

1741. February 19.

NISBET *against* BALFOUR.

No 46.

REGULARLY an executor against whom decree is obtained, is not to be found liable in expense, because he cannot safely pay without a decree for his warrant; but where the debt was due by a bond containing a penalty, as the penalty is no less the defunct's debt than the principal sum, the creditor was found entitled to the penalty to the extent of his expense, which would be allowed to the executor at accounting for the executry.

*Fal. Dic. v. I. p. 191. Kilkerran, (EXECUTOR) No 6, p. 173.*

1746. June 4.

MARGARET SIMSON *against* MARY CAIRNS.

No 47.

DAVID SIMSON merchant in Leith died insolvent in May 1736, leaving Mary Cairns his widow with several children, who confirmed herself executrix to him, giving up an inventory to the extent of L. 810 Sterling, continued to trade, and paid off debts as she could to the extent of L. 1400 Sterling, without being compelled by diligence, she being (as she said) ignorant of the law, and resolved, as far as possible, to satisfy all her husband's creditors.

William Carmichael merchant in Edinburgh, who had married Margaret Simson, sister to David, engaged with him for L. 600 Sterling, part whereof Mr Simson paid before his death, and for the remainder gave to William Carmichael, son to William the cautioner then deceased, a security upon a tenement belonging to him; and Mary Cairns had by Candlemas 1739 paid L. 365 thereof; but the remaining sum, amounting to L. 192, was at Martinmas thereafter paid by Margaret Simson, and an assignation taken to the obligations; on which she raised a summons of adjudication of the above-mentioned tenement, disposed to her son in security of the debt, and upon this diligence Mary Cairns paid L. 100 thereof about eight months thereafter.

Margaret Simson was herself creditor to her brother in some small sums, and received payment of them, and in a bond of L. 44 Sterling, which lay over for above six years after his death, and then she pursued upon it; in which process the relict *alleged*, that she had promised never to make the demand, but to assign it to one or other of her brother's children, and referred the promise to her oath: She deponed *negative*; and then the defender *pleaded*, that the inventory was exhausted by payments. The debate upon which point was by the Lord Ordinary taken to report.

*Pleaded* for the defender; That though it certainly was the rule, that an executor could not pay voluntarily, but behoved to have a decret for his warrant, to the end that it might not be in his power to prefer one creditor to another; yet this rule might admit of exceptions, and the circumstances of the present case were such as to make it justly an exception: There could here be no intention of collusion, because the payments made so far exceeded the inventory,

Payment made by an executor without decree, was sustained to exhaust the inventory, for this reason, that by her own industry and diligence she had paid much more than the funds amounted to.