(Due by Executors.)

No 73. The Lords found annualrent due for the ſums in the inventory bearing annualrent, and that from the date of the confirmation; but not for other ſums which were not mentioned in the teſtament, as bearing annualrent.

Fol. Dic. v. 1. *p.* 41. *Forbes, p.* 11.

1730. *July.* Creditors of Thomson *againſt* Monro.

No 74.

An executor-creditor having confirmed and uplifted ſums not bearing annualrent, and having a balance in his hand, after payment of his own debt, which he laid out upon intereſt; he was found liable to account to the other creditors for the neat balance, only not the profits; becauſe an executor-creditor is not bound like a tutor, to lay out upon intereſt the ſums he uplifts; and if he does it, the riſk is his own.

Fol. Dic. v. 1. *p.* 41.

1747. *June* 3.

The Countess of Caithness, and Lady Dorothea Primrose, *againſt* The Earl of Rosebery.

No 75.
An executor is not entitled by his commiſſion, to lend out the executry funds upon intereſt. He is bound to gather in, in order to diſtribute. If he lend, it is at his own peril. Conſequently he cannot be liable for intereſt.

James, Earl of Roſebery, was confirmed executor to his father, 24th May 1724, and a proceſs was raiſed againſt him by the Ladies Margaret and Dorothea, his ſiſters, to account for the half of the executry due to them by the defunct's diſpoſition, and a decreet obtained; but this being opened, and in the review, the charge given up by him in inventory conſiderably reſtricted, there occurred a queſtion, How far he was liable in intereſt for principal ſums, and money upon government ſecurities uplifted by him, eſpecially the executry having been ſo long in his hands, and alſo for other ſubjects, though not bearing profit, when intromitted with; on account of certain ſpecial circumſtances to be afterwards noticed?

Pleaded for the purſuers: An executor is a truſtee, and it is agreeable to the nature of a truſt, that it be managed in the moſt beneficial manner for the perſons intereſted; he is indeed to pay the debts; and if the dead ſubjects will not do that, he may make uſe of part of thoſe that are profitably employed; but it is contrary to his engagement wantonly to uplift money bearing profit, to the prejudice of the owner, and employ it perhaps to his own advantage, and by delaying his accounting by litigious objections, draw more out of the executry than will fall to the perſon having right.

Pleaded for the defender: The buſineſs of an executor is to call in the effects, pay the debts, and diſtribute the remainder: He cannot lend out; for he ought to have money to anſwer when called for; and if he do lend it, he muſt run the

hazard. From which it follows, that he is not liable in the intereſt of ſums uplifted by him; and a condeſendence is now made of L. 14,000 Scots, and more, of principal ſums uplifted by the Earl, which would have been of little value, if left in the ſame hands till this time; neither has he been *in mora*, as the long proceſs which has till now depended, was owing to the purſuers inſiſting to charge the defender with much more than he is found liable in; and he in the beginning offered to aſſign them to a proportional ſhare of the inventory. No 75.

Pleaded for the purſuers: He muſt alſo be liable for intereſt on the unprofitable ſubjects from theſe circumſtances, which conclude ſtronger with regard to the ſecurities.

The late Earl of Roſebery diſponed his heritable eſtate that was unentailed, and whole moveables to his four younger children; but the Earl made a tranſaction with the two eldeſt, who conveyed to him their right, and he granted a bond for L. 1800 Sterling to John his brother, and L. 900 to Lady Mary his ſiſter.

The purſuers, then minors, were confined in his houſe of Barnbougle, where acceſs was denied to their friends and curators named by their father, and to a meſſenger who came to execute a warrant of the Lords of Seſſion, and they were concuſſed to ſign a declaration before a juſtice of peace, that they were not detained by force; in theſe circumſtances they were prevailed with to chuſe the the Earl and two of his confidents their curators, he being *ſine quo non*, 24th April 1724. On the 24th of May he was confirmed executor, and on the 28th, the Ladies, with conſent of their curators, gave him an ample factory, and executed a renunciation in his favour of their father's executry, in conſideration of his bond to each of them for L. 900 Sterling, being a third leſs than he purchaſed the other half for from their brother and ſiſter; beſides which they granted a renunciation of any claim they had to any Scots equivalent debenture notes, due to the Lady Semple their aunt, whereby they loſt two notes to the value of L. 1117 Sterling, aſſigned by the Lady to them, in which the other children had no intereſt.

Upon a petition from two of the young ladies' relations, and afterwards from themſelves, and a reduction repeated, theſe deeds were ſet aſide, and the ladies reponed, who brought a proceſs againſt the Earl, to account for their ſhare of the executry, and obtained judgment therein, againſt which a repreſentation was offered; but upon expiration of the ſtop, according to the ſenſe in which the act of Sederunt was then underſtood, the decreet was extracted in 1726, and adjudication obtained.

A reduction was raiſed of this decreet in 1734, which is the proceſs now in dependence, and the Earl has obtained conſiderable defalcations of the charge given up by himſelf in inventory.

Thus, it appears that the Earl got into poſſeſſion of the whole executry, while he was curator to his ſiſters; and therefore, if they had never brought any pro-

No 75.

ceſs againſt him, he muſt have accounted to them in that character, ſince it was his duty to have confirmed them with himſelf, or if he did not, he muſt be held to have confirmed himſelf on their account; and though his title of curacy was reduced, he, under it, got himſelf confirmed, and ſtill keeps poſſeſſion of the executry, whereof the purſuers ſhare exceeds L. 38,000 Scots.

Pleaded for the defender: When the late Earl of Roſebery made the ſettlement abovementioned on his younger children, he had contracted the diſeaſe of which he died; ſo that it was underſtood they could have no intereſt in the heritable eſtate; the ſubject of the tranſaction, therefore, was only the moveables, in which it would have been difficult to have ſhewn that the Ladies were leaſed, and it was reduced ſolely on this, that he could not authoriſe a deed in favour of himſelf; but during the ſtanding of that bargain, and while he had in him the univerſal title to the executry, he raſhly gave up an inventory containing many debts, that either never exiſted, or were paid. Upon the proceſs againſt him to accompt, a decreet was pronounced in abſence; againſt which he gave in a repreſentation, ſhewing, 1*mo*, That the inventory ought not to be the rule of valuing the ſubjects, as they were moſtly ſtill *in medio*, and manifeſtly of leſs value. 2*do*, That ſeveral heritable debts given up, ought to be deducted. As, 3*tio*, ought the funeral charges: And offering to aſſign. This was ordained to be anſwered; inſtead of which, an extract was irregularly taken out, and afterwards an adjudication. Of this a reduction was raiſed in 1734, and the dependence has ſince been occaſioned by the Ladies inſiſting againſt him for the full inventory, from which he has obtained great defalcations.

If the Ladies were leaſed by the tranſaction with their brother, that is now ſet aſide, and they have been left to exact their ſhare of the executry, for which he muſt accompt by the common rules of law; nor can he be ſaid to be *in mora*, conſidering there was a charge brought againſt him of L. 216,285 Scots, the ſum in the inventory; and now, upon a ſtrict examination, he has been found liable in no more, as the charge, than L. 69,841, notwithſtanding many diſadvantages his doers lay under from loſt vouchers, diſtance of time, and circumſtances of health. He cannot ſurely be blamed for not paying the half of ſo large a ſum, when, at the ſame time he offered to aſſign their ſhare of the inventory, inſtead of accepting whereof, they irregularly took out a decreet againſt him.

The queſtion put was, Whether annualrent was due *nomine damni?*

The Lords, 23d January, 'Found the Earl of Roſebery, the executor, not liable for the intereſt of ſums uplifted by him.'

On a bill, which was anſwered, inſiſting, beſides the above topics, on the Ladies having been obliged to borrow money on intereſt, and that whatever might have been pleaded by the Earl, if he had preſerved the money in his cuſtody, or ſo ſecured as to be ready on a call, yet he could not claim the right of an executor, when he had broken the truſt, and ſquandered the ſubjects.

(Due by Executors.)

No 75.
An executor found liable for intereſt from a certain date, *nomine damni*, on account of malverſation in the execution of his office.

The Lords, 20th February, found, 'That the Earl was liable in intereſt upon the balance now found due, from the date of the decreet of conſtitution in the year 1726.'

Pleaded in a reclaiming bill: That the foundation of finding the Earl liable in annualrent from that period, being his having diſſipated the executry funds; the interlocutor could not be ſupported, unleſs it were ſhewn that he had then committed the diſſipation; for that if he had not, the Ladies' claim could then have been made forthcoming to them; and that it was not, was only occaſioned by their own extravagant demand. 2*do*, It was a ſufficient anſwer, if now when accompts were adjuſted, he had money ready to replace what he had ſpent; and this was condeſcended on, to wit, rents of his eſtate in the factor's hands, and ſome other funds ſufficient to anſwer the claims of his ſiſters without intereſt, and the other adjudgers in the ſame rank with them.

It occurred, that intereſt had been found due to the Ladies from the date of their decreet of conſtitution; whereas it was only the adjudication that entitled them to compete with other creditors, to whom it was of import that the ſum to which it was reſtricted ſhould only bear intereſt from the date thereof, as if that had been the ſum adjudged for.

The Lords refuſed the bill, without prejudice to the Earl's other creditors, to be heard how far they ought to be preferable upon their diligence with regard to the annualrent of the ſum now found due to the Ladies, ariſing thereon, before the date of their adjudication.

Reporter, *Elchies*. Act. *H. Home*. Alt. *Ferguſon*. Clerk, *Forbes*.

Fol. Dic. v. 3. *p.* 29. *D. Falconer, v.* 1. *No* 177. *p.* 236.

*** The ſame caſe is thus reported by Lord Kames.

1747. *January* 23.

The late Earl of Roſebery having five children, the eldeſt of whom, the preſent Earl, being to ſucceed to the entailed eſtate, ſettled upon his other children, September 1723, his whole funds real and perſonal, the entailed eſtate excepted. Having died within the ſixty days, the deed was reckoned unavailable as to the real eſtate; and, as to the moveables, two of the children being of full age, made a tranſaction with their eldeſt brother, the preſent Earl, ſurrendering to him their intereſt in the ſaid deed for a ſum certain. The ſame tranſaction was afterward made with the other two children; upon which the preſent Earl obtained a confirmation as executor-dative to his father, and proceeded to intromit. The confirmation is dated in the year 1724; and, in the 1725, a reduction was brought of the tranſaction by the two youngeſt of the children, as to their intereſt in the moveables; and, upon evidence brought of ſome indirect practices by the Earl in bringing about the tranſaction, joined with the minority of the purſuers, the tranſaction was ſet aſide as to them. This produced a compt and reckoning, which

No 75. ſubſiſted many years, betwixt them and their brother the Earl, about his management as executor-dative. All the other points being ſettled, it came to be a queſtion, Whether the Earl was liable for intereſt upon the aſcertained balance? The Lord Elchies Ordinary pronounced the following interlocutor: 'Finds, That 'ſuch ſums as did bear annualrents to the late Earl of Roſebery, and have been 'uplifted by the preſent Earl, ought, in the accounting betwixt the parties, to 'continue to bear annualrent; and, in like manner, that the profits of equivalent 'debentures, or other public funds, diſpoſed of, or intromitted with by the pre'ſent Earl, ought (as well as theſe funds themſelves) to continue to be charged 'againſt him, unleſs it appear that there was a neceſſity to uplift and apply ſuch 'ſums bearing annualrent, or funds, for payment of preſſing debts of the late 'Earl, and when he had no other ſums of the executry in his hand. But finds 'that he is not chargeable with annualrent for what part of the executry did not 'bear annualrent or profit to the late Earl.' But afterward, having taken the caſe to report, the reaſoning that determined the Court was to the following purpoſe.

As there is no proper ſucceſſion of moveables like what there is in heritage, a truſtee or adminiſtrator is appointed to ingather the moveable effects of the deceaſed, to turn all into money, and to make diſtribution among the parties concerned. This management is implied in the very nature of the office, and is expreſſed in the commiſſion granted by the commiſſaries: 'With full power to the 'ſaid executor to intromit with the goods, gear, debts and ſums of money con'tained in the above inventory, uplift, receive and diſpoſe upon the ſame, grant 'diſcharges thereof, and, if need be, to purſue therefor, &c.; provided always that 'he render juſt compt and reckoning of his intromiſſions, where and when the 'ſame ſhall be legally required.' This commiſſion binds the executor to execute the teſtament, by taking decrees againſt the debtors, and by proceeding to execution in order to force payment. Hence it is, that, if an executor die before the money be levied, the teſtament is reckoned ſo far not executed, and there is place for a new executor *ad non executa*. Upon the ſame plan of adminiſtration it is *tritiſſimi juris*, that an executor is not entitled, by his commiſſion, to lend out the executry-funds upon intereſt: if he does, it is at his own peril; for his duty is not to lend out, but to gather in, in order to make a diſtribution: he ought to have the money in his hand, ready at the call of the perſons intereſted. And thus it was found July 1730, Creditors of Thomſon *contra* Monro, No 74. p. 534. that an executor-creditor, having lent out money upon intereſt, was liable to account to the other creditors for the neat balance only, not for the profits; becauſe an executor is not bound, like a tutor, to lay out upon intereſt the ſums he uplifts; and, if he does, the riſk is his own.

From theſe premiſes it follows neceſſarily, that an executor is not liable for intereſt. If, on the one hand, he is bound to uplift, and, on the other, cannot lend out, there can be no place for this demand; nor can there be any difference be-

twixt ſums bearing intereſt and not bearing intereſt as to this particular. Executors have, oftener than once, been found liable for allowing the funds to lie out upon intereſt; a decree is not reckoned ſufficient execution; and conſequently, if the debtor prove inſolvent, the executor muſt make good the debt. No 75.

Inſpecting the records of the Commiſſary-court, and the decrees of exoneration there found without number, in no caſe was intereſt ever decerned or ſo much as demanded. This ſhews the univerſal ſenſe of the nation as to this point.

'Found the Earl of Roſebery, the executor, not liable for the intereſt of the 'ſums uplifted by him.'

N. B. The purſuers reclaimed, giving up in a good meaſure the general point; but inſiſting upon ſeveral articles of malverſation committed by the Earl in the execution of his office; upon which ground, they ſaid, intereſt ought to be due *nomine damni*. Anſwers having been given in, intereſt was found due from a certain period *retro*. This judgment was founded upon the ſpecial circumſtances of the caſe, without intention to alter the foregoing interlocutor pronounced upon the abſtract point.

An executor, by the later practice of England, is liable for intereſt.

Inſpecting the law of England, I obſerve it to be a rule there as with us, that an executor is not liable for intereſt. But of late years the Court of Chancery has begun to find intereſt due. The reaſon given is, that the objection of the executor's running the riſk of the money he lends out, vaniſhes where a man may inſure his money for one *per cent*. *See* General Abridgement of caſes in Equity, p. 238. § 23.

This argument was not moved for the purſuers; and it is uncertain what influence it might have had. As the intercourſe betwixt the two parts of the united kingdom is daily opening more and more, it is probable that we will follow the judgments of the Court of Chancery in this particular; for which there are two reaſons: 1*mo*, The opportunity of inſuring in Scotland as well as in England. 2*do*, Our reſpect to the judgments of the Houſe of Lords; which, in an appeal, would probably be directed by the practice of the Court of Chancery.

Rem. Dec. v. 2. *No* 79. *p.* 123.

1758. *January* 4.

Archibald Arbuthnot and Others *against* Lieutenant Robert Arbuthnot.

No 76.

A legatee found entitled to the profit ariſing upon his ſhare of the defunct's

Robert Arbuthnot, on the 15th of February 1752, executed a teſtament in England, by which he gave to his wife the liferent of his whole eſtate; and, failing children, divided his fortune into legacies to his wife and certain other perſons his relations: Mary Arbuthnot, his wife, he named executrix of his will. He died ſoon after.