

No 360.

cause for her third, and which assignee had obtained sentence against the suspender before the relict's sentence; so that the exception upon the sentence for the debt being emergent since litiscontestation in the relict's cause, and being competent to have been proponed before the relict's sentence, the decret for the debt being obtained before it, and being omitted to be proponed as said is by the executor, who might have proponed that exception upon that same debt, for retention of the goods for satisfying thereof, and so not proponing the same, that omission was found to exclude him therefrom in all time coming, although nothing could be said against the verity of the debt, or that it was not owing, and albeit the suspender also was a poor ignorant man, in whom *ignorantia juris et in damno vitando* is excusable; and the Lords understood, that the Commissaries of Edinburgh are ever in use to decide, that where an executor is confirmed, at the time of confirmation, if he as executor protests not that his accepting of the office be without prejudice of any debt owing to himself by the defunct, that the omitting to make such a protestation excludes him ever from seeking of that debt thereafter; which I think should not be sustained where the debt is true.

Act. Hay.

Alt. Baird.

Clerk, Hay.

Fol. Dic. v. 2. p. 208. Durie, p. 311.

1631. March 18. RAGUEL BENNET *against* BENNET.

No 361.

It was pleaded, that one could not renounce to be heir, because he had sold land belonging to the predecessor. Although he had been convened before *super eadem re*, as successor in general, it was found relevant to prove the allegation now made, not formerly libelled and insisted on.

THE defender being convened as heir to her predecessor, or as successor to him in his lands, or as lawfully charged to enter heir, and by some other alternatives, as use is, and she for eliding of that member, where she was convened as lawfully charged to enter heir, offering to renounce; the other *replying*, That she could not be suffered to renounce, seeing *res* was not *integra*, because she had behaved herself as heir, by selling of the lands of wherein her father died infest, since his decease; and it being *duplied*, That this alienation, if it were true, yet could make her only liable as successor to her father, but did not hinder her but she might renounce to be heir, and thereby she might by her renunciation elide that member; for this deed, as said is, tended only to prove her successor, which alternative the pursuer could never be heard to prove against her, because she being convened by the same pursuer in another process *super eadem re*, as successor to her father, and the same being admitted to his probation, he failed to prove her successor, and she is assoilzied, so that he cannot be heard to qualify the same, and this alleged disposition is only a qualification thereof. THE LORDS found, that albeit the pursuer failed to prove this defender successor, yet that secluded him not but that he might reply upon this disposition made by her of lands, wherein her father died infest, and seized, to whom she was apparent heir, and that the pursuer

might be heard to propone and prove that reply, notwithstanding of his failing to prove her successor; for the LORDS found this a several member, which was now offered to be proved, from that member, whereby she was convened as successor; seeing, to prove her successor, the pursuer behoved to produce where she was infest, and this reply qualified her to behave herself as heir to him, whereby she could not renounce in prejudice of the charge given to her to enter heir; and the same was not alike, as if he had insisted thereby against her as successor; but the LORDS found them distinct members.

No 361.

Act. Hart.

Alt. Trotter.

Clerk, Hay.

*Fol. Dic. v. 2. p. 207. Durie, p. 582.*

1632. December 20.

KNOX against KNOX.

No 362.

JEAN KNOX having obtained sentence for payment of 1000 merks against her brother, as heir to his father, granter of the bond upon that sum to her; and having also obtained decret against a suspension and reduction intended by her said brother, for reducing of that sentence and bond; thereafter the charges for the said payment being *de novo* suspended, upon this reason, viz. because she was executrix nominate to her father, granter of the bond, and albeit she was not confirmed, yet she had intromitted with as many of the defunct's goods as would extend to that sum, and so she was paid in her own hand, and could not pursue the heir therefor, especially seeing the bond is a moveable bond, and not heritable, which ought to affect the executor, and who ought to relieve the heir thereof; the LORDS would not receive this reason being competent before the first sentence given against the suspender, then compearing, and then known to him, but omitted, and not proponed; and therefore found it not receivable now, especially seeing it was offered only to be proved by witnesses, that she had intromitted, and was not offered to be proved by writ or oath of party; therefore it was not received in this suspension against a written bond and sentence, being omitted of before *ut supra*.

Clerk, Scot.

*Fol. Dic. v. 2. p. 208. Durie, p. 661.*

1636. July 12.

BURREL against GILGOWER.

No 363.

ONE Burrel obtains decret of removing against Gilgower before the Bailies of Edinburgh, *in foro contradictorio*, which being desired to be suspended upon a reason founded upon a tack of the land controverted, and other opposing his decret given against him compearing; the LORDS found the letters orderly