

1681. January 29.

GRAY *against* BROWN.

GRAY having pursued Brown as executor-creditor to umquhile Gray, for payment of a debt due by the defunct to this pursuer; and condescending that the executor-creditor having only due to him 200 merks, had confirmed to him L. 3000, being all the defunct's means, and had set down the particular dates of the defunct's bonds, 'and the Lords having examined the defunct's relict, she hath deponed that the executor creditor had inspection of her husband's writs after his death, and took with him two of the bonds which were confirmed, whereof the creditors were most responsible, and had left several others,' which coming to be advised, it was *alleged* for the executor-creditor, That though he had gotten the bonds, he was liable for no diligence, but only to assign any other creditor who should pursue, after a competent time to have done diligence for himself; and, though the Lords, by the late act of sederunt, 'have found executors liable for diligence of what they confirm, yet not to be obliged to confirm, but what he thinks fit;' yet that cannot reach to this case, which was twenty years since the confirmation. It was *answered*, That though executors-creditors were not liable to diligence, yet by that title that they take up the defunct's writs, they must produce, or be liable for the sums; and that he did uplift the bonds is sufficiently proven by the testament bearing their dates, and by the relict's deposition.

THE LORDS found it proven, that he had uplifted these two bonds, and found him liable for the principal sums, annualrents, and expenses therein contained, since he did not produce the same, in so far as exceeded his own debt.

Sair, v. 2. p. 847.

No 3.
An executor-creditor found accountable for sums confirmed due by bonds which he had taken from among the defunct's writs.

1686. December 17.

A. *against* B.

It was queried, *imo*, If a creditor having an heritable bond whereon he is infest, may seek to be confirmed executor-creditor to his deceased debtor? It was *contended* he might, for he had in his bond a personal obligation to pay, and he had action against the executors in his option, as well as against the heir; *ergo*, he might be executor. It was thought if a creditor on a moveable bond sought the office, he was preferable; for an heritable debt cannot be the subject of confirmation *passive*; *ergo nec active*.

Fol. Dic. v. 1. p. 279. Fountainball, v. 1. p. 438.

No 4.