contended for the pursuer, that it does not; because, 1*mo*, The defunct him- No 18.
could not have gratuitously disponed or discharged in prejudice of his creditors; far less his executor who is now bankrupt. 2*do*, An executor is only trustee for the creditors of the defunct, and has by no means the absolute disposal of the subjects confirmed.

To the *first*, *answered*, The executor was solvent at the time of granting the discharge; and it is a rule, that gratuitous deeds are only reducible upon the act 1621, where the granter does thereby become insolvent; so that as the defunct himself could have granted this discharge notwithstanding his former debts, so may his executor; and if the executor became thereafter insolvent, *sibi imputet*; who did not insist in time against the executor to obtain payment.

To the *second*, *answered*, The executor is not in any proper sense a *trustee*, but a *successor*; he is indeed accountable to the creditors as far as to the value of the testament, but they have no *real* interest in the defunct's goods; otherwise they might recover them *rei vindicatione*, or *condictione*, against his debtors; which will not be pretended: All they have, is a personal action against the executor to account *secundum vires inventarii*; so that though the executor do gift or dilapidate the inventory, the acquirers are secure, providing he becomes not thereby bankrupt; and the only redress of the creditors is by their personal action against the executor.

Replied to this *last*, An executor is truly a *trustee*, which the very name denotes, importing an *office*, not a *succession*; he indeed has the only power to intromit with the defunct's moveables, and pursue *rei vindicatione*, or *condictione* against his debtors; but is not this perfectly consistent with his being a trustee? is it not the very design of the thing, that he alone should intromit for the common benefit of all concerned?

'THE LORDS refused to sustain the gratuitous discharge.'

Fol. Dic. v. 1. *p.* 273. *Rem. Dec. v.* 1. *No* 28. *p.* 60.

1738. *June* 15.

LEGATARS of MRS HANNAH *against* HENRY GUTHRIE Writer in Edinburgh.

No 19.
An executor-nominate is liable to account for the residue of the free effects to legatars, if it appear, by his oath, the testator trusted to his faith to dispose of it in that manner.

MRS HANNAH executed a testament, wherein she appointed Mr Guthrie her executor, and burdened him with certain legacies to her relations; signifying to him, at the same time, that, whatever residue of her effects should remain over and above her debts and legacies, and a reasonable gratification to himself for his trouble, it was her will or pleasure he should make a fair distribution thereof amongst her friends, in proportion to their legacies expressed in the testament.

Upon her death, the Legatars brought a process against Mr Guthrie for the free balance of the effects, and referred it to his oath, Whether or not the tes-

No 19. tor had not trusted to his faith and promise to apply the same in that manner? In consequence whereof, he deponed, That Mrs Hannah told him, at the time the testament was executed, and he accordingly believed, that, after payment of the debts and legacies in the disposition, there would be some small thing over, which would be more than a gratuity for his own pains; and that he understood, that, if the remainder, after paying the debts and legacies, should come out to be any thing considerable, that he, though named executor, was to have no more than a reasonable gratuity for his own pains, he being no ways related to the defunct, nor never having been acquainted with her till a short time before her death. And, further, he deponed, That, after Mrs Hannah's death, he promised to a lady, who was a friend of her's, to dispose of the effects as she should direct, deducting a gratuity to himself, because such he understood to be the will of the defunct. Whereupon the Legatars *pleaded*, 1*mo*, That the testament sufficiently excluded the nearest of kin from the office of executor, by nominating the defender executor-testamentar, and from the benefice, by burdening him with the legacies partly expressed and partly committed to the faith and credit of his promise. 2*do*, That there was a sufficient active title in the pursuers to insist in this action, without any confirmation by the defender's promise made to the defunct; whereby it was plain, this case was as directly a proper Roman *fidei-commiss.* as any that possibly could occur; the defender being fiduciary, and the pursuers the *fidei-commissary* heirs, as to the superplus of the defunct's effects above her debts and legacies. See § *ult. Inst. de fidei-com. hæred. T.* 23. and *ult. Cod. de fidei-com.* Neither ought it to be any objection, That this superplus may seem to be of the nature of verbal legacies, which, according to our law, cannot have effect above L. 100 Scots to each legatar, seeing, though we do not allow the effect of verbal legacies to be extended beyond L. 100 Scots, where the proof of them is rested, by the defunct, on the credit of witnesses, and not on the faith and promise of the executor-nominate, even though the executor acknowledge the verity of the bequeathment; yet reason and justice require, that, where the defunct has depended on the faith and promise of the executor, and not on the credit of witnesses, the same should be made effectual, as all promises are, with us, whether made to the living or dead, they being proved, as here, by the oath of the party.

THE LORDS, in respect of the acknowledgment, on oath, of the executor, (who, by the will, hath right to the residue of the effects, if any be, after payment of the legacies), That he understood it to be the will of the defunct, that he was to account to the Legatars proportionally to their several legacies, for the remainder of the effects, after payment of the legacies and a reasonable gratification to himself, found him liable to account.

C. Home, No 95. p. 149.