

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.*