

1747. February 28.

DR TAIT *against* BIGGER of Woolmet, and JAMES JACKSON.

ELIZABETH WALLAGE tenant in Sheriff-hall died 26th January 1744, having named John Bigger of Woolmet and James Jackson merchant in Dalkeith her executors, to whom she left one half of her free effects, after paying her special legacies; and the residue she bequeathed to her three nearest relations by the mother's side.

The executors were confirmed, and finished the labouring of the farm for that year, and reaped the crop; but being pursued by Dr John Tait of Dalkeith, who had purchased the interest of the three relations, to account, they *alleged* they were only liable for the effects left by the defunct, and not for the profits made by that year's culture, which he claimed his share of.

The Commissaries of Edinburgh sustained the pursuer's claim; and, on a bill of advocation, The Lord Ordinary, 26th instant, 'in respect it was admitted, that the wheat seed was sown before the defunct's death; that other part of the land was tilled, and the same was sown by the executors, by the seed which belonged to the defunct, and the labouring and crop was managed by the horses and servants also belonging to the said defunct; and that the executors had no other right or title to carry on the management of the farm, but under colour of their office given them by the defunct, for payment of legacies, and to be accountable for the half thereof to the residuary legatees, found that the executors were accountable for the produce of the said crop 1744, after taking credit for their expenses of management, and the year's rent, which was a burden upon the executors.'

Pleaded in a reclaiming bill, That by the law, upon the death of a tenant the right to the possession of a farm belonged to his heir, and the executor had no interest therein; that in the present case the defunct had no heir; and therefore the heritor had right immediately upon her death to take possession of the farm, as he would also have had, if an heir appearing had declined to represent; that the petitioners being persons known and trusted by the heritor or his factor, were suffered to take up the possession for that year, which therefore was an acquisition made by themselves, and on their own account; and accordingly they had obtained a discharge of the rent 'for their possession that year;' that they were not obliged to have meddled with the farm, but might have disposed of the stocking, notwithstanding whereof the rent would have been a burden on the executor; so that the pursuer had been profited by their management: And if any further advantage had arisen therefrom, it ought to be allowed them, as they behoved to have borne the loss, if there had been loss in the matter.

That the circumstances noticed in the interlocutor were not of force to support it; for it was acknowledged that the profits of the seed sown behoved to be accounted for to the legatees; but then there was no strength in that observation of the remainder of the farm being laboured by the horses, and sown with the

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Executors nominated having laboured and sown the defunct's farm, were found liable to the universal legatee for the profits.

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seed belonging to the defunct; for these belonged no longer to her than her death, but by the confirmation became from that time the property of the executors, which they were bound to account for, and had for the cattle at the selling price, being something above the appreciation: The servants were not part of the executry, and yet their maintenance to a term might have been charged thereon, unless they had engaged with another master; and this charge was saved, by their serving the executors in their new acquisition of the farm for that year, which, as had been noticed before, they entered to possess not in virtue of their nomination, for that could give them no title, but by tolerance from the heritor; the year's rent, as all the defunct's debts, was indeed a burden on the executry, with right to relief from the heir, if any such had taken up the possession; or if the heritor himself had taken it up, he could have made no demand for the rent, and this the possessors had actually paid.

'THE LORDS refused the petition.'

Pet. W. Grant.

D. Falconer, v. 1. No 174. p. 232.

* * * See A case relative to this report, Bee against Wallace, D. Falconer, v. 1. p. 104., *voce* HUSBAND AND WIFE.

SECT. IV.

An Executor has the only Title to Intromit with the Subjects Confirmed.

No 22. 1564. March 23. EXECUTORS of The BISHOP of DUMBLANE against —

A LEGATUM *nominis* being left, the executor nevertheless, and not the legatar, was found to have right to pursue for it; because the debt, quot, &c. must first be deducteu.

Fol. Dic. v. 1. p. 273. Maitland, MS.

* * * The like was found, 9th December 1628, Mackie against Dunbar, No 18, p. 1708.