

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.

No 15.

executor a part of their sums, shall that donation belong to you? THE LORDS ordained the Reporter to hear the parties on what motives the cases were given; for, if a creditor, to get timeous and ready payment, give the executor an ease, without regard or design of a favour, they thought a posterior creditor might claim the benefit of that ease; but if it was on personal respects or considerations it would be otherwise.

*Fol. Dic. v. 1. p. 276. Fountainball, v. 2. p. 516.*

1709. December 9.

MENZIES against WOOD.

No 16.

An executrix was decerned to find new caution on the decease of her former cautioner, tho' that cautioner was her father, to whom she succeeded *in universum jus.*

SIR WILLIAM MENZIES and Captain Alexander Wood the brewer, having engaged in a tack of the inland excise in March 1699, and Sir William *alleging* he paid the tack-duty partly out of his own private credit, by borrowing money, he pursues Marion Johnston, Wood's relict, on the passive titles to repay his share and proportion of the tack-duty, extending to L. 2319 Sterling, the fund having fallen considerably short by sterility of the crops, and so diminishing of the brewing during the years of the tack. *Answered* for Mrs Wood, That any thing Sir William had paid to the General Receiver was out of the common stock and fund of the excise, and so could never afford him any ground to recur against Captain Wood his partner's representatives, and so he must first count and reckon for his intromissions with the subject of the excise. THE LORDS found that if his payments were what arose from the thing let, he could never crave relief or reimbursement of Wood, his co-partner, unless he had advanced money of his own, and therefore ordained him to count and reckon. But Sir William *represented*, That she had confirmed herself executrix-creditrrix to her husband in an inventory of L. 11,700 Scots, and found caution, but they being now dead he had no contradictor or security until she renewed the same, by finding new caution. *Answered*, He was in no hazard, for though Jasper Johnston of Warriston, her father and cautioner was dead, yet she succeeded to him as heir, and so his case was not deteriorate. *Replied*, The conveyances were involved and obscure, and there was no reason to put him, a creditor, to uncertain expiscations. Some thought this an extraordinary remedy, and not to be used save when the debtor or executor were notourly *vergentes ad inopiam*; yet it was instanced, that the Commissaries in some cases have forced executors to renew their caution, when dead or lapsed, and that the LORDS had as much power as they; therefore they ordained her to renew her caution before Sir William should be obliged to count to her.

*Fol. Dic. v. 1. p. 273. Fountainball. v. 2. p. 538.*