

No 10. more moveables left by the defunct, and intromitted with by the executor, than might satisfy the foresaid legacy.

Act. *Craig.*

Alt. *Rollock.*

*Durie, p. 99.*

No 11.

An infestment of four acres of land, found to be demonstrative and not taxative; and therefore was sustained against a process of removing, the pursuer craving the possessor to be removed from all that was above four acres.

1630. February 2. DOUGLAS of Pumpharston against LYNE.

IN a removing, the defender defending with his infestment of the miln libelled, and four acres of land; and the pursuer passing from that, and desiring the defender to remove from all which should exceed four acres after metting.—THE LORDS found, That in the removing, the defender and his predecessors immemorial possession of the land, which they bruiked at four acres of land without interruption, ought to defend against this removing, albeit the excesce of the land possessed should exceed four acres, and should be more than six or seven; whereanent in this removing, the LORDS would take no trial by metting.

Act. —.

Alt. *Craig.*

*Fol. Dic. v. 1. p. 145. Durie, p. 489.*

No 12.

If to an infestment of lands, under a general denomination, be added a more particular description, expressing the names of the particular tenants possessing some of the lands only; this will be reckoned taxative, to limit the infestment to the lands possessed by the particular tenants enumerated, though the rent of the parts be not sufficient to pay the sum, for the security of which the infestment was granted.

1634. February 1. MURRAY against OLIPHANT'S WIFE.

SIR PATRICK MURRAY having obtained decreet of removing against Mr William Oliphant's wife, for removing from the lands of Middleton and Powflat, she suspends, that she is infest in the lands and mains of Uphall in liferent, (she being now divorced,) of the which lands these are a part; and the party *answering*, That her infestment, albeit bearing 'the whole mains,' cannot extend to those lands contained in his decreet, because the same bore, 'her to be infest in the whole mains, containing the lands underwritten, viz. (for these were the words 'of her infestment,) the lands possessed by patticular tenants, specially enumerated and exprest in the said infestment:'. And true it is, that these lands were not then, nor at any time before, possessed by these tenants; and so she cannot claim the same, seeing he offers to prove, that these lands were then possest by other tenants, viz. —And the suspender *answering*, That albeit some of the mains were possest by the tenants designed in her infestment, yet that was not enough to exclude her from the rest; for that word, (viz. possest by these several tenants,) is not of that force to take away the right of the rest of the mains from her; specially seeing, by her contract of marriage, she is ordered to be provided to the lands worth 20 chalders victual yearly; and wanting these lands controverted, she will inlack three chalders victual thereof.—THE LORDS, in respect of the said infestment, bearing the foresaid clause, viz. possest by the tenants specially designed therein, found, That the suspender's liferent could

extend to no more of the mains, but to so much thereof, as was then possess by the saids special tenants, and could not extend to these lands acclaimed, wherein this defender was infest, albeit after her contract of marriage; and found these words, (possess by these tenants,) not to be demonstrative, but to be taxative, and to restrict her right to so much of the mains, as then was possess by them, and that she could have right to no more; therefore admitted to the defender's probation, that these lands acclaimed were, at that time of the suspender's infestment, possess by other tenants condescended on; and repelled the answer made by the suspender, bearing the same to be a part of the mains; for albeit they were so, yet by the restriction of her infestment, she had no right thereto.

Clerk, *Scot.*

*Fol. Dic. v. 1. p. 145. Durie, p. 699.*

No 12.

1667. July 17. HERMISTON against L. SINCLAIR.

HERMISTON being bound to pay to the Lord Sinclair, his brother, out of the first and readiest of the rents of the estate of Sinclair, a certain annuity;

THE LORDS found, That he ought to pay the said annuity entire, though he pretended he was not obliged simply, but out of the rents; and that the said rents, in respect of the real burdens upon the estate, and the low rates of victual, would not extend to satisfy the same; seeing he was obliged to pay out of the first and readiest.

*Fol. Dic. v. 1. p. 145. Dirleton, No 99. p. 39.*

No 13.

1673. January 21. FORBES against FORBES.

THE LAIRD of Leslie having legate to his grand-children 1000 merks out of the rests due by his tenants; they pursue his executor for payment, who *alleged*, That this being a special legacy out of rests, if there was not so much rests, they cannot crave that legacy out of any other of the defunct's estate. *2do*, It being a special legacy, the legatars might have pursued the tenants themselves, and the executor is only obliged to assign.

THE LORDS found, That this legacy was only to be payable out of the rests, and no otherways performable; but found, that the executor was liable to have done diligence against the tenants within the year, when the hypothec remained upon their goods; and that this was not in the condition of special legacies, or sums due by bond, in which it is sufficient to assign whenever the legatars insist.

*Fol. Dic. v. 1. p. 145. Stair, v. 2. p. 154.*

No 14.

A legacy of 1000 merks, out of the rests, due by the tenants, was found payable out of the rests only, and not otherwise performable, if there was not so much of rests.