

* * * Dirleton reports the same case :

No 28.

It was decided, That an executor-creditor was liable to do diligence as other executors ; and though there was a difference betwixt him and other executors, upon that account that he was confirmed in order to his own interest, and to the effect he might be paid off his debt, and had preference before other creditors ; yet as to the duty and office of an executor there was no difference ; and having accepted the office, which was *voluntatis*, it became *necessitatis*, and he was obliged to execute it.

Reporter, *Reidie*.

Dirleton, No 35. p. 15.

* * * The same case is also reported by Newbyth :

JOHN RAILLING being obliged in his contract of marriage with Catharine Craig to provide her to the annual rent of L. 1000, and to the hail conquest during the marriage ; the said Railling being deceased, John Bisset and certain others, creditors, confirm themselves executors-creditors to the said Railling ; and Catharine Craig the relict, as creditor to her umquhile husband by her contract of marriage, pursues the executors-creditors, for count, reckoning, and payment, more than satisfies their own debt. The defence proponed was, That being only executors-creditors, they were not liable to count, unless the pursuer would allege that they had intromitted with more than would satisfy their own debt.—To this it was *answered*, That whether they had intromitted or not with more than would pay themselves, they must count to her in the hail inventory confirmed ; and that they are liable to do diligence therefor.—THE LORDS found, That executors-creditors are liable to do diligence for all the sums contained in the inventory, and confirmed by them, more than satisfies their own sums.

Newbyth, MS. p. 81.

1671. July 18. ANDREW HARELAW against AGNES HOME.

No 29.

THE said Agnes Home being pursued as executrix-creditrrix to her deceased husband, upon this ground, That she had given up an inventory of more than had satisfied her own debt, and therefore *quoad* the superplus should be liable to make payment, or to instruct that she had done sufficient diligence against the debtors ;—it was *alleged* for her, That albeit executors nominate or dative are liable for the whole inventory, or to instruct that they had done diligence ; yet executors-creditors are not so liable, because they only confirming then that

Executors-creditors having given up inventory far exceeding their own debt, and being confirmed, found not liable for the superplus of

No 29.
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kin.

they may be satisfied of their own debt; as to any superplus of the inventory, they are only obliged *cedere actionem*, to the effect any other creditor, or nearest of kin, may pursue.—It was *replied*, That all executors, finding caution to make furthcoming the inventory, are alike obliged to account for the same, or to show diligence; and if it were not so, executors having the only title to pursue debtors, and so hindering all other creditors or nearest of kin to pursue, in law and reason they ought to do diligence against all debtors; and if they become insolvent *medio tempore*, it is just that they should be liable.—THE LORDS did sustain the defence, and found, That where there was no executor nominate or dative confirmed, that creditors were necessitated to confirm only *ad hunc effectum*, that they might have a legal title in their person to pursue for payment of their own debt, and that whensoever they were paid, any other creditor or nearest of kin might force them *cedere actionem*, which was an ordinary remedy in law against their further intromission; that therefore they should not be liable to do diligence as to the superplus of the inventory more than paid their own debt. And in this process there being produced contrary practics; one in anno 1667 against the executors-creditors, finding them liable to do diligence in a case Bisket against —*, and Hog against Niven, *voce* IMPLIED DISCHARGE AND RENUNCIATION, where it was found, that executors having no benefit but *medium officium*, they were not obliged to pursue the debtors upon their own charges, but it was sufficient to assign; the LORDS having reasoned long amongst themselves, and resolving to make this a practic in future, decerned *ut supra*.

Fol. Dic. v. 1. p. 240. Gosford, MS. No 381. p. 189.

No 30. • 1673. *January 21.* FORBES *against* FORBES.

A MAN having left a legacy of 1000 merks out of the rents due by his tenants, the executor was found liable to have done diligence against the tenants within the year, when the hypothec remained upon the goods.

Fol. Dic. v. 1. p. 240. Stair.

* * * See This case, No 14. p. 2263.

1675. *December 14.*

CECIL THOMSON, and JOHN HALIBURTON her Spouse, *against* OGILVIE, and JOHN WATSON her Spouse.

No 31.
An executor
obtaining
payment,
but doing
no diligence,

THE said Cecil, as executrix confirmed to Henry Thomson her brother, did pursue the said Grizel Ogilvie, as executrix to David Thomson her husband, for payment of the sum of L. 5000 left in legacy to the said Henry. It was

* Examine general List of Names.