

said annual-rent to one of his bairns, who thereupon was infeft, reserving his own liferent; thereafter the annailzier of the annual-rent to John Orr, not knowing of the infeftment given by John Orr's resignation in the hands of the Bailies of Edinburgh, to his bairn, pays the sum whereupon the annual-rent was redeemable to the said John Orr, and obtains his renunciation. After the decease of the said John, his said daughter being infeft, obtains pointing of the ground for the said annual-rent, notwithstanding of the renunciation granted by the father, whereupon the heritor of the land being distressed, pursues warrandice of the said renunciation granted to him by the father, against the two executors confirmed to the father, wherein he convenes them conjunctly and severally, to warrant the same, and for that effect, to make payment of the principal sum paid to the father, and of the annual-rent thereof paid since then to the daughter, of the years for which she had obtained decret of pointing. In which process the Lords found, that there being two executors, they could not be convened but for their own halves, and not one of them for all, seeing one of them was not alleged to have intromitted with so much as would pay the sum acclaimed. And it being also alleged, that this action of warrandice being for warranting of an heritable infeftment, that fact was not prestable by the executors, but by the heir; the Lords repelled this allegiance, and found the same prestable by the executors, viz. to pay a sum for which the defunct had given renunciation of an annual-rent; but because the annual-rent was for more than ten for each hundred, the Lords found, that the executors should refund no more than that proportion, albeit that decret was obtained by the daughter against this pursuer, to point for the annual-rent libelled, which was more than ten; for that was his own fault, who proponed not that allegiance in that pursuit, without prejudice to him to repeat from the daughter what he had paid, more than the annual-rent allowed by act of Parliament.

Act. *Mowat.*

Alt.

Clerk, *Gibson.**Durie, p. 533.*1634. *March 8.*————— *against L. LAG.*

THERE being four executors conjunctly nominated by the defunct, and all the four obtaining licence from the Commissaries to pursue for the debts, albeit the testament was not confirmed; one of the four pursuing alone at his own instance, without concurrence of the rest, and without inserting of their names in the pursuit, for registration of a bond of £.100 made to the defunct by the defender; it was found, that one executor of four nominated, (the licence being granted to all the four) could not alone seek this registration, except all the rest should either concur in the pursuit, or else should refuse to assist, and that they were excluded from their office; even as more tutors being conjunctly nominated, one of them could not assist the pupil's pursuit, without concurrence of the rest, and such like in

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Found, that one of a number of executors conjunctly nominated, could not sue alone.

No. 76. curators, whereof two or three were necessary, and were given *sine quibus non*, &c. one of these could not insist in a pursuit without concurrence of the rest, for the satisfying of this executor would not be an exoneration to the defender at the hands of the rest of the executors.

Clerk, *Scott*.

Fol. Dic. v. 2. p. 382. Durie, p. 710.

No. 77. 1738. November 7. INGLIS of Murdiston *against* MIRRIE.

FOUR creditors of a defunct having been conjoined in the office of executry, and the debtor of one of the bonds confirmed having made partial payments to one of the executors confirmed, but within the fourth part of the bond, the same was objected to, as being more than the creditor's claim extended to. The debtor pleaded, That without regard to the extent of their respective debts, executors creditors conjoined in the office have an equal interest in the administration, and debtors are in safety to pay an equal proportion to each of them. It was the unanimous opinion of the Court, That co-executors must all concur in pursuing or discharging, because they have but one office, are one body, and represent the defunct as one person, and therefore any one making payment to a co-executor, without concurrence of the rest, does it at his peril. It is true the danger is not great, where the co-executors are nearest of kin, who have an equal interest, in case the payment does not exceed the co-executor's share; but the case of co-executors creditors is different; a voluntary payment in that case to one will be sustained or not, according as the person receiving payment shall, in the event, be found a lawful creditor; and therefore it was agreed, that in this case the payment was not lawfully made.

Fol. Dic. v. 2. p. 383.

* * * For Kilkerran's report of this case see TITLE TO PURSUE.

1764. July 11.

SIR ALEXANDER GRANT and JOHN GREGORY, *against* REPRESENTATIVES of CAMPBELL of Monzie.

No. 78.

Three executors being named by the testator of her last will, can two of them pursue without the third?

Mrs CAMPBELL, by her last will and testament, executed at London, 28th March, 1763, after bequeathing some legacies, " Settles the remainder of her goods, chattels, and personal estate, upon her executors after named, to be applied and disposed of in such manner as the survivors or survivor of them shall think fit; and nominates and appoints Sir Alexander Grant of London, John Gregory of Conduit-Street, and Matthew Gregory of the Island of Jamaica, executors of