1748. *November* 2. Duke of GORDON *against* Lady HENRIETTA GORDON.

No 28.
How far a proof led in an action against the heir for a moveable debt, will be sustained in the action of recourse against the executor?

GEORGE Duke of Gordon had been cautioner to the Earl of Aboyne for his tutor-in-law; for the balance of whose accounts, action being brought against Alexander Duke of Gordon as representing his father Duke George, submission ensued, on which proof was in part led by both parties. But the Duke's death having prevented further procedure, the Earl of Aboyne transferred the process again his son and heir, the present Cosmo-George Duke of Gordon; and after a further proof, and re-examination of some of the witnesses formerly brought upon the submission, a new submission was entered into, whereon decreet-arbitral was pronounced against the Duke for the sum of L. 1400 Sterling, whereof he made payment.

A process being now brought at the Duke's instance against Lady Henrietta his sister, as executrix to Duke Alexander their father, for relief, the pursuer repeated the decreet-arbitral and proof led in the first submission with Duke Alexander, and in the process against himself, as the instructions of his claim: And there could be no question, but that the proof led upon the submission, wherein Duke Alexander, the defender's father, was party, was equally available to the present Duke, the pursuer of this process, as it would have been to the Earl of Aboyne, had he brought his action against the defender as executrix to his debtor.

But the question was, how far the decreet-arbitral, as supported by the proof led in the process at the Earl's instance against the pursuer as heir, could be repeated against Lady Henrietta the executrix, as she had not been made a party to it, which the Lord Ordinary, by his interlocutor, gave in favour of the defender?

But, upon advising petition and answers, the LORDS "Found the pursuer entitled to relief of the sums contained in the decreet-arbitral, unless the defender could prove collusion in taking of the proof, or bring any other relevant objection whereby the sums claimed by the Earl of Aboyne might be brought lower than those contained in the decreet-arbitral; reserving liberty to the defender to re-examine such of the witnesses adduced in either proof as were yet living."

This was by some thought hard; although a decree obtained against an heir for a moveable debt, constituted by writ, to which the executor was not made party, be not a *res judicata* against the executor, but that the executor pursued for relief, may still be heard to propone any proper exception to the debt, in like manner as a cautioner may to a decree obtained against the principal; yet if the executor have no exception to the debt, it is no defence against the relief that he was not made party to the process, as upon the same medium he must be decerned against in an action at the instance of the creditor against himself. Yet where a debt is constituted against the heir only by a proof by

No 28. witnesses, it was thought hard that the executor should be at all bound to submit to that proof; and that both in point of principle, as such proof as to him is *res inter alios acta*, and in point of expediency, as there may be collusion, which the executor may not have it in his power to discover.

Nevertheless, as the condition of the parties, and circumstances of the case, did here exclude all suspicion of collusion, and that by the proof a much greater balance had come out than was decerned by the decreet-arbitral, which justified the submission to have been a rational act on the part of the Duke, the LORDS, on these equitable considerations, found as above.

*Fol. Dic. v.* 4. *p.* 235. *Kilkerran*, (RES INTER ALIOS.) *No* 1. *p.* 493.

*** D. Falconer reports this case:

GEORGE Duke of Gordon having been cautioner for George Gordon, tutor-in-law to John Earl of Aboyne, the Earl, on his majority, made a claim upon Alexander Duke of Gordon, as representing George his father, on account of the tutor's alleged deficiencies; and a submission was entered into, and a proof led of the intromissions and articles of discharge, but no final determination given.

Duke Alexander died, and the Earl of Aboyne raised an action against his son, Cosmo-George Duke of Gordon, in which a proof was led, and severals of the former witnesses re-examined; and the matter being again submitted, a decreet-arbitral was pronounced against the Duke for L. 1400 Sterling.

The Duke pursued his sister Lady Henrietta, executrix to their father, for relief; and she having objected to the evidence of the claim, the LORD ORDINARY, 15th November 1746, "Found that the decreet-arbitral, proceeding on a submission between the pursuer's tutor on the one part, and the Earl of Aboyne on the other, to which the defender was not a party, was not a sufficient instruction of the extent of the balance, but prejudice to the pursuer yet to instruct and ascertain the same."

The Duke for this purpose produced the two proofs above-mentioned, from which he *pleaded*, It appeared the charge against the tutor considerably exceeded the decerned sum, so that the submission was a beneficial transaction for the late Duke's Representatives, and he entitled to relief from the executrix.

*Pleaded* for Lady Henrietta, The decreet-arbitral is not binding upon her, as she was not party thereto, *res inter alios acta aliis neque nocet neque prodest*; and hence a cautioner being pursued, is obliged to notify his distress to the principal, or the decreet recovered, as *res inter alios acta*, will not militate against him. A decreet recovered against the principal, is not *res judicata* against the cautioner; 28th December 1709, Sir George Hamilton against Sir James Calder, No 24. p. 2095.

No 28.

The proof taken in the process and submission with the heir cannot be repeated against the executrix, since the effect in law of witnesses swearing to a fact, is not the establishing that fact as truth against every person, whether parties to the procees or not, but only that it shall be held as such between the pursuer and defender, on account of the judicial contract of litiscontestation, whereby the cause was put upon that issue; and for that reason it has been greatly doubted, if a proof led in one process, ought to be used between the same parties in another, wherein it was not submitted to by the litiscontestation; and the depositions have only been allowed to be repeated, with liberty to the parties of examining new wisnesses, and of re-examining the former if alive; — January 1731, Bontein against Bontein, No 26. p. 14043., in which cause an objection to a witness, which arose after leading the proof, was sustained to cast that witness, 9th December 1737.

*Pleaded* for the Duke; An executor is liable to relieve the heir against moveable debts; and it will be no defence, that the process against the heir was not intimated, if no defence can be made against the ground of debt. Stair, lays it down, " That warrandice will take effectwhere there is unquestionable ground of distress, though the fiar transacted to avoid the distress." A decreet against an heir is not indeed *res judicata* against an executor, nor one obtained against a principal against a cautioner; but if the heir be distressed thereupon, it is a sufficient ground of recourse; and for the same reason, if, upon a proof brought, he transact the claim and pay it, this is a distress he ought to be relieved of. The Earl was pursued, he made all defence possible, a proof was led against him, he had no further vouchers of discharge, and the executrix does not pretend she can furnish him with any; it appeared he must have been decerned in a larger sum, and therefore he transacted; and there is the same reason he should be relieved, as if he had paid on a decreet.

THE LORDS found, That the proof taken in the submission betwixt the deceased Earl of Aboyne and the late Duke of Gordon, and in the process at the said Earl's instance against the present Duke of Gordon and his tutor, might be made use of and repeated against the defender, the executrix of the said late Duke of Gordon; and that the pursuer, as heir, was entitled to relief from the said executrix, of the sums contained in the decreet-arbitral, pronounced on the submission entered into betwixt the said Earl of Aboyne and the tutor of the pursuer, unless the defender could prove collusion in the taking of the foresaid proof, or bring any other relevant objection, whereby the sums acclaimed by the said late Earl of Aboyne, in the processes at his instance against the said late Duke of Gordon, on account of the cautionry of his father George Duke of Gordon for the tutor of Aboyne, might be lessened, or diminished, below the sums contained in the said decreet-arbitral; reserving to the defender

No 28. liberty to re-examine such of the witnesses contained in the foresaid proofs as were yet living.

Reporter, *Elchies.* Act. *R. Craigie.* Alt. *H. Home.* Clerk, *Kirkpatrick.*
*D. Falconer, v. 2. No 2. p. 2.*

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1767. *February* 24. M'HARGS *against* CAMPBELL.

No 29.

THE sentence of a court-martial, finding a man guilty of murder, found a sufficient ground for an action of assythment in the Court of Session.
*Fol. Dic. v. 4. p. 235. Fac. Col.*

*** This case is No 429. p. 12541. *voce* PROOF.

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## SECT. II.

### Res Judicata.

1543. *March* 20. CAMPBELL *against* LAIRD of GRANGE.

No 30.
A forfeiture being reduced *per modum justitiæ*, all dispositions granted by the donatar, of parts of the land, were found to fall in consequence,

SIR JOHN CAMPBELL of Lundie asked the Laird of Grange's infeftment of certain lands holden by him of my Lord Glamis, and become in the King's hands by reason of my Lord Glamis's forfeiture, and therefore given by the King to the said Grange, to be reduced, because the said forfeiture was reduced by Parliament, holden by my Lord Governor, after the King's decease, wherefore all the said Lord Glamis's free tenants ought to be put in the same place they were in before the said forfeiture. The Laird of Grange *replied*, That his infeftment should not be reduced for the cause foresaid, because both before and after the reduction of the said forfeiture, and in the time thereof, in judgment, the said Lord Glamis consented that that infeftment should not be reduced, but should stand and be of effect, sicklike as if the forfeiture were not reduced, and that the reduction thereof should not be prejudicial to the said infeftment. The said Sir John *duplied*, That since the said forfeiture was reduced and decerned to be null, from the beginning, and in all time coming, with all that followed thereupon; and that the said Sir John's right, as free tenant to the said Lord Glamis, was tint by the forfeiture; and that the said Lord might not have taken from the said Sir John his land without his consent; and that so he might not consent that the forfeiture, being reduced and declared null from the beginning, that it should be of no avail anent the escheat of the said Sir John Camp-