

ed to dispositions, renunciations, or translations of the right, and obliges not against intromissions.

REPLIED for the Pursuer,—This translation not being a disposition of lands, but of the apprising itself *tanquam optimam maximam*, and hail sums therein contained, principal, annual-rents and penalties; if the disponent, by his intromission, hath got payment of any part thereof, the defender must make the same good to the pursuer, who has mails and duties assigned to him without restriction, and all that was assigned by M'Gowan. Now M'Gowan had right to the rents craved, and therefore the warrandice must extend thereto. The super-intromissions not life-rented cannot be ascribed to Cuill's title by his wife, but to the apprising, which was the only title existing in his person at the time. 2. Assignations, translations, dispositions, and renunciations in the warrandice, comprehend all the writs the cedent could have made to the principal debtor, or to any third party except tenants: and the subsequent words, "or any other security of the premisses, to no person or persons," plainly include his own super-intromissions; the same way as in the case of his translation of an infeftment of annual-rent, or any infeftment in security of a sum in the same terms, his bygone intromissions, that might have extinguished the subject assigned, would have fallen under the warrandice.

DUPLIED for the Defender,—The disposing of the apprising by the defender's father, with all right which he had or might have by virtue of the assignation from M'Gowan, implies that he intended only to dispoise what right he had so acquired, such as it was. And since he never intromitted by virtue of the said apprising, the warrandice in his assignation thereof can never make him liable for any intromissions he had, which his wife's possession and his own *bona fides* do abundantly legitimate.

The Lords found the warrandice was incurred by the defender's father's super-intromissions with the rents of the estate above his wife's jointure, preceding the conveyance of the apprising to his stepson. And remitted to the Ordinary to hear parties as to how far the defender is liable.

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1706. July 18. JAMES LEES, Merchant in Glasgow, *against* ROBERT DINWIDIE, Merchant there.

JAMES LEES, merchant in Glasgow, as executor-creditor to Ninian Glass in Crawford's-dike, having intented a process against Robert Dinwidie, merchant in Glasgow, and Elizabeth Kelburn, relict of the said Ninian Glass, for restitution and delivery to him of some barrels and a boat belonging to the defunct, and confirmed by the pursuer;—

ALLEGED for the Defender,—That before the pursuer's confirmation, the said Elizabeth Kelburn was confirmed executrix-dative to the defunct, and had obtained the goods pursued for, eiked to her confirmed testament; and Robert Dinwidie was assoilyied in a process at her instance for them, before the Commissaries of Glasgow, upon a ground of compensation by an equivalent debt the defunct was owing to him. So that the pursuer's confirmation is null, as being posterior to

another's confirmation as principal executrix-dative: since there cannot be two principal executors to the same defunct; as was found betwixt Kennedy and Cumming, and the Creditors of Kinfauns.

REPLIED for the Pursuer,—Albeit the relict's confirmation was prior to his, yet his confirmation was expedite before she did eik the goods now pursued to her first confirmed testament; and the making the said eik could be of no import, since the goods therein mentioned had been formerly confirmed by the pursuer, as executor-creditor, who therefore ought to be preferred to them, as if he had been confirmed *ad omissa*. 2. It is *jus tertii* to Dinwiddie to found upon the relict's confirmation, since he derives no right from her.

DUPLIED for the Defender,—The pursuer's confirmation cannot subsist as a dative *ad omissa*, because it bears not to be such. Nor was the principal executor called thereto, which is necessary to the obtaining a dative *ad omissa*; because the principal executor has the privilege to eik, and may object against the ground of the executorship. 2. It is *jus proprium*, and not *jus tertii*, for the defender to found upon the relict's testament; because he stands assoillyed in an action at her instance as executor, and so has interest to maintain that absolviture.

TRIPLIED for the Pursuer,—That he could not call the executrix-dative to his confirmation; because, though her confirmation was prior to his, yet it was after the taking out and executing of his edict. 2. The absolviture obtained by Dinwiddie against the relict cannot be obtruded to the pursuer, being *res inter alios acta*, wherein he is not concerned.

The Lords found the confirmed testament at the pursuer's instance null; in respect that, before the date thereof, the defunct's relict was confirmed executrix-dative, and the pursuer is also confirmed a principal executor, and not *ad omissa*, without calling of the first executor-dative.

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1706. July 19. WILLIAM BLACK and other Tenants of Gogar's, *against* HUGH M'GILL of Grange, Bailie of the Regality of Culross.

IN the action of reduction and declarator at the instance of William Black and the other tenants of Gogar's, against Hugh M'Gill, bailie of the regality of Culross, for damages the pursuers were put to by a poinding that followed on an unjust decreet of poinding the ground, pronounced by the defender, wherein he repelled this defence, that the heritor was not called;—the pursuer founded his libel on several Acts of Parliament concerning judges' administration of justice, particularly the Act 12. Par. 6. Ja. 2. whereby any officer wilfully trespassing in the ministration of his office of the law, and the same proved against him, shall tine his office year and day, and assyth the party as effeirs; and by all law, a judge, *qui facit litem suam* by doing injustice, is liable to the party's damage thereby sustained.