

1707. December 10.

JAMES LEES, Merchant in Glasgow, *against* ROBERT DINWOODIE, Merchant there,

IN the action at the instance of James Lees, as executor-creditor to Ninian Glass, against Robert Dinwoodie and Elizabeth Kelburn, Ninian's relict, for the value of their intromission with some goods belonging to the defunct; the LORDS, the 18th of July 1706, found the confirmed testament at Lees's instance null, in respect that before the date thereof, the defunct's relict was confirmed executrix to him, and she was not called in Lees's confirmation, who is also confirmed a principal executor, and not *ad omissa*.

Mr Lees yet *insisted* and *urged*, That though the testament confirmed in his favours be found null, it is *jus tertii* to Mr Dinwoodie to found upon the first confirmation, which he has no right to, in order to quarrel the pursuer's title by the second.

Alleged for Dinwoodie; That he having been convened before the commissaries of Glasgow for the value of the goods intromitted with by him, at the instance of Elizabeth Kelburn, the principal executrix, upon an eik thereof made to her confirmation; he obtained decret of absolvitor upon a ground of compensation for a liquid debt resting to him by the defunct. By which absolvitor he hath interest to found on the relict's confirmation, as preferable to the pursuer's.

Replied for Lees; He being creditor as well as executor, and having cited both the principal executrix, and Robert Dinwoodie, debtor for the goods confirmed, was thereby preferable to these goods; which preference, by the first citation and diligence against the executrix, could never be excluded upon any ground of compensation founded on by Dinwoodie; otherwise, it were in the power of any creditor of a defunct to prefer himself, and disappoint another's diligence. Nor could there be any concurrence of debit and credit in the person of the executrix, to give rise to the compensation; because she could, in no event, be debtor to Dinwoodie, except for the unexhausted free gear, not affected by the preferable diligence of other creditors. And the using habile diligence against executors, is the legal way of giving preference to the defunct's creditors; in so far as a debtor's taking assignation to his creditor's debt after his decease, could not thereon found compensation against the executor, February 8. 1662, Crawford against the Earl of Murray, No 63. p. 2613.; February 14. 1662, the Children of Mouswal *contra* Lawrie, No 64. p. 2614. And if a legal assignation of the defunct's debt could not secure the debtor against the executor, far less could Dinwoodie's unwarrantable intromission with Ninian Glass's goods, prefer him to the payment of debt due to him by the defunct, upon the pretence of compensating the said intromission, to the prejudice of habile diligence used by other creditors.

No 14.

The Lords sustained a testament, tho' it bore not that the executor, at the confirmation, made faith and depone on the inventory; but only, that it was faithfully made and given up by him; altho' the instructions to the commissaries require executors to make faith.

No 14.

Duplied for Dinwoodie ; The relict, as executrix-dative, being debtor to the defunct's creditors *quoad vires inventarii*, and Dinwoodie, who was creditor to the defunct by bond, falling to be debtor by intromission with his goods ; there was a clear *concursus debiti et crediti* : And seeing he was not assignee, but creditor to the defunct *proprio nomine*, the decisions adduced concerning the assignee's not having the benefit of compensation against an executor, are not applicable to this case. *2do*, No respect to Lees's first citation ; because, *imo*, It was given at his instance as executor to the defunct, and the testament being found null, the citation and all that followed thereon, must fall in consequence, to all intents and purposes. Nor could he, as creditor, pursue for the debt he had confirmed as executor, in regard *qua talis* he was debtor, and so his debt was extinguished *confusione*. *2do*, The citation at Lees's instance was given to the relict before the goods pursued for were eiked to her confirmed testament.

Triplied for Lees ; Elizabeth Kelburn's principal testament is null, for that it does not bear, that at the confirmation she made faith and gave her oath upon the inventory, which is indispensably required by the Commissaries instructions : And the testament being null, there was no necessity to call her to Lees's confirmation. *2do*, Though her testament were valid, and Lees's confirmation null as to the office, in so far as exceeds the payment of his just debt, it ought to be sustained at least as a security for that : As the Lords are in use to sustain the diligence of creditors *ad talem effectum*, though labouring under greater defects.

Quadruplied for Dinwoodie ; It is true, by the instructions to the Commissaries, executors are to make faith upon the inventory, that nothing is omitted or mal-appretiated, which is done before giving out the confirmation : But the making faith is never carried further, or expressed in the confirmation, than by these words in the beginning, ' Faithfully made and given up by such a person executor.' *2do*, Lees's confirmation being found null, and the principal executor having eiked the debt due by Dinwoodie, and pursued him, and he being assoilzied upon compensation ; this is a sufficient *medium impedimentum* to hinder Lees's confirmation to have any effect.

THE LORDS sustained the defences proponed for Dinwoodie, and assoilzied him from the process at James Lees's instance.

Thereafter, February 12. 1708, it was *alleged* for Lees, That he offered to improve the execution of the edict whereupon the relict was confirmed, and craved that Dinwoodie might abide by the same *sub periculo falsi* : And the execution of the edict being taken away as false, the confirmation following thereon, and Dinwoodie's absolvitor, must fall in consequence, and Lees's confirmation, as the next valid deed, must take place. For improbation states the relict in the same case as if she had never been confirmed, a false confirmation and no confirmation being *paria in jure*. Nor can it be pretended, that improbation is not competent *hoc ordine* ; seeing the writs craved to be improved, and all parties concerned, are in the field, and *lites non sunt multiplicandæ* ; and

improbation is proponed by way of reply by the pursuer himself, who cannot be thought to do it *animo protelandi litem*.

No 14.

Answered for Dinwoodie ; If the execution of the relict's edict be false, James Lees may insist against her as he may be served ; but Mr Dinwoodie is no way concerned therein, whose absolvitor would stand good to him, as if he had *bona fide* paid the executrix, albeit the execution of the edict were improved. *2do*, The relict is not compearing, and so all concerned in such an improbation, are not in the field.

Replied for Lees ; There is a great difference betwixt *bona fide* payment, and an absolvitor upon compensation ; for, in the last case, the person assoilzied is at no loss by being re-convened, which cannot be said of him who hath *bona fide* paid, and wants his money. And if improbation should not be received *incidenter* against Dinwoodie, there could be no safety against falsehood. For, how easy is it to get a mean person to make up a false right to the most considerable debt, and to cause him discharge the debtor ; whereby the true proprietor would have but an unprofitable action against the forger, who perchance is gone off for his safety.

THE LORDS found that Dinwoodie is not bound to abide by the verity of the relict's testament, and that the improbation is not competent in this state of the process, and therefore adhered to their former interlocutor, assoilzieing Dinwoodie from the process ; reserving to Lees to pursue his improbation against the executions of the relict's testament, as accords.

Fol. Dic. v. 1. p. 273. Forbes, p. 206.

* * See This case by Fountainhall, No 4. p. 2546.—See also No 10. p. 2702.

1709. July 15.

FARQUHAR against PATON.

CAPTAIN FARQUHAR being a creditor of Andrew Logie of Loanhead, pursues Anna Paton, his relict, as executrix, for payment ; and she offering to prove exhausted by payment of true and lawful debts before his citation ; he *replied*, you got eases and abatements of sundry of these sums, for which you must count to me ; and they being deduced, there will be a superplus, which ought to be made forthcoming to me, seeing an executor is no more than a fiduciary for the use and behoof of the creditors, legatars, relict, and nearest of kin, allowing their own share, viz. the third of the dead's part given them by law for their pains in executing the office ; and for this very end they give up inventory, and find caution. *Answered*, *Esto* I had got eases, I am not bound to communicate them to you ; for if the creditors, out of compassion to me, a poor widow, and my fatherless children, have given me the favour of an ease, they nowise intended it should accresce to you, in whom they were not concerned ; and, if they thought it would have gone that way, they would not have given it ; and what hinders them on personal respects and considerations to have gifted the

No 15.

If an executor pay a composition for debts due by the defunct, he is bound to communicate the eases to the creditors.