

## L E G A C Y.

1624. February 13.

HELEN CUNNINGHAM'S CHILDREN *against* THOMAS M'MICHAEL'S EXECUTORS.

No 1.

HELEN CUNNINGHAM, spouse to Thomas M'Michael, left 4,000 merks to her grand-children, to be employed for their behoof, at the sight of Thomas M'Michael her husband, David Johnston, Mr John Hay clerk of Edinburgh, and of their own parents, John Hunter and Margaret Johnston. It happened 2,000 merks of this to be put in James Dalzell's hands by all their advices and consents, except Mr John Hay's, who was not at home at the time. The Children having pursued the Executors of Thomas M'Michael for it;—"THE LORDS found that it was not employed as it should have been for want of Mr John Hay's consent, and therefore made the Children be answered."

*Spottiswood, (LEGACIES.) p. 194.*

1627. February 20.

JOHN BISSET and his CURATORS *against* JOHN and ROBERT BISSET.

UMQUHILE George Bisset, by his latter will, leaves an universal legacy of all his moveable goods to John Bisset, his brother's grand-child, and nominates John Bisset, his brother's son, father to the legatar, executor. Afterwards, John, the executor, by contract and appointment between him and Mr Robert Bisset, divides the whole moveable goods of the executry between them, by virtue whereof, Mr Robert intromitted with the just half thereof; whereupon the friends of the mother's side to the said legatar, finding him prejudged by this transaction, raised a summons at the grand-child's instance, and their own, as curators to him, against his father (who was executor confirmed) and Mr Robert, to hear and see the foresaid contract rescinded, as being *super re aliena*,

No 2.  
An universal legatee found entitled to prosecute the debtor, although there was an executor confirmed.

No 2.

and also to pay and deliver the particular goods intromitted with by them, back to the grand-child to whom they appertained by virtue of his universal legacy. *Excepted, imo*, by Mr Robert, No action against him as intromitter, because the said John was executor confirmed before the intending of the cause. *2do*, The contract being made between them two majors, could not be annulled. *Replied, imo*, The legatar being *rei legatæ dominus*, hath action competent to him, either against the executor *actione personali*, or the possessor *rei vindicatione*. *2do*, Albeit the parties contractors could not pursue the reduction of the contract, being both majors, yet the minor *super cujus re contraxerunt*, and in whose prejudice they had divided his gear, might quarrel it lawfully. " THE LORDS repelled the exception, and sustained process against the possessor Mr Robert, notwithstanding of an executor confirmed; as likewise found, he might lawfully quarrel the contract, in so far as it did prejudice him allenary.

*Spottiswood, (LEGACIES.) p. 194.*

\* \* Durie's report of this case is No 28. p. 3846, *vocæ* EXECUTOR.

1628. February 29.

RUTHVEN against CLEIK.

No 3.

A FATHER leaves a legacy to his son, who was out of the country in the easter seas the time of making the legacy, and failing of his son by decease, he leaves it to his daughter. The legacy was 600 merks, addebted to the defunct by bond of a debtor, who, supposing the first legatar to be dead, made payment of the annualrent to the sister, being the second person substituted in the legacy, for the space of 10 or 12 years. Thereafter being pursued to make payment of the principal sum to the sister, *alleged*, That he could not be *in tuto* to make payment of the principal sum to her, except she proved that her brother was dead. THE LORDS would not astrict her to this hard probation, but ordained her to find caution to warrant the defender at all hands.

*Auchinleck, MS. p. 119.*

1630. July 6.

DOCTOR MONRO against Sir WILLIAM SCOT'S EXECUTORS.

No 4.

A legacy *ad pios usus*, suffers a proportional deduction, if the funds be not sufficient for all the legacies, unless the legacy *ad*

THE EXECUTORS suspending against all the legatars, that the free gear confirmed would not be so meikle as will pay all their legacies; and so the legatars disputing amongst themselves, and Doctor Monro, as doer for the Kirk, *alleging*, That a legacy of 5000 merks, left for building of a kirk in the Elie, should be totally paid, albeit the rest of the legacies should suffer defalcation, because the same was left *ad pios usus*, which ought to have the preference to all other legacies; the LORDS found, that there ought no preference to be