

1741. February 19.

NISBET *against* BALFOUR.

No 46.

REGULARLY an executor against whom decree is obtained, is not to be found liable in expense, because he cannot safely pay without a decree for his warrant; but where the debt was due by a bond containing a penalty, as the penalty is no less the defunct's debt than the principal sum, the creditor was found entitled to the penalty to the extent of his expense, which would be allowed to the executor at accounting for the executry.

Fal. Dic. v. I. p. 191. Kilkerran, (EXECUTOR) No 6, p. 173.

1746. June 4.

MARGARET SIMSON *against* MARY CAIRNS.

No 47.

DAVID SIMSON merchant in Leith died insolvent in May 1736, leaving Mary Cairns his widow with several children, who confirmed herself executrix to him, giving up an inventory to the extent of L. 810 Sterling, continued to trade, and paid off debts as she could to the extent of L. 1400 Sterling, without being compelled by diligence, she being (as she said) ignorant of the law, and resolved, as far as possible, to satisfy all her husband's creditors.

William Carmichael merchant in Edinburgh, who had married Margaret Simson, sister to David, engaged with him for L. 600 Sterling, part whereof Mr Simson paid before his death, and for the remainder gave to William Carmichael, son to William the cautioner then deceased, a security upon a tenement belonging to him; and Mary Cairns had by Candlemas 1739 paid L. 365 thereof; but the remaining sum, amounting to L. 192, was at Martinmas thereafter paid by Margaret Simson, and an assignation taken to the obligations; on which she raised a summons of adjudication of the above-mentioned tenement, disposed to her son in security of the debt, and upon this diligence Mary Cairns paid L. 100 thereof about eight months thereafter.

Margaret Simson was herself creditor to her brother in some small sums, and received payment of them, and in a bond of L. 44 Sterling, which lay over for above six years after his death, and then she pursued upon it; in which process the relict *alleged*, that she had promised never to make the demand, but to assign it to one or other of her brother's children, and referred the promise to her oath: She deponed *negative*; and then the defender *pleaded*, that the inventory was exhausted by payments. The debate upon which point was by the Lord Ordinary taken to report.

Pleaded for the defender; That though it certainly was the rule, that an executor could not pay voluntarily, but behoved to have a decret for his warrant, to the end that it might not be in his power to prefer one creditor to another; yet this rule might admit of exceptions, and the circumstances of the present case were such as to make it justly an exception: There could here be no intention of collusion, because the payments made so far exceeded the inventory,

Payment made by an executor without decree, was sustained to exhaust the inventory, for this reason, that by her own industry and diligence she had paid much more than the funds amounted to.

No 47.

that they could only be attributed to the honest intention of the executrix to pay all her husband's debts, and she had always entertained an apprehension that this debt was not to have been demanded, as she well might, when no demand was made by a creditor so rigorous in other cases: That the pursuer by insisting for the L. 100 which was safe, being heritably secured, endangered the payment of this personal debt, if she had then intended to exact it, by taking a step that might have at once disabled the defender from business, by bringing all the creditors upon her: That the pursuer was sister to the defunct, acquainted with his circumstances, and the manner of the defender's management, in which she allowed her to proceed, receiving payment herself, and making no demand of this money till the subject was paid away to others, and so might be thought to have ensnared her, and therefore ought not now to be heard in making this demand: That in a case, James Johnston against the Lady Kincaid, No 38. p. 3853., the Lords having repelled the defence of voluntary payment, they qualified the interlocutor in this express manner, 'Especially seeing it was not a debt given up in testament by the defunct, neither was it alleged that the pursuer had long neglected to pursue.'

Pleaded for the pursuer, That the great payments alleged to be made by the defender, (from which several defalcations would fall to be made on examination) brought a shrewd suspicion upon her, that her intromission had been larger than the extent of the inventory, or that the effects had been undervalued: That her intention of paying the whole creditors, if it was known to the pursuer, was a good reason for lying off and not straitening her; and the method taken by the defender of paying without decret, might give any person observing it, reason to imagine she had such an intention, and knew of sufficient funds for that purpose; the pursuer had therefore been easy to her with regard to this claim belonging to herself, although she had used some diligence for the debt due to her children, where she acted as trustee, and yet there she had gone no further than a summons of adjudication, while (she affirmed) she had often demanded her own debt, though she had taken no legal steps for the recovery, but allowed herself to be postponed to more importunate creditors.

The rule of law ought to be adhered to, otherwise great prejudice would arise to creditors, who might be amused with stories of the defunct's circumstances, and the good intentions of the executor, whom they saw making some payments, and might therefore suppose that he knew of effects to come in, and thus at last they might be cut off altogether, if the rule were to be departed from upon certain equitable considerations, which could never be determined.

Pleaded for the defender; That the inventory was full, and the valuations just, and the way by which she was enabled to make so large payments was, partly by the forbearance of the creditors, who lay off till she, by her success in trade, had bettered her circumstances; partly by the assistance of others, particularly her correspondent at London, as appeared by his letter in process; and partly by large sums borrowed on bond, and yet due by her, to the extent of 4500 merks, for which she produced receipts of annualrents.

THE LORDS, 8th June 1745, found, that in the circumstances of this case the payments made by the defender behoved to be admitted in exhausting the inventory ; and, on a bill and answers, adhered.

No 47.

Reporter, *Arniston.* Act. *Lockhart & Williamson.* Alt. *Balfour* Clerk, *Gibson.*
Fol. Dic. v. 3. p. 191. D. Falconer, v. 1. No 109, p. 129.

1748. December 19.

ELIZABETH and MARY ARBUTHNOTS *against* ARBUTHNOT.

No 48.

IN a process at the instance of Elizabeth and Mary Arbuthnots against their brother the executor, for payment of their bonds of provision, he offered to assign as many of the bonds contained in the inventory of the testament as would answer their provisions.

But THE LORDS found, ' that a creditor is not bound to accept of an assignation from an executor.'

Fol. Dic. v. 3. p. 191. Kilkerran, (EXECUTOR) No 10, p. 176.

1781. November 28. BENJAMIN BELL *against* WILLIAM CAMPBELL.

UPON the death of Bryce Blair, his relict was decerned executrix, for behoof of herself and the younger children. In that character, she brought an action against Richard Thomson, for payment of a debt due by his predecessor to her husband ; and afterwards assigned this claim to William Campbell, in payment of an account owing to him by George Blair, the eldest son and heir of Bryce ; and by William Blair, the second son, as representing his deceased brother.

Posterior to the date of this assignation, Benjamin Bell raised a process against the executrix for relief of certain debts in which his grandfather had been bound as cautioner for Bryce Blair, and for which he was now distressed ; and upon this dependence, laid an arrestment in the hands of Richard Thomson. In a multiple-poining at Thomson's instance,

Pleaded for the arrester ; An executor is no more than a trustee or administrator for those interested in the executry. Confirmation does not vest the property in his person. He cannot compete with a creditor of the defunct attaching any part of the estate ; neither can he, by assignation, give a preference to any particular creditor ; *Erskine, b. 3. tit 9. § 42.* Upon the same principle the executry estate, while *in medio*, cannot be attached for the debts of the executor, but remains open to the creditors of the defunct, who have been preferred, even without diligence, upon a simple statement of their interest ; 12th February 1779, *John Tait contra David Kay, No 21, p. 3142.*

No 49.

An executor cannot give a preference by assignation to any particular creditor.