

1626. *November 18.*ADAM *against* GRAY.

No 11.

THE LORDS fand the executors obliged to pay an heritable bond.

*Fol. Dic. v. 1. p. 246. Kerse, MS. fol. 133.*1627. *February 24.*CARNEGIE *against* KNOWES.

No 12.

A CREDITOR may, at his option, pursue either the heir or executor of his debtor, albeit the bond be heritable; because the heritable clause is always thought to be introduced in favours of the creditor, and therefore should not prejudice him.

*Fol. Dic. v. 1. p. 246. Spottiswood, (CREDITORS & DEBTORS.) p. 76.*

\* \* Durie reports the same case, calling the defender Lermonth:

In an action betwixt William Carnegy and Lermonth, for payment of a sum of money contained in an heritable bond, whereby the debtor was obliged to pay annualrent to the creditor, as well not infeft as infeft, the LORDS found, that the creditor might as well pursue the executor of the defunct, as his heir, for payment of such heritable sums, notwithstanding that the bond was heritable, and that the heir needed not be pursued, and discussed before action were granted against the executor; but that, in deeds which were prestable by executors, the creditor had in his option and election, either to pursue the heir of the defunct debtor, or his executor, or any of them whom he pleased to chuse, for payment.

Act. Aiton.

Alt. Hope.

Clerk, Gibson.

*Durie, p. 281.*1628. *July 10.* L. MELDRUM *against* CARNOUSSIES.

No 13.

FOUND, by an act of sederunt, that heritable bonds may not be pursued against an executor, nor a moveable bond against an heir.

*Fol. Dic. v. 1. p. 246. Kerse, MS. fol. 133.*1662. *July 1.*WILLIAM BAILLIE *against* MARGARET HENDERSON and JANET JAMESON.

No 14.

An executor being pursued upon a minute of sale, was found liable to pay the price, tho'

By minute of contract, betwixt umquhile Jameson and Baillie, Baillie obliged himself to infeft Jameson in a tenement; for which Jameson obliged himself to pay 3000 merks of price. Jameson being dead, without any further progress upon the minute, Baillie pursues the said Margaret Henderson, as executrix

to him, and the said Janet Jamieson, as heir, to pay to him the price. It was *alleged* for the executor, absolvitor; because, the bargain being incomplete, the heir must perfect it, and dispoise the tenement, and so can only be liable for the price; for, by the performance of mutual minutes, the heir will only get the land, and therefore the executor should not be liable for the price, or at least if the executrix be decerned to pay the price, the pursuer must dispoise to her the third part of the tenement in fee, and the two parts to the heir, she being the only child, and having right to the two third parts of the moveables; which moveables being exhausted, by the price of the tenement, the tenement ought to come in place of the price. The pursuer *answered*, That he could dispoise no otherwise than according to the minute, but the executrix might betake her recourse against the heir, as she pleased, but both, as representing the defunct, were liable to him.

THE LORDS decerned the executrix to make payment, and would not bring the debtor betwixt the heir and her in this process, for the third of the tenement, or for her terce thereof, but reserved the same as accords.

*Fol. Dic. v. I. p. 246. Stair, v. I. p. 118.*

No 14.  
the bargain stood unimplemented *in nudis finibus contractus*, reserving action against the heir.

---

S E C T. III.

Whether an Heir Male can be Pursued without calling the Heir of Line.

1672. January 24.

LAIRD OF LUSS and GLENDUNNING *against* EARL OF NITHSDALE.

THE LAIRD of Luss and Glendunning pursue the Earl of Nithsdale as heir to Robert Earl of Nithsdale, to pay a debt of his, who alleged no process, because all parties having interest are not called, viz. Hugh Wallace, son to the deceased Laird of Craigie, who is heir of line to the deceased Earl of Nithsdale, and the defender is only heir-male; and the heir being heir absolute, and liable in the first place, who may have writs and defences, exclusive of the pursuit, he must be called. It was *answered*, There was no necessity to call the heir of line, unless the defender can condescend upon any estate competent to him, that might be first affected, which is the ordinary reply, and ordinarily sustained. It was *replied*, That this reply is ordinary where the heir of line and others are both called, against the exception of the order of discussing; but such processes were never sustained without calling the heir of line.

THE LORDS found no process till the heir of line were called, and that he could not be called by a new diligence upon this summons.

*Fol. Dic. v. I. p. 246. Stair, v. 2. p. 53.*

No 15.  
An heir-male being pursued for payment of his predecessor's debt, the Lords found no process, in regard the heir of line was not called, tho' the heir of line had no visible estate.