

No 17.

Found that the expense of repairs laid out by an adjudger on the subject adjudged, is a moveable debt for which his executor is liable; but that the executor is entitled to relief from the heir.

1752. January 18. GEIKIE against AGNES HALYBURTON and HAY.

HENRY HALYBURTON, writer in Edinburgh, led an adjudication of certain tenements in the Canongate in 1736, against Jackson sadler, for the accumulated sum of L. 1012 Scots; but, as the tenements were liferented, and that the liferenter lived till 1746, Mr Halyburton could recover no part of his payment in that period.

Upon the liferenter's death, he applied to the Sheriff of Edinburgh, craving a visitation of the tenements, and a warrant to lay out the necessary repairs. The Sheriff accordingly named an inquest, who valued the houses at L. 122 : 18s. Sterling, and stated what repairs were necessary, and he granted warrant to Halyburton to make the repairs, declaring, as usual, the expense to be a real and preferable debt affecting the subject. Accordingly, Halyburton employed tradesmen, and the repairs were all made during his life; but he died before the tradesmens accompts were paid.

Halyburton having been succeeded in his heritage by his sister Agnes, and by Charles Hay, the son of another sister deceased, and in his moveables by his said sister Agnes; Henry Geikie, the son of Agnes, who had got right from her to the defunct's executry, with the burden of his moveable debts, having paid the said tradesmen, and taken assignation to their accompts, obtained a decree of recognition before the Sheriff, finding that the repairs amounted to L. 294 : 11 : 4d. Sterling, and that the said sum, with interest from Candlemas 1746, was a real and preferable debt affecting the subject, and that Henry Geikie was a just and lawful creditor upon the subject for the same, and for the expense of the former application and visitation and process, amounting to L. 14 : 3 : 9d. Sterling; and for L. 3 : 14 : 6d. as the expense of extracting the decree.

Henry Geikie now brings a process against his own mother, and Charles Hay, the heirs of Henry Halyburton, for having it found and declared, that he, in the right of the tradesmen who made the repairs, had a real and preferable right for these repairs upon the tenements repaired, or otherways that they ought to repay him the sums advanced to the tradesmen upon his conveying the decrees of cognition and recognition in their favour.

It was *answered* for the defenders, That the sum claimed being a moveable debt due by the defunct, did ultimately affect the executry, and that the executor, who had paid the same, could have no relief against the heir; and the Ordinary "Sustained the defence, that the expense of the repairs made during the life of Henry Halyburton, by tradesmen employed by him, is a moveable debt which affects his executors, and assolzied."

The pursuer reclaimed, and the LORDS "Found that the expense of the repairs is a moveable debt, for which the executors of Henry Halyburton were liable, and that the same also affected his executry; but found that the right

of relief arising from the making such repairs, likewise was a moveable claim descending to his executors, and found that the pursuer having paid these repairs, has right to be repaid of the same out of the first and readiest of the mails and duties of the subjects repaired, and therefore preferred the pursuer, and decerned;" and refused a petition reclaiming against this interlocutor, without answers.

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The view the Lord Ordinary explained himself to have taken in this case, was, that Henry Halyburton had by his adjudication, the legal whereof was expired before his application for the warrant to repair, acquired the irredeemable property, against which there lay scarcely a possibility of a challenge, as his accumulated sum and interest then due exceeded the sum at which the inquest had valued the subject, and that no other creditor appeared to have adjudged, and that therefore the executor had no relief against the heir in this case, more than the executor of any other proprietor will have relief against his heir of any debt that may be resting at his death to tradesmen whom he had employed to repair his house.

But the Lords took the matter in a different view, and as nothing differing from the common case of repairs made by a creditor upon a tenement in burgh upon the warrant of a Judge; for, supposing the legal to have been expired, the same was opened by the application for the warrant to repair; and in all those cases, as by the law in burgh, the tradesmen who had been at the expense of making the repairs, had a preference upon the subject for their payment, as well as a personal action against the representatives of the employer; so when the executor pays that debt, he is in the like case with an executor who pays a moveable debt, in which the defunct was bound cautioner, and had got an heritable bond of relief, where, though the debt as moveable, affects the executor, yet he will have relief in virtue of the heritable bond out of the estate of the principal debtor affected by it.

*Fol. Dic. v. 3. p. 255. Kilkerran, (HEIR AND EXECUTOR.) No. 5. p. 235.*

1758. December 20. DAVID MULLO against JAMES and ROBERT MULLOS.

By marriage-contract, in the year 1743, betwixt Alexander Mullo and Christian Robertson, Alexander had bound and obliged him, his heirs and executors, at and against the term of Whitsunday thereafter, to provide and have in readiness, of his own proper means and effects, the sum of 10,000 merks; and to ware, employ, and bestow the same, upon land, or other good security, for annualrents; and to take the rights and securities to be granted therefor, conceived in favour of himself, and the said Christian Robertson, his promised spouse, and longest liver of them two, in liferent, and to the child or children to be procreated between them of said marriage, their heirs, executors, or assignees, in fee; and failing of children, L. 1000

No 18.

An heir was found entitled to relief from the executor of the provisions in a contract of marriage, although the obligant in the contract had bound himself to lay out money or land for these provisions.