

1666. *February.* CUNNINGHAME *against* The LEGATARS of His WIFE.

No 21.

An executor found to have made legacies debts of his own, by confirming the testament, and not entitled thereafter to reduce it.

AGNES HOWIE, spouse to George Cunninghame, by her testament, nominates her husband executor, and leaves some legacies to friends extending to 1000 merks; her husband confirms the nomination, in which the free gear and the defunct's part thereof did far exceed the legacies; and yet he intents a reduction of the testament as it is confirmed, and a declarator, that he may be free of the legacies, in respect of a debt owing by the pursuer himself, before the defunct's decease, and still owing the time of the confirmation. It was *alleged* for the defenders, absolvitor; because the confirmation being his own deed, and the inventory given up by himself, by which his deed, he has constituted himself debtor in the legacies, he cannot, upon a debt of his own, liberate himself from the legacies nor quarrel the confirmation, unless it were an emergent debt, owing by the defunct testator herself. *Answered*, That the husband has liberty, in the wife's confirmed testament, either to give up, or not give up, his own debt, for exhausting the inventory, and his wife's part; and therefore, he not having given up this debt, he may, *quocunque tempore*, exhaust the inventory therewith. *Replied*, That he having privilege to give up and exhaust with his debt, and being executor nominated by his wife's testament, wherein she appoints the legacies to be paid, he becomes debtor of the legacies by his own deed, and by omitting to make use of that privilege which was due to him, viz. the upgiving of his own debt, thereby to exhaust the inventory, but specially this debt which could not but consist in his knowledge, the bond being registered not long before the confirmation, and being charged thereupon not long after.

THE LORDS found the allegiance and reply relevant, in respect of his knowledge of the debt, unless he would condescend upon, and make appear, some probable reason of ignorance, or why he did not confirm the same. This cause was again heard and considered in February and June thereafter.

June, this interlocutor was adhered to; though in February it went otherwise; but at that time the knowledge of the debt was not considered.

*Gilmour, No 184. p. 134.*

1666. *July 24.*

PETRIE *against* RICHART.

No 22.

The knowledge of a contract of wadset not entered in the register of reversions, found not to

RICHART of Auchnacant having a wadset of 12000 merks from Buchan of Portlethem, did thereafter enter in a second contract with Buchan's son and heir, who had right to the reversion; and divers years back-tack duties being accumulated and made a principal sum, it was agreed that there should be no redemption but by payment of the sum contained in the said second contract, made up as said is, of the sum contained in the said second contract, and the