

No 25.

A legatee cannot pursue the defunct's debtor for his legacy, where there is an executor confirmed, unless the executor omit to confirm the same.

1623. February 4.

JOHN LEITCH *against* BALNAMONE.

IN an action betwixt Mr John Leitch and Balnamone, THE LORDS found that a legatar, who had a sum left in legacy to be paid out of the readiest money owing to him in Fife, had not *legatum speciei*, and albeit it was *legatum determinatum et circumscriptum*, yet it was not *legatum individui*, and therefore could not have action against the debtor, but only against the defunct's executor, especially seeing there was a testament confirmed. But they found that if the executor-nominate had not confirmed, or had omitted to confirm *rem legatam*, that in the first case the legatar might obtain himself decerned dative, and in the second, might pursue the detainer of the particular left in the legacy. It was affirmed by some, that the practice of the commissariot was, that if a legatar had pursued the defunct's debtor, and had obtained decret and payment, or deliverance *speciei legati* a creditor of the defunct might pursue the creditor as intromitter, and recover from him that which was left to him in legacy, and paid to him.

*Fol. Dic. v. 1. p. 273. Haddington MS. No 2744.*

\*.\* Kerse reports the same case :

THE LORDS found that a legatar has no action immediately against a debtor, but against the executor intromitter with the goods.

*Kerse, MS. fol. 127.*

\*.\* This case is also reported by Durie :

IN an action pursued by the Laird of Balnamone against the Laird of Balcomie for payment of a sum of money owing by him to Mr John Leitch, and which was left in legacy by the said umquhile Mr John, the LORDS found, that the legatar's self, nor the pursuer his assignee, had no action against the debtor, and that they could pursue no person for the legacy but the executor of the defunct, who had the only action competent to him against the debtors of the defunct, and that he was subject to answer to the legatars for their legacies.

*Durie, p. 43.*

1623. March 11.

DOUGALL *against* HENDERSON.

No 26.

Found the reverse of No 22, p. 3842.

IN an action betwixt Dougall and Henderson, an obligation being granted to a woman, and to her husband, to be paid to them ; the husband living a long space after the decease of the wife, and thereafter the husband dying, the

LORDS sustained an act of registration pursued at the instance of the wife's executors, for registration of this obligation, albeit it was *objected*, that the sum pertained, and was *in bonis mariti*, and so that his executors behoved only to have that action of registration competent to them, and if the wife, or her executors had any right to the money, or any part thereof, contained in the bond, the husband's executors should be answerable to them therefor, which reason was not found relevant. But THE LORDS declared, that execution should only pass at the instance of the wife's executors, for one half of the sums only belonging to the wife.

No 26.

Clerk, Hay.

*Fol. Dic. v. 1. p. 273. Durie, p. 58.*

1625. July 7.

FALCONER against IRVIN.

IN an action betwixt Falconer and Irvin, Falconer relict of umquhile — Wishart, having pursued Irvin for registration of an obligation made of a sum, bearing to have been paid to her husband and her, and the longest liver of them two, at the term therein appointed; and in case of their decease, to the heirs therein nominate; in the which cause, notwithstanding of the tenor foresaid of the obligation, the LORDS found, that the relict could not pursue for registration thereof, but that it came under her husband's testament, and so would pertain to his executors, against whom the relict had her action, for her part of the said sum, which would fall to her by the law, by her husband's decease, but that she had no action competent to her against the debtor, but only against the executors of her husband, albeit her husband died before the term of payment, whereby she *alleged*, that she had right to seek the sum, and to pursue for registration of the bond; she being that person contained in the bond, with her husband, to whom payment was contracted to be made, which was repelled by the LORDS; and albeit the relict desired, that the Lords would grant her execution, for her own third, upon this obligation, to the which she restricted her pursuit, yet the LORDS refused the same, and ordained her to seek the same from her husband's executors.

No 27.

A bond being taken payable to husband and wife and longest liver of them, and the husband having died before the term of payment, it was found that the relict had no action against the debtor for her third. In a subsequent case, mentioned in this report, the contrary was found.

The contrary was done, July 21 1635, betwixt two parties, to which Hay was clerk, where execution was given to the relict, on a bond bearing the debtor to be obliged to pay the sum, to the husband, and his wife, and the longest liver of them two, at the term appointed, and in case of failzie, to pay annualrent to them; and the husband dying before the term, charges were sustained to the wife, for payment of the annual to her, during her lifetime, albeit the sum, as moveable, may appear to pertain to her husband's executors.

Act. Aiton.

Alt. Hope &amp; Mowat.

Clerk, Gibson.

*Fol. Dic. v. 1. p. 273. Durie, p. 175.*