

No 41.

years last bypast, and the prior right acquired, and being now clothed with possession the time of this pursuit, was sustained without sasine, as said is; but the disposition of the liferent not clothed with possession, albeit prior, was repelled, because the sasine and this pursuit gave preference to the same, even as if there had been two dispositions made, the prior last intimated, or not intimated at all, would have been postponed to the second disposition first intimated.

Act. Stuart.

Alt. —

Durie, p. 715.

1637. July 19.

L. INNERWEIK *against* LA. SMEITON.

No 42.
Found in conformity with
Kinnaird against Yeaman, No 40.
P. 5469.

UMQUHILE L. Smeiton being obliged to pay to L. Innerweik, a yearly annuity of 1700 merks, during Innerweik's lifetime yearly, which bond registered being transferred in the Lady Swinton, as executrix to her husband, granter of the bond, reserving her defences, and she suspending, that she as executrix, could not be subject to pay a yearly duty, for years and terms to come, after the decease of her husband, who was the debtor, for that was a fact only prestable by the heir, who ought to be convened therefor, and not by the executor, and the most that the executor could be liable thereanent, was only for so many terms bygone of that annual rent duty, as were owing the time of her husband's decease, and that she ought not to be subject to payment in time coming, the LORDS repelled this reason, and found, that the executor was subject to pay the yearly duty in all time to come, during the creditor's lifetime, *usque ad vires inventarii*, wherein the LORDS found both the heir and executor liable to the creditor, as he pleased; and found, that there was no necessity to the creditor to charge and discuss the heir *primo loco*, before the executor could be charged, as if it were proper to be first paid by the heir, and that if any otherwise the executor could be subject, the same was but *in subsidium*, after the heir was first discussed; which was repelled, seeing they found, that they were both obliged alike principally to the creditor, as said is; and here the charger insisted against her as executrix, at the least intromissatrix with the defunct's goods and gear; but the dispute run upon this ground, as if she had been executrix; for she *alleged*, that the intromissatrix could be liable no further than an executrix, which ground was holden as granted, and so disputed, as said is.

Act. Stuart.

Alt. *Advocatus.**Fol. Dic. v. 1. p. 368. Durie, p. 853.*