

APPENDIX.

PART I.

HEIR AND EXECUTOR.

1777. *July 25.* ROBERTSON and ROSS *against* BISSETS.

No. 1.

THE particulars of this case, mentioned No. 4. p. 5203. relative to the right of an heir and representative to exhibit his subscription as drawer of a bill which had been left blank by his predecessor, will be found, APPENDIX, PART I. *voce* BILL OF EXCHANGE, No. 5.

1804. *February 17.* CATHCART *against* MOODIE.

No. 2.

Mr. William Anderson having been the man of business for Lord Rockville's family, was considerably indebted to them at the time of his death, (Dec. 1796), when he nominated Mr. Stuart Moodie, advocate, to be his executor.

An executor who has made payment of a debt of the defunct, cannot be reponed upon a shortcoming of the funds.

The account due to the Countess Dowager of Dumfries, Lord Rockville's widow, amounted to £1054. 15s. and as there was then supposed to be much more than a sufficiency of funds for the discharge of his whole debts, payments were made to the amount of L.986. 5s. 8d. so as nearly to extinguish this debt.

It having turned out, however, that Anderson's funds were inadequate to answer the demands upon him, Moodie raised a summons of multiplepounding (4th June 1798), in which it was agitated, whether Lady Dumfries should rank upon the debt as at Mr. Anderson's death, or as then outstanding; that is, whether the payments were to be held as dividends out of the interest belonging to Lady Dumfries in the funds, or if she should now rank for the dif-

No. 2. ference between the sum originally due, and the payments made in extinction of it.

Mr. Moodie contended, That the whole creditors, after their debtor's decease, are constituted into an aggregate body, for whose behoof the executor is trustee: That therefore he has no right to apply the funds to the payment of one creditor more than to another: Although he cannot make any such selection, still it is held that he may pay *primo venienti*; but this cannot be to any one making a private extrajudicial demand, but can only be to the person who first obtains a decree; Ersk. B. 3. T. 9. § 43. This was not the case here. The payment, therefore, was unwarrantable; and there must be room for a *condictio indebiti*. For although it may be true, that there was a debt truly due at first, there was none due by the executor, in so far as the funds turn out insufficient. The payment was made by mistake, and therefore not protected by the *bona fides* of the creditors; Carrick against Carse, 5th August 1778, No. 11. p. 2931.

Lady Dumfries having assigned her interest to Robert Cathcart, writer to the Signet, as her trustee, in his name argued: A creditor having obtained payment from an executor, where no diligence has been used for six months after the death of the debtor, is not liable in any claim for repetition, though an insufficiency of the funds should afterward be discovered. A debt which is not disputed may be paid in this way without any decree. The claim of repetition cannot be supported upon the idea of a *condictio indebiti*, which implies a want of title in the receiver, or ignorance of some plea in point of fact or law on the part of the payer. Neither of these can be alleged here. The debtor might have obtained decree against the executry funds for the debt, and, when paid, no claim in the way of *condictio* would be competent; Robertson against Strachan, 29th July 1760, No. 35. p. 8087. Ersk. B. 2. T. 9. § 23. Lesser Institute.

The Lords found, "That the payments made to Lady Dumfries are to be imputed in extinction of the original debt due to her, and that she is not bound to repeat any part thereof."

Lord Ordinary, Polkemet.

Hay, W. S.

Att. A. Bell.

For Executor, Lord Advocate Hope.

Agent, Robert Cathcart, W. S.

Agent, James

Clerk, Menzies.

F.

Fac. Coll. No. 146. p. 327.

1804. November 13. FRASER against FRASER and Others.

No. 3.

A debt due by an heritable bond, must be paid

Lieutenant-Colonel Hugh Fraser of Knockie, executed a deed of settlement on the 28th of April 1801, in London, by which he disposed his lands of Knockie and Dalchapple to his cousin Simon Fraser of Farraline, binding him-