

1710. December 16.

Sir JAMES ELPHINSTON of Logie, *against* ANNA PATON, Relict of Andrew Logie of Loanhead.

IN the process at the instance of Sir James Elphinston, against Anna Paton, as executrix to her husband, for payment of certain sums due by him to the pursuer; the defender having *alleged*, That the inventory of the defunct's testament was exhausted, the LORDS found in the general, That an executrix having an office, could only state, in order to exhaust the defunct's testament, what was actually paid of his debts, and not the sums contained in the grounds of debt; and ought to communicate the benefit of any eases got from some creditors to the rest.

Fol. Dic. v. 1. p. 276. Forbes, p. 453.

* * * Fountainhall reports the same case :

SIR JAMES ELPHINSTON, Commissary of Edinburgh, being creditor to Andrew Logie of Loanhead in several sums of money, he pursues Anna Paton, his relict, as executrix-dative confirmed to him. She craves to be assoilzied, because she offers to prove the inventory of the testament was exhausted by payment of true and lawful debts before his citation, and that *scripto. Answered*, You must be still liable, because you had super-intromission unconfirmed; besides, the goods are mal-appretiate and undervalued. *2do*, You got considerable eases and compositions from your husband's creditors, which being discounted, there will remain as much of the inventory unexhausted as will near satisfy me; and it were unreasonable she should enhance the benefit and advantage wholly to herself, but it must accresce and redound to the common interest of her husband's creditors, seeing executry is but a trust and office to the behoof of creditors, legatars, the relict, bairns, and nearest of kin, and a fideicommiss. except as to the share law gives them, viz. the third of the dead's part: even as the Roman law introduced the *quarta falcidia et trebellianica*, as a bait and encouragement to cause them embrace the office; and the 14th act 1617, has copied after the same pattern. And Stair, *lib. 1. tit. 17.*, speaking of cautioners, goes farther, that a cautioner getting an ease or abatement from the creditor, he must communicate it to his co-cautioners; and to demonstrate that an executor (except in so far as concerns his own debt) is only a fiduciary and administrator, and not proprietor of the goods, if he go to the horn, nothing falls by his rebellion under escheat but only his own share of the executry goods, as was decided 21st December 1671, Gordon, Sec. 9, *b. t.*; and therefore nothing can be more just than her compting for the eases she got. *Replied*, This is a new passive title never heard of before, and a ground without any precedent in our law or decisions, that any of her husband's creditors can crave the benefit of the

No 17.

Found in conformity with
No 15. P.
3833.

No 17.

eases given to her, she being in the creditor's place ; and, as Sir James Elphinston could not have compelled them to quit any part of their just debt, so neither can their favour be wrested from her : And though the office of executry be but a trust, yet it was never pleaded to that pitch, to deprive them of the easements given them on personal considerations. It is true, what tutors or curators get down of their pupil's debts, accresces to the minors, and so in factors and chamberlains ; but no lawyer has yet extended it to executors. THE LORDS, by plurality, found they could not engross the benefit of the easements to themselves farther than they were either creditors by bonds, or by the legal proportion allotted them, and so could not exhaust the testament by the easements, to the prejudice of the other co-creditors ; but though they found this in the general, yet reserved the consideration of the specialities which might be in this case till the advising of the cause ; such as a personal regard to her circumstances, which they would not have yielded to the other creditors who needed not that favour ; and, if they had dreamed of its running any other way, they would have exacted their whole sums. A commission being craved for her deponing in the North, it was *objected*, That the easements would be so cunningly and latently managed, there was a necessity of her deponing before the Lords, to disclose these private negotiations, which will give rise to such incident interrogatories as can neither be seen before or prophesied, so as to be insert in a commission, where things would be huddled up in darkness. THE LORDS refused to grant her a commission in this case ; but reserved the specialities on which the easements were given, to be considered after her deponing. This was looked upon as a great decision, and a leading case against heirs entering *cum beneficio inventarii*, that they must not exhaust the heritage by counting up the easements they have got. It lays also donatars of escheat open the same way to the creditors ranked in their back-bonds.

Fountainhall, v. 2. p. 610.

1721. *December.*

SIR JAMES KINLOCH of that ilk, *against* BLAIR of Ardblair, Merchant in Edinburgh.

No 18.

An executor is but a trustee, and cannot gratuitously discharge debts owing to the defunct.

SIR JAMES being creditor by progress to the deceased Mr Gilbert Blair of Balgersho, obtained from his executor an assignation to certain debts due to the defunct, and given up in the inventory of his confirmed testament ; and amongst others, a bond of 300 merks due to the said Mr Gilbert by the said James Blair : Upon this assignation, James Blair being charged, he obtained suspension upon a gratuitous discharge granted by the said Mr Gilbert Blair's executor, of a date anterior to the assignation.

The question arose, If a gratuitous discharge by an executor to the debtor of the defunct, does exclude the defunct's true and lawful creditors ? And it was