

No 26. testament to the legatar to pursue, albeit there were 16 years past since the defunct's decease, during which time no diligence was done; but the LORDS found the executrix should confirm the particular legacy, and eik the same to the inventory, and make the legatar assignee thereto, or lend her name to pursue therefor; and that she should warrant that debt from her own deed, *et prestare tantum factum suum*, and the legatar should have the expense of this pursuit paid to him by the executrix, off the first end of the free goods and gear, and that the executrix was no further obliged to any legatar in the like case, viz. *in legatis nominum vel corporum, et ejusmodi aliis legatis particularibus et circumscriptis*.

Act. Aiton.

Alt. Cunningham.

Clerk, Gibson.

Fol. Dic. v. 1. p. 239. Durie, p. 403.

No 27.

Found as
above.

1629. June 18.

PEEBLES against KNIGHT.

THE relict of a defunct pursuing the executor confirmed for her own third of certain particular goods belonging to the defunct, her husband, omitted out of the defunct's testament, confirmed by the said executor, and which omitted goods were known to the said executor, and were purposely omitted unconfirmed by him; in respect of which omission *scienter* done, albeit the goods were not intromitted with by the executor, the relict claimed her third thereof from the executor, as debtor therein. This action was not sustained upon that ground of omission, it not being libelled that the executor had intromitted with the said goods; seeing the executor could not be compelled to give them up in testament, or confirm them, but might confirm or omit them as he pleased, and the relict might seek a dative thereto *ad omissa*, if she pleased, and thereby claim right to the same, or otherwise pursue the intromitters for the third thereof.

Fol. Dic. v. 1. p. 239. Durie, p. 446.

No 28.

1666. June. CRAIG against The EXECUTORS of her HUSBAND.

IN a process pursued at the instance of Catharine Craig, relict of John Rolling, against the executors-creditors of her husband;

THE LORDS found, That the executors-creditors were bound to diligence for the whole inventory, just as any other executor, and that not only for payment of their own debt, but that the superplus may be furthcoming to the rest of the defunct's creditors, and others having interest.

Fol. Dic. v. 1. p. 240. Gilmour, No 188. p. 136.

* * * Dirleton reports the same case :

No 28.

It was decided, That an executor-creditor was liable to do diligence as other executors ; and though there was a difference betwixt him and other executors, upon that account that he was confirmed in order to his own interest, and to the effect he might be paid off his debt, and had preference before other creditors ; yet as to the duty and office of an executor there was no difference ; and having accepted the office, which was *voluntatis*, it became *necessitatis*, and he was obliged to execute it.

Reporter, *Reidie*.

Dirleton, No 35. p. 15.

* * * The same case is also reported by Newbyth :

JOHN RAILLING being obliged in his contract of marriage with Catharine Craig to provide her to the annual rent of L. 1000, and to the hail conquest during the marriage ; the said Railling being deceased, John Bisset and certain others, creditors, confirm themselves executors-creditors to the said Railling ; and Catharine Craig the relict, as creditor to her umquhile husband by her contract of marriage, pursues the executors-creditors, for count, reckoning, and payment, more than satisfies their own debt. The defence proponed was, That being only executors-creditors, they were not liable to count, unless the pursuer would allege that they had intromitted with more than would satisfy their own debt.—To this it was *answered*, That whether they had intromitted or not with more than would pay themselves, they must count to her in the hail inventory confirmed ; and that they are liable to do diligence therefor.—THE LORDS found, That executors-creditors are liable to do diligence for all the sums contained in the inventory, and confirmed by them, more than satisfies their own sums.

Newbyth, MS. p. 81.

1671. July 18. ANDREW HARELAW against AGNES HOME.

No 29.

THE said Agnes Home being pursued as executrix-creditrrix to her deceased husband, upon this ground, That she had given up an inventory of more than had satisfied her own debt, and therefore *quoad* the superplus should be liable to make payment, or to instruct that she had done sufficient diligence against the debtors ;—it was *alleged* for her, That albeit executors nominate or dative are liable for the whole inventory, or to instruct that they had done diligence ; yet executors-creditors are not so liable, because they only confirming then that

Executors-creditors having given up inventory far exceeding their own debt, and being confirmed, found not liable for the superplus of