

ted and unmiddled with by them, or for the which diligence is not done; and that the said executor surviving, stands debtor to the creditors in place of the other executors deceased, if they have not intromitted or done diligence as said is, seeing the said executor surviving hath right to all which was not executed; but if the other executors have intromitted fully with their own parts, or done diligence therefore, the executor surviving is not liable but for the proportion of the debt acclaimed, according to his own part of the executry, and the other executors stand debtors likewise for their parts thereof.

No 71.

Act. Aiton & Lermontb. Alt. Hope & Lawrie. Clerk, Scot.

Fol. Dic. v. 1. p. 277. Durie, p. 180.

* * Spottiswood reports the same case :

ANY co-executor may be convened *in solidum* by a creditor or legatar, the rest being dead, if his intromission hath been above the value of the debt sought for, albeit the executors have made division among themselves, and he ought only to have his relief against his co-executors and their heirs.

Spottiswood, (EXECUTORS.) p. 112...

1627. February 20. DUKE OF LENOX against CLELAND.

In an action of transferring, at the instance of the Duke of Lenox, as executor to umquhile Esme Duke of Lenox his father, and also as executor to Ludovick Duke of Lenox his uncle, against Sir James Cleland, for transferring of an act of lisiscontestation, in a process intented by the said umquhile Esme, as executor decerned to the said umquhile Ludovick, against the said Sir James; the LORDS found, That seeing Esme was executor decerned to Ludovick, and that he died *pendente lite*, and so that debt pursued for was not executed, therefore, that that office of executry to Ludovick, which was in Esme's person, became extinct by Esme's decease; and that the pursuer, as executor to Esme, could not seek transferring of that action, and as executor to Ludovick, he could not seek transferring, because no action was pursued at Ludovick's instance; and so, albeit the pursuer was executor to both, yet that he had no interest to seek transferring of that action, but that the right of executry whereto he succeeded, furnished him a ground of a new pursuit.

No 72.

An executor having raised a process, and died *lite pendente*, it was found that his executor could not obtain transference of that process.

Act. Hope & Stuart. Alt. Aiton & Nicolson. Clerk, Hay.

Fol. Dic. v. 1. p. 276. Durie, p. 279.

No 72.

* * * Nicolson reports the same case :

JAMES Duke of Lennox, as executor decerned, and having licence to Esme his father, and as executor decerned, and having licence to Ludovick his uncle, pursues transferring of an action and process pursued by Esme, as executor decerned and having licence to Ludovick, against Sir James Cleland, and Alexander Wemyss, to be transferred in the pursuer *active* the hail process, and namely, the act of litiscontestation therein made. *Parte comparante, excepted,* na transferring of the action in the pursuer as executor to Esme, because the process was at his instance as executor decerned and having licence, and sua pursued *ratione officii* of executry to Ludovick, whilk office is dead with Esme, and so falls ; and the clame of the process and right to the goods and debts therein contained are in *bonis non executis* of Ludovick, and will pertaine to his executors *ad non executata* ; but the first action and litiscontestation at Esme's instance perishes ; and, as executor having licence to Ludovick, he has no right to crave transferring, the first action not being pursued at Ludovick's instance. *Replied,* The litiscontestation cannot evanish, and cannot pertain to any other but Esme's executors, and *res ipsa* the goods pertains to Ludovick, to whom the pursuer pursues also as executor. THE LORDS will not sustain action *hoc ordine* ; but reserve to the pursuer to acclaim the goods and debts contraverted be any other lawful manner of way.

Nicolson, MS. No 161. p. 114.

1629. June 26.

YOUNG against MURRAY.

No 73.

A co-executor having been excluded from his office by decree of the commissaries, the office was found to accresce to the remaining executor.

Two being confirmed executors to a defunct, and a pursuit being moved in both their names against the debtor, one of the two not assisting the pursuit ; this action was sustained at the executor's instance, who insisted without concurrence of the other, for the whole debt acclaimed ; because the Commissaries of Edinburgh, who had also confirmed both the two alike executors by their decret, after the said confirmation, had secluded that executor from the office and benefit of the executry, seeing he had refused to concur with the other in doing diligence, and making equal charges for recovery of the debts and goods pertaining to the defunct ; but the decret which secluded him, was not given upon trial and probation of his not concurrence, but only for not compearance, being summoned for that effect, and absent ; notwithstanding whereof, it was sustained, with the action at the executor's instance for the whole ; albeit the decret which secludes an executor from his office, is ever in use to be given before the confirmation, for either refusing to accept or to make faith, or to find caution, or such like other causes, he is debarred and not confirmed executor,