

husband's moveables was not *in bonis ejus*. As to the cited decisions, it cannot be thought strange that debtors, or intromitters with the defunct's goods, should be liable to his executor *primo loco*, when the quantity and extent of the relict's interest is not known, but from a computation of the debts and free gear; but here, where the debt is still extant in the debtor's hand, and the executor in the field, *cui bono* should the relict be put off to seek the executor? Let him say now what he can against her, *actiones non sunt multiplicandæ*. 2do, No provision made by the husband without the wife's consent, or acceptance in satisfaction, can exclude her from the provision of law. The making of a law to exclude a wife who hath a liferent provision from a terce of lands, without mentioning any thing of moveables, doth imply that these were industriously omitted, and left as before to the disposition of law. Besides, here is no liferent secured to the wife, which can be presumed in satisfaction of a legal right; because the husband being absolute fiar, could have disappointed her thereof by uplifting the money; and he was not so much as obliged to re-employ it for her liferent use.

THE LORDS found, that Margaret Bell's contract of marriage doth not exclude her from an interest in the husband's moveables; and that she is not excluded by the act of Parliament 1681, that act relating only to terces: And found the husband's executor had right to confirm the whole subject, and the *jus exigendi*; but remitted to the Ordinary to hear the relict's procurators upon her interest as to this sum as free moveables.

*Fol. Dic. v. 1. p. 273. Forbes, p. 643.*

1740. December 19.

LORD NAPIER and Others *against* MENZIES and his Cautioners.

ONE who is creditor to a defunct, either originally or by assignation, or by having made payment upon a discharge which entitled him to relief, thereafter confirming executor *qua* nearest of kin, has the same preference as if he had confirmed upon his debts as executor-creditor, his confirmation being in the one case as in the other considered as a proper diligence for his payment or relief. Nor does it vary the case, in so far as concerns the cautioners in the confirmation, though the said executor be also heir; for though, as heir, he be universally liable, yet his cautioners in the testament are only bound for him *qua* executor, for what remained unexhausted of the testament over his own debt.

Upon which grounds it was, in the process at the instance of the Lord Napier and Others, creditors of the deceast Sir William Menzies, against his Executor *qua* nearest of kin, and his cautioners, found, 'That the cautioners for Mr Thomas Menzies, in the eiks of Sir William Menzies his father's testament, ought to have credit for such debts as were paid by Mr Thomas the executor,

No 30.

No 31.

A person who had confirmed executor to his father, before his confirmation, intromitted with moveable subjects belonging to his father, to whom he was likewise debtor in moveable debts. In an action against his cautioners, the Lords found, that neither the

No 31.  
debts due by  
the executor  
to his father,  
nor his intro-  
mission before  
confirmation,  
could be  
brought in  
*in computo* to ex-  
clude the cau-  
tioners from  
getting credit  
for the debts  
truly paid by  
the executor.

before confirmation, and of which debts he had taken assignations or discharges ;' and that notwithstanding Mr Thomas the executor was also heir :

1744. February 11.—In a process at the instance of Lord Napier, Colonel Dalrymple, and others, as creditors to the deceast Sir William Menzies, against the Cautioners in the confirmation of Mr Thomas Menzies his son, executor confirmed to him *qua* nearest of kin, it was found *ut supra*, December 19. 1749, 'That the executor and his cautioners were to have credit for such debts as had been paid by the executor before confirmation, and of which he had taken assignations or discharges.'

Another question was now stirred between the parties. It was *alleged* for the pursuers, That Mr Thomas the executor had, prior to the confirmation, intromitted with moveable subjects belonging to his father, and was also debtor to his father in moveable debts, and that therefore the cautioners could not have credit for the debts paid by the executor before confirmation, without accounting for these subjects, and which they argued to be a very different point from that formerly determined. Where one, who afterwards confirms executor, has, prior to the confirmation, paid debts, there may lie equity for his relief of such payment when made out of his own money ; which is not the case, where, at the time of the payment, he has the executry-money in his hands ; and if credit were to be given for payments made in that case, it would establish this doctrine, that a nearest of kin might intromit, without confirmation, with great sums, and pay what debts he pleased with the money arising from such intromission ; and when he came to confirm the remaining subjects of the executry, his cautioners should be allowed to discharge themselves with debts paid with that very money he had irregularly taken up without confirmation, and apply them in extinction of the inventory confirmed, which they pleaded to be absurd.

Nevertheless, the LORDS found, 'That neither the moveable debts owing by Mr Thomas to his father, nor the intromissions had by him before confirmation, could be brought *in computo* to exclude the cautioners from getting credit for the debts truly paid by the executor.'

The question was not here with the executor, but with the cautioners, whose obligation is limited to the inventory confirmed ; and as they have no concern with any intromissions the executor may have had with the defunct's effects not confirmed, or what he may be owing to the defunct, so it was thought, that to exclude them from the defence of the subject being exhausted, on account of intromissions beyond the inventory, or of debts due by the executor to the defunct, would be to extend their obligation beyond the intention of it, and to subject them as cautioners for subjects not confirmed, whereby a cautioner's obligation for an executor would be so uncertain as to its extent, that no man would ever undertake it. And as for the inconveniency that a nearest of kin

may intromit with great sums without confirmation, and therewith pay whom he pleases, and the cautioners in the confirmation of the remaining subject avail themselves of such payment, it is what the creditors have in their power to prevent, by confirming themselves in due time, or if they be excluded by the confirmation of the nearest of kin, by pursuing him within the six months. *See* EXECUTOR CREDITOR.

*Fol. Dic. v. 3. p. 190. Kilkerran, (EXECUTOR) No 5. p. 172. & No 7. p. 173.*

No 31.

1777. *March 11.* CRAIG *against* RATTRAY.

No 32.

ANNE RATTRAY decerned executrix *qua* relict of Steven her deceased husband, applied by petition, and obtained a valuation of the effects according to inventory. Craig, a creditor, *objected* to the inventory, that the valuation being L. 133 : 5s. was too low; whereas he was willing to give L. 200 for the effects. He therefore craved, that either they should be delivered to him, or charged to the widow at that amount, or, lastly, exposed to public auction.—THE LORDS, in an advocacy from the Commissaries, remitted with instruction to find the relict accountable to the creditors for L. 200, in respect that sum was offered for the goods, and that she had disposed of a part of the same, which she had no power to do before confirmation. *See* APPENDIX.

*Fol. Dic. v. 3. p. 190.*

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## SECT. V.

### In what cases Executors may make Payment.

1507. *January 27.* MARGARET SYMSON *against* JAMES SCOT.

No 33.

COUNT and recknyng beand justlie and lauchfullie maid be the executor, of his intromission with the guidis and geir pertening to the deid, he on na wayis thairefter may be callit as executour for ony debt auchtand be the deid.

*Balfour, (EXECUTOR) No 11. p. 221.*

1541. *July 30.* A. *against* B.

No 34.

THE executouris may be callit and persewit be the legatoris, for payment of all legacies left to thame be the deid.

*Balfour, (EXECUTOR) No 9. p. 220.*