

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-

self to make up proper titles, and convey these lands to him, his heirs and assignees, of and with regard to my personal estate, I give, grant, devise, and bequest to the same in manner following, viz. in the first place, I order and direct, that my funeral charges and expenses, together with all my just and lawful debts, be paid by my executors hereafter named, as soon after my decease as conveniently may be. All the rest, residue, and remainder of my estate and effects, of every nature and kind whatsoever, and wherever situated, I give, grant, and bequeath, assign, convey and dispose to my uncle, James Fraser of Gorthlick, Esq. his heirs and assignees; and I hereby nominate and appoint him the said James Fraser to be my residuary legatee."

Colonel Fraser had not been in Scotland for more than a year before he executed this settlement. His personal estate was much more considerable than his heritable property; and the only debt which he left was a bond of £2000 due to Helen and Grizel Fall, which was heritably secured upon his estate in Scotland.

Farraline, and the other trustees of Miss Falls, brought an action against the executors for payment of this bond, and the executors brought a counter action against Farraline for relief.

"The Lord Ordinary having heard parties' procurators, conjoins the process of relief at the instance of John Spalding and others, the executors of Colonel Hugh Fraser, against Simon Fraser of Farraline, Esq. with the before-mentioned process at Simon and John Fraser's instance against Colonel Fraser's executors: Finds the whole defenders, conjunctly and severally, liable for payment of the heritable bond libelled on; but in respect the settlement by which the lands of Knockie are disposed to Simon Fraser of Farraline, one of the defenders, could only import a right to those lands, subject to the heritable debt with which they were burdened; and that the clause taking the executors bound to pay the debts, cannot have the effect of altering the right of relief between him and the executors; finds the executors entitled to relief from said Simon Fraser of Farraline, Esq. of the heritable bond libelled on, conform to the conclusions of their actions of relief; and decerns accordingly."

The trustees presented a petition to the Court against this interlocutor, and Pleaded: The present case ought to be decided by the law of England, where the testator had his domicil, by which law the executors are liable for this debt. The settlement was drawn in London, and must be interpreted according to the received rules of the country where it was executed. But even supposing the question to be decided according to the principles of the law of Scotland; when a person disposes an heritable subject to one, and, at the same time, the bulk of his fortune to another, in a character inferring general representation, taking him bound to pay the whole of his debt, he must relieve the disponee of the burden attached to the heritable property. Consi-

No. 3.

by the heir, without relief, though the executor is taken bound in general to pay all the debts of the deceased.

No. 3. dering this as a question of intention, there can be no doubt that Colonel Fraser, who had no other debt than this heritable bond, meant, by imposing the obligation of discharging his debts upon his executors, that the disponee should possess the estate unencumbered, and that the executors were only to have a right to the personal estate after paying this debt.

But the petition was refused without answers, the Court being of opinion, that, without a special clause to that effect, the legal rules of accounting between heir and executor could not be altered.

Lord Ordinary, *Hermann*. For Petitioner, *Craigie*. Agent, *Col. M'Donald, W. S.*
Clerk, *Ferrier*.

J.

Fac. Coll. No. 179. p. 403.