

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.