

SECT. V.

Citation in Process against Executors; and for their Exoneration.

1567. February 26. LADY LOVAT *against* FRASERS.

No 25.

It was found, That where one of two executors was dead, the other might be pursued as such, without calling the heirs or executors of the deceased.

Fol. Dic. v. 1. p. 133. Maitland, MS.

* * * See This case *voce* EXECUTOR.

1628. July 18. PEACOCK *against* PEACOCKS.

No 26.

IN an action, Peacock against Peacocks, the defenders being two of three executors confirmed to their father, were pursued for payment of a sum owing to the pursuer by their father, wherein the LORDS found no process against the two executors, because the third executor confirmed with them was dead, and who before her decease had received payment of her own whole third part of the defunct's goods, and so her part was executed; and therefore the LORDS found, That no process could be granted against the rest of the executors, until some person were convened to represent the executor deceased; except the pursuer would reply, that the executors surviving who were convened, had intromitted with as much of the defunct's goods, as would satisfy the debt acclaimed; which being replied, the LORDS would sustain the process against the executors living for the whole debt. See SOLIDUM ET PRO RATA.

In an action against executors, the exception that the heir of one of the co-executors was not called, (the office being indivisible) was found relevant, unless the pursuer would allege, that the executors convened had intromitted with sufficient to pay him.

Act. *Stuart.* Alt. —. Clerk, *Hay.*

Fol. Dic. v. 1. p. 133. Durie, p. 391.

* * * Spottiswood reports the same case :

IN an action pursued by Barbara Peacock against Peacock's Bairns and Executors confirmed to their father George, for the sum of L. 1500, *alleged*, All parties having interest were not summoned, viz. somebody to represent Isobel Peacock, conjunct executrix with the rest of the defenders; which should have been done, seeing the office of executry is indivisible. This exception was found relevant, unless the pursuer did allege that the executors convened had intromitted with as much as would pay the pursuer.

Spottiswood, p. 112.