

he was obliged to denude himself in Sheens's favour of several rights upon the conditions and qualifications therein mentioned;—and upon that ground the LORDS found the assignation made by Sheens to Grange, before the date of the second gift, was profitable to Grange; in so far as he intromitted with the teinds *bona fide* by virtue of that right, providing the reservations and conditions contained in Bailie Hamilton's back-bond to Sheens, be first made appear to be satisfied and paid; so that seeing Grange's assignation to the teinds cannot be made effectual before the qualifications of Bailie Hamilton's back-bond be fulfilled; whereof the purging of all incumbrances that did affect the said tenement, and particularly that of Howieson's apprising was one, he is not in the terms of the interlocutor finding that he, as donatar, could not pay any debt resting by the creditors upon the general clause in the back-bond; which is only to be understood of extrinsic debts, but not as to such debts that fall under the conditions and qualifications of the back-bond granted by him to Sheens; which, by another interlocutor, is appointed to be fulfilled before Grange's assignation to the teinds can be effectual.—THE LORDS allowed the articles in the count and reckoning for purging the right of the tenement of Howieson's apprising, by the annualrent of the debt due by the Earl of Annandale; and find the donatar will not be liable to count therefor.

Sir P. Home, MS. v. 2. No 886.

No 25.

S E C T. V.

Diligence prestable by Executors.

1628. December 2.

POOL against MORISON.

A LEGATAR pursuing an executrix for payment of a particular legacy of sheepskins, cairsays, and some money addebted to the testamtar, by his debtor designed in the testament, and which he gave special power to the legatar to seek and pursue for himself; which testament of the defunct's, bearing this particular, *being confirmed by the executrix*, that debt was not given up by her in the inventory of the defunct's goods, but was omitted to be confirmed, albeit the body of the nomination bearing the legacy thereof, was confirmed, as it proported; and the relict being pursued by the legatar for payment thereof, it was found that she was not subject to pay the same, and that her omission could not put her in *mala fide*, seeing it might be omitted as a desperate debt; and her not doing of diligence was not imputed to her, seeing power was given by the

No 26.

The nearest of kin confirming some of the defunct's moveables, is not liable, tho' he knowingly omits others; for this debars no party having interest, as such may confirm *ad omnia*.

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.