

1760. July 29.

JOHN ROBERTSON, and other Executors of JAMES MACCOMIE, Merchant in Aberdeen, *against* ISOBEL and RACHEL STRACHANS.

WILLIAM STRACHAN, senior, merchant in Aberdeen, in 1745, granted bond to the executors of James Maccomie for L. 1000 Scots.

Strachan died in 1747; when it appeared, that he had, as early as the 1735, made a testament, by which he appointed his wife Rachel Baxter to be his sole executrix; 'and, after payment of his debts, he legated to his two sons, William and James, two third parts of his hail effects; and to his two daughters, Isobel and Rachel, the other third part thereof.'

Rachel Baxter having predeceased her husband, no confirmation was expedited on the testament; but William, the eldest son, was confirmed executor *qua* nearest in kin to his father. In the inventory, the debts contracted by the defunct, in a copartnery with his son, the executor, were deducted; but Maccomie's debt was not; and the sum confirmed amounted to L. 700 Sterling, besides some heritage, which was collated by William.

Isobel Strachan had, before her father's death, received at her marriage 3000 merks; and William, the executor, afterwards paid her L. 100 Sterling in full of her share. To Rachel he granted bond, in 1749, for L. 240, as her proportion; which he afterwards paid in September 1754. To his brother James he also paid, or granted security, for his share.

After all these payments, there remained a sufficient fund in his hands, both to answer the defunct's debts, and the proportion provided to himself.

William Strachan likewise made sundry partial payments of the debt due to Maccomie's Executors; whereby it was reduced, in the 1754, to a balance of L. 383 : 6 : 8 Scots.

Towards the end of September 1754, William Strachan's affairs went into disorder, and he became bankrupt.

Maccomie's Executors thereupon brought an action, not only against the cautioners in William's confirmation, as executor to his father, but also against James, Isobel, and Rachel Strachans, as representing their father, on the passive titles, or as having intromitted with his effects, for payment of the balance of the said debt; but James Strachan died during the dependence.

*Pleaded* for the pursuer; *1mo*, William Strachan was not confirmed executor upon his father's testament, but as next of kin; and the defenders stood in equal degree with him, and drew their shares as such. He was only their trustee, and therefore all should be liable as if they had been conjoined in the office. *2da*, One to whom a certain share, such as a third or fourth of the defunct's effects, is bequeathed, is termed a *legatarius partiaris*, and is liable *in valorem* for the testator's debts; and supposing the testament to have been here followed as the rule, the defunct therein expressly provided, that his children should

No 35.

If an executor confirmed received sufficiency of funds for payment of both debts and legacies, the legatees are not liable in repetition to the creditors upon his insolvency.

No 35.

only be paid their shares after his debts were cleared ; which made those debts a burden on their shares. And, *3tio*, Legacies of all kinds are only due *deductis debitis*, in so much, that if an executor has made payment *bona fide* to the legatees, and creditors of the defunct afterwards claim, an action of repetition lies against the legatees proportionally ; Stair, B. 3. T. 8. § 70.

*Pleaded* for the defenders ; *imo*, The predecease of the executor nominate did not invalidate the testament, but any of the legatees might have confirmed upon it ; and although the eldest son confirmed as next of kin, yet the testament was the rule observed in settling the childrens' proportions of the funds. The person who is confirmed as executor, whether as nominate, or as nearest of kin, comes to have the sole administration, as representing the defunct, and is alone liable to the defunct's creditors. *2do*, A legacy, indeed, is not due unless there be a sufficient fund for the payment of it, after deducting the defunct's debts ; but if there be a sufficient fund, as there was in this case, and the legacy is accordingly paid, the subsequent insolvency of the executor, without clearing the defunct's debts, although he was left sufficient for doing it, cannot subject the legatee, even though he should be one of the defunct's children ; because such legatee does not take by succession or intromission, but by gift, and the defunct had the absolute disposal of the free effects, after deducting his debts. This testament did not burden the legatees with the payment of debts, but only declared their legacies to be a proportion of the free surplus, after deducting debts, and they received no more. And, *3tio*, Legatees receiving their money in this way think themselves *in bona fide* to use it, and have no action to oblige the executor to apply the funds retained for payment of the debts ; and it would be very hard if the creditors, by neglecting to claim payment from the executor while solvent, should have it in their power to subject the legatees, at a great distance of time, to make good the debts out of the money they had thus *bona fide* received, and perhaps consumed.

THE LORDS assoilzied Isobel and Rachel Strachans.

Act. D. Rae.

Alt. Johnston.

Clerk, Pringle.

D. R.

Fac. Dic. v. 3. p. 374. Fac. Col. No 241. p. 440.

1761. February 11.

MARION WRIGHT and her Husband *against* MARGARET and MARY WRIGHTS.

No 36.  
Legacy cannot be constituted in the form of a bill.

JOHN WRIGHT of Easter-glins died in 1751, leaving issue, Thomas Wright, who succeeded him in his land-estate, and Margaret and Mary Wrights, who succeeded to the executry.

Thomas Wright the son had a natural daughter named Marion, who, at the age of ten, had been taken into John Wright's family ; and a year before his death, when she was about 16 years old, received from him a bill drawn in her