

No 38.

sum, which was so mean that it would not pay the service. To supply all, he offered to find caution to warrant him at all hands. For all this, the LORDS found the exception relevant.

Spottiswood, (EXECUTOR.) p. 113.

* * Durie reports the same case :

IN an action of registration of a bond at the instance of James Drysdale, executor to him to whom the bond was made, against Henry Crawford debtor, the LORDS found, that this bond could not be sought to be registrate at the executor's instance, albeit the same was confirmed in the defunct's testament, in respect the bond obliged the defender to pay annualrent therefor; whereby the Lords found, it pertained to the heir, and not to the executor; neither was it sustained what the pursuer answered, that he was that same person who would be heir in law, and that he also offered caution to warrant the defender at the heir's hands, and all others, seeing he was not retoured heir to the defunct; but the LORDS found the process might lie over while he should be served heir, and then, upon production of his retour, he might proceed to his cause.

Clerk, *Hay.*

Durie, p. 301.

1629. June 13.

INGLIS against FRASER.

No 39.
An executor found not liable to pay the annualrent of debts owing by the defunct, and due after his death. The contrary found, Kinnaid against Yeaman, No 40. p. 5469.

AN executor, or intromitter, is not subject to pay any more to the creditor of the defunct, but that quantity of the debt which was owing by the defunct the time of his decease, and wherefor he might have been convened himself at the time of his decease; and the said executor or intromitter (who represents only the defunct in the case he was in when he died) was not found liable for any running debt after the defunct's decease, as for annualrent of principal sums resting and running after the debtor's decease, ay and while the payment of the principal sum, as was done this day betwixt these parties, where the defender being convened, as intromissatrix with the debtor's goods, to pay the principal sum owing by him, for the which he was denounced rebel before his decease; and also the said intromissatrix was convened, upon the act of Parliament, to pay the annualrent therefor, of all terms since the defunct was denounced, and ay and while the sum was repaid. It was found that the intromissatrix was subject to pay no more than the principal sum, with the annualrent of so many terms as run after the horning, unto the time of the defunct's decease, but not of any terms after his decease, intervening before the intending of that pursuit, moved against the intromissatrix. It would appear that the

intromissatrix or executrix, after pursuit moved against them, should be ever liable to the annual thereafter, ay and while payment be made of that which was owing the time of the defunct's decease.

No 39.

Clerk, *Gibson*.*Fol. Dic. v. I. p. 368. Durie, p. 445.*

1632. February 17.

KINNAIRD against YEAMAN.

IN a contract of marriage betwixt umquhile David Yeaman and Margaret Kinnaird, the said David is obliged to employ 2000 merks, received in tocher, with other 3000 merks of his own, to his said spouse in liferent; whereupon, after his decease, his executors being charged to employ the sum at the relict's instance, and to pay to her all the annualrents thereof, of all terms since the husband's decease; which being suspended, that these deeds were only prestable by the heir, specially anent the paying of annualrent since the husband's decease, which they *alleged* was not prestable by the executors, but by the heir of the defunct; as also, that since the contract, the husband had infest the charger in some tenements in Dundee, the yearly mails whereof should be allowed to her *pro tanto* in the first end of the provision of that contract;—THE LORDS found the executors of the defunct subject to the creditor, as well as the heir, both to pay the annualrents since the decease of the husband, who was obliged, as also to employ the principal sum; and that the creditor might convene therefor, either the heir, or executors of the defunct; and therefore, seeing the creditor, viz. the relict, had chosen the executors, the LORDS found them liable thereto, according to the free goods of the testament, which was so found, albeit the executors were the defunct's bairns, and so who ought in law to have not only the naked office as strangers, who are subject to count, and have only a naked administration, but they, being bairns, have also benefit by the executry, and which they alleged ought not to be taken from them, by compelling them to pay heritable debts, which should affect the heir, and not deprive them, not only of the executry, but of all bairns part of gear for these heritable debts, which nevertheless was repelled, seeing the creditors might seek either the heir or executors, without prejudice always to them to seek their relief therefor against the heir *prout de jure*. And it being controverted, if the executors should ever be holden to employ the money to the relict again, how often it should happen to be lifted, as the relict *alleged* ought to be found should be done, the LORDS decided not this point, but ordained the executors once to employ, and when the same should happen to be lifted, and that the question should then arise at the relict's instance for the employment thereof, they should then consider thereof; whereby it may appear, that if the fee of the money pertain to the heir, and not to the executor, after the liferentrix's decease, that *eo*

No 40.
An executor found liable to pay the annualrents of debts contracted by the defunct, and becoming due after his death. The contrary found, Inglis against Fraser, No 39. p. 5468.