errol, having left in legacy, to the said Elizabeth, his sister, a yearly annuity, during her lifetime, of forty pounds Scots ; Mr John Herbertson, who was his executor, gave bond for payment thereof ; whereupon the said Elizabeth did pursue Janet Morisone, his relict, as executrix, for payment of all bygones, and in time coming.

It was ALLEGED, That she could not be liable. 1st. Because she was executrix-creditrrix, by virtue of her contract of marriage. 2d. Her husband having died at the horn, she had the gift of his escheat without a back-bond ; and so was not liable to any other creditor.

It was REPLIED to the *first*, That she had intromitted with much more than what was due to her by her contract of marriage, and so was liable for all farther intromission to other creditors.

It was REPLIED to the *second*, That, being executrix, and having intromitted by virtue of that title, *ipso facto* she did constitute herself debtor thereby ; and any new gift of escheat could not defend her, because it was only impetrated *animo fraudandi creditorum* ; and she, having constituted herself debtor, by confirmation, was liable in law as successor, and representing her husband.

The Lords repelled the first defence, and found her liable to count, notwithstanding she was executrix-creditrrix, for all farther intromission which did exceed her own debt ; but, as to the second, they did argue much amongst themselves, and without determining that point of law, if she could make use of the gift of escheat, they did find, that if she gave a back-bond, she was liable ; and albeit she gave none, yet, by virtue of an act in Exchequer, ordaining that all donatars getting gifts for their own debts, should be liable to their creditors, they did find her liable to count, as said is : but it is thought that she was liable upon that head, that she was confirmed, and had intromitted with much more than would satisfy her debt ; and so, in law, had constituted herself debtor, before the gift.

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1676. November 23. SIR DAVID CARMICHELL of BALMUDIE *against* MR JOHN DEMPSTER of PITLIVER.

SIR David, as assignee by his son David Carmichell, to a bond granted to him by Pitliver, for the sum of eighteen thousand merks, having charged for pay-