

1741. February 27. MARGARET MOUBRAY *against* AGNES SIMPSON.

MARGARET MOUBRAY being decerned executrix *ad omnia*, &c. as nearest of kin to her deceased brother David Moubray tenant in Primrose, brought a process of count, reckoning, and payment, against Agnes Simpson his relict, who was decerned and confirmed executrix to him upon her contract of marriage.

The defence offered for the relict was, That David Moubray, her husband, was indebted, the time of his death, to Lord Primrose, in a bond for above L. 3000 Scots, which she having paid, and procured an assignation thereto, she ought to have credit for the same.

*Answered* for the pursuer, That the defender having obtained an ease from Lord Primrose, she must communicate it to the pursuer, because she (the relict) was decerned executor the time of the transaction, whereby she became a trustee for behoof of all concerned, it being an undoubted principle in our law, that trustees are bound to communicate eases; witness the case of tutors and curators, or trustees for majors; and it cannot be doubted that executors are held as trustees for behoof of the several parties concerned. It is on that foundation that an executor confirmed cannot safely pay a creditor without a decree, because that would be an abuse of an office of trust, it being a power too high for a trustee to prefer one creditor to another: And indeed, should an executor be found not obliged to communicate eases, then persons chosen to that office on account of their activity and skill, and who, for their trouble, are entitled by law to a third of the dead's part, would have a notable opportunity of practising their dexterity, to the utter disappointment of the defunct's laudable intentions, and the manifest disadvantage of the nearest of kin; conform to which it has been decided, December 16th 1710, Sir James Elphinston, No 17. p. 3835., December 1725, Aikenhead of Jaw, *voce* HEIR CUM BENEFICIO. See likewise act 14th Parl. 22d James VI.

*Replied*; That, both from the general principles of law, and particular circumstances of this case, the relict cannot be considered to have acted as a trustee, but *tanquam quilibet*; for the transaction passed entirely betwixt Lord Primrose and herself; no other party intervened, or had any interest in it; neither was it the design or meaning of my Lord, or relict, to profit any third party: My Lord's view was to have his money; and, as he could not have the whole without a good deal of trouble, and even a chance of losing a part, he therefore chose rather to give down somewhat, that he might have the rest certain from the person to whom he gave down; and, as this was my Lord's intention, so the relict's was suitable thereto: She ran a considerable risk; the subject of the executry was uncertain and precarious; most of it corn standing on the ground; it was a great question whether it would answer her whole debt and Lord Primrose's too; and therefore it would have been the height of folly in her to have paid my Lord his whole debt, and taken her chance of the uncertain product of

No 20.

An executor is bound to communicate an ease obtained from a creditor of the defunct, to the nearest of kin confirmed executor *ad omnia*.

No 20. the executry; to compensate this hazard, the abatement was given her. Put the case the corn had perished, or greatly sunk in its value, surely the pursuer would not have been obliged to have indemnified the relict of the bargain she made with Lord Primrose; and if she would not have shared the loss, there is no reason she should be admitted to any share of the gain; nay, the defender was not even executor at the time of the transaction; for although it was true she was decerned preceding that period, yet nothing followed on that decerniture; the same was dropt, and it was not till after the transaction that the decerniture was pronounced, upon which the relict's confirmation proceeds; and as she had made up no title at the time of the transaction, she cannot be understood to be a trustee: But even supposing the confirmation had proceeded on the first decerniture, yet, till confirmation, it is certain she was no executrix, and therefore no trustee. She could not have sought payment from the debtors of the defunct, seeing it is the confirmation alone that gives the right of intromission with the defunct's effects; the decerniture vests nothing till the confirmation; for the decerniture is nothing else, in the case of a nearest of kin, but a declaratory judgment, that the mover of the edict is nearest of kin, and may be let in to intromit with the defunct's effects, upon giving up inventory, and finding caution; it is not a passive title; and it is frequently deserted, and never made use of; just so in the case of a creditor, it is nothing else but a declaratory judgment, that the mover is creditor to the defunct by the grounds of debts produced, and may be confirmed for payment of his debt; but never any body imagined that such decernitures vested any right or trust in the movers of the edicts.

*Duplied* for the pursuer, That an executor decerned, and afterwards confirming, is equally liable to account for his acts and deeds relative to the defunct's effects, before confirmation as after it. The confirmation must be drawn back to the date of the decerniture, or rather to the date of the serving the edict; nay, to the first moment that a person began to intromit with the defunct's effects, that person having afterwards confirmed; and in this case the widow intromitted soon after her husband's death. It may be true, that, after the transaction, the widow got herself of new decerned executrix; but the reason of that was, because my Lord Primrose had formerly been decerned executor *qua* creditor: But he went no further, having assigned his claim to the widow, and she took out a new decerniture, in order to be confirmed executrix-creditrrix upon the defunct's bond to Primrose, and assigned by his Lordship to her, as well as upon her contract of marriage. But still it is obvious the widow was acting all along upon the plan of confirming as executrix; and if this should be listened to, it is plain, a door would be opened to numbers of contrivances for defeating the communicating eases altogether.

THE LORDS remitted to the Commissaries, with this instruction, that the relict be obliged to communicate the eases to the nearest of kin.

*Fol. Dic. v. 3. p. 192. C. Home, No 164. p. 275.*