

1712. February 19.

ISOBEL MONCRIEF and her HUSBAND, against KATHARINE MONYPENNY, Relict of  
GEORGE MONCRIEFF of Sauchope.

IN the action at the instance of Isobel Moncrieff, as executrix to her brother, the Laird of Sauchope, against Katharine Monypenny, (mentioned July 20. 1711, voce QUOD POTUIT NON FECIT), for her intromissions by virtue of a testament now reduced:

*Alleged* for the defender; She ought to have allowance and retention of 1000 merks she had expended in building a monument to her husband, conform to his orders in the testament; which though now reduced, must keep her *indemnis* as to all she hath laid out in executing thereof; because the testament was reduced upon grounds of law, and not by the fault of her the executrix therein named, *cui officium non debet esse damnosum*; and while the testament stood, she might have been compelled by the defunct's relations to fulfil that part of his will.

*Replied* for the pursuer; The defender can have no allowance for such an article; because the testament reduced can have no effect. Besides, she was *in pessima fide* to build; in respect before her making any step therein, a reduction of the testament raised at the pursuer's instance made her *titubare de jure suo*. And suppose she had built *bona fide*, *officium illi non est damnosum*; for she hath provided *aliunde* for her indemnity, by taking a bond from the heir, obliging him to relieve her, in case of the testament's being reduced.

*Duplied* for the defender; It is *jus tertii* to the pursuer to plead upon the obligation of relief granted by the heir, to whom it was optional to grant it or not.

THE LORDS allowed the expense of building the monument, not exceeding 1000 merks, the defender instructing the same. For albeit the heir engaged to relieve the relict, yet the defunct's desire and intention in his own lifetime, to have such a monument built, and her causing build the same while the testament stood unreduced, was thought a sufficient ground to burden the executry with the expense thereof.

*2do*, The defender craved allowance of the charges she had been at in defending against the reduction of her husband's testament, seeing the decision therein proceeded *in apicibus juris*, upon narrow points of law; and she was obliged both out of gratitude to her husband's memory, and *ex natura officii*, to maintain the testament so long as she could.

*Replied* for the pursuer; There are several laws ordaining the loser of a cause to pay the gainer's expenses, but neither law nor practick obligeth the gainer to pay the loser's expenses. If the defender took and debated upon a null right, she did that at her peril. It is too much, that the pursuer hath been at the trouble and charge of reducing such a deed, though she be not further burdened with the expense of maintaining a plea against herself.

No 15.

A person in his testament ordained a monument to be built. The testament was reduced in an action commenced before the building was begun. The executrix was allowed the expense from the nearest of kin. She was not allowed the expense of defending against the reduction.

No 15.

THE LORDS refused so allow to the defender the expense she had been at in defending against the reduction of the testament.

1712. June 20.—IN the action at the instance of Isobel Moncrieff and her Husband against Katharine Monypenny, mentioned the 19th of February last, the defender craved allowance of the expense of confirming the reduced testament, because *nemini officium debet esse damnosum*.

*Replied for the pursuer*, No such expense can be charged upon her, because the same was nowise profitable to her, she having been obliged to pay out the expense of her own confirmation, as if the defender had not wared a sixpence on the head. Yea, it was plainly laid out in opposition to the pursuer's interest.

*Duplied for the defender*, What she expended in confirming the testament ought to be allowed, as well as what she paid to her husband's creditors, seeing whether profitable to the pursuer or not it was legal, and *inconmodum non solvit argumentum*. It was an officious and wilful humour in the pursuer, to expedite a new confirmation of that which was confirmed before, since the defender's assigning the pursuer to the goods and gear confirmed would have established the right in her person without confirming.

THE LORDS allowed to the defender the ordinary expenses of confirming her husband's testament, in so far as the same were profitable to the pursuer the executrix.

*Fol. Dic. v. 2. p. 318. Forbes, p. 590. & 600.*

\*.\* Fountainhall reports this case :

1712. February 20.—THE LORDS, *supra* 15th July 1710, *voce* TESTAMENT, reduced Stanhope's testament; and the Parliament of England, on an appeal, confirmed the sentence. The sister now, as nearest of kin, pursues Katharine Monypenny, the relict, for intromission with the executry; wherein she craved sundry deductions; and, *imo*, The sum of 1000 merks for a tomb and monument, enjoined by her husband's testament, and for which she entered into a contract with workmen, and has paid a part of it, and can be forced to pay the rest, and falls as a natural burden on the executry. *Objected*, The testament could be no warrant for this, it being *funditus* reduced; it being imposed on the defunct when he was *in extremis*, and had not so much sense as fully to sign out his name; and you *bona fides* was interrupted, because I raised reduction and interpellated you, before you employed the tradesmen; and you was so diffident that ye took a bond from the heir to relieve you of all hazard, in case the testament should be reduced; and therefore this monument standing on no other foundation but the testament it must fall with it. *Answered*, She being executrix nominate, and expressly burdened with it, might have been compelled to perform the defunct's will; and it ought as well to be allowed as the other debts and legacies she paid before the decret of reduction; and her

taking the heir's bond does not alter the case, for it was only *ad majorem cautelam*; and the monument was most his concern; and she being *in titulo, officium nemini debet esse damnosum* though it was reduced *ex post facto*; and it is against the rules of decency and humanity to quarrel this. THE LORDS sustained the article, in so far as extended to 1000 merks, but no further; and in case she wared less, then restricted it to that sum; 2do, The relict craved allowance of L. 50 Sterling, expended on his funerals. *Objected*, Though the pursuer might refuse the whole, as being prescribed, not being pursued within the three years, yet she only quarrels the exorbitant articles far above his rank and quality; and opposes the 14th act 1681, discharging such extravagances at burials, and offers to prove there were brandy and other liquors in the house sufficient for that occasion; and it is the province of all well governed nations to restrain such follies. *Answered*, There is some allowance to be indulged to relicts, when *in recenti luctu*, though there be some excess, *de minimis non curat prætor*; and she is willing to depone it was all truly expended, and his estate is able to bear it. THE LORDS thought such extravagances were not to be encouraged, and therefore remitted to the Ordinary to examine the articles; and though the widow had lavishly expended on it, yet ordained the Ordinary to modify and restrict the same: 3tio, She craved allowance of the expenses in confirming the testament. *Objected*, You was *in mala fide* to proceed, seeing I intimated to you I was raising a reduction; and though it was not got executed till after your confirmation, yet you proceeded on your peril. *Answered*, I must retain my husband's moveables, to reimburse me of so necessary expense as the confirming my husband's testament; and your reduction can have no retrospect, but only operate *pro futuro*; and when you come to confirm *de novo* the same goods, for establishing your title, the Commissaries will not exact dues for the same moveables twice; but if they do, *incommodum non salvit argumentum*. Some doubted if she could claim the expense for confirming, but the plurality found she might, the usual rates being charged, and no more. The fourth deduction craved was for her expenses in defending this process, seeing the grounds of reduction of the testament arose from no deed of hers, but were very dubious, and *in apicibus juris*, on a variety of facts requiring probation. If she had ultroneously assumed the office, there had been less to say, but duty and gratitude obliged her to defend her husband's testament. *Answered*, This is a very surprising novelty. Laws of all nations ordain the tyner of a cause to pay the victor's expense; but where is the practice condemning the gainer in expense to him that is cast and *victus* in the cause? THE LORDS rejected this article. There was a general objection against all her claims, that they were extinguished by her vitious intromission, 1mo, By clandestine abstracting of bags of money, and goods before confirmation; 2do, By super-intromission above the inventory confirmed; but that not being as yet clearly instructed, it was not decided at this time.