

ruption; because in that case law requires only some document that the action pretended to be pursued was not neglected.

Fol. Dic. v. 1. p. 277. Forbes, p. 19.

No 83.

1744. December 18.

DIN against BLAIR.

EXECUTORS are liable to diligence for the subject of the inventory confirmed; but are not liable for their omission in not confirming, in respect every party having interest may confirm *ad omissa*.

And accordingly, in the process at the instance of John Din, in the right of Anne Blair his wife, as one of more nearest of kin of James Blair her father, against John Blair son and executor nominate of the said James, to account for his wife's share of her father's moveables, and that not only to the extent of the inventory confirmed by him, but to the full extent of the effects known to the executor to have belonged to the defunct, which it was insisted he was, by the trust conferred on him, bound to have confirmed; especially in this case, where, by a special clause in the nomination, all other executors were debarred, the LORDS found the defender only liable for what he had confirmed or intromitted with; for even such debarring clause was not understood to preclude the nearest of kin from confirming *ad omissa*.

Fol. Dic. v. 3. p. 192. Kilkerran, (EXECUTOR.) No 8. p. 174.

** See This case by D. Falconer, No 36. p. 3501.

** See Bell against Wilkie, *voce* NEAREST OF KIN.

No 84.

Executors are liable to diligence for the subject of the inventory confirmed; but are not liable for their omission in not confirming.

S E C T. IX.

In how far, and by what means, the executor is constituted proprietor.

1665. July.

COLVIL against LORD BALMERINO.

MR JOHN COLVIL, as executor to Mr John Colvil, his uncle, minister at Kirk Newton, pursues my Lord Balmerino for the stipend of the said kirk, crop 1663, the defunct having died in February that year, and also for the profit of the glebe that year.—It was *alleged*, That Balmerino had *bona fide* paid it to the intransit minister, who was presented to that year's stipend.—It was *answered*, That he could not have been legally presented thereto, it having belonged to

No 85.

A party had paid to the intransit minister a sum claimed as ann by the nearest in kin of the defunct incumbent. Found, that the nearest in kin might

No 85.
still be confirmed executor to it, to whom it must be paid.

the executor, and to the defunct's nearest of kin as ann; and as to the profits of the glebe, it is part of the ann also.—*Replied*, That there is no ann due to the executor as executor, but only to the wife and bairns where there are any; nor can the profits of the glebe be due, unless the glebe had been sown.—*Duplicated*, That the ann is due to the nearest of kin, who may confirm the same if they please, and there is *par ratio* for the glebe.

THE LORDS found the ann due, and that it might be confirmed by the nearest of kin, but nothing due for the glebe, unless it had been sown before the defunct's death; and not being sown, the intrant might lawfully enter thereto, and to the manse.

Gilmour, No 160. p. 113.

1671. December 21.

Mr ARTHUR GORDON *against* LAIRD of DRUM and Mr FRANCIS IRVING.

No 86.

An executor having taken decree in his own name against a debtor of the defunct, but dying before payment was made; in a competition betwixt a donatar of his single escheat, and the nearest of kin of the first defunct, the Lords preferred the nearest of kin.

THE Laird of Drum being debtor in two bonds to Alexander Menzies, the same was confirmed in his testament by his two executors, who having obtained sentence, establishing the debt in their person; Margaret Gordon, one of the executors becoming at the horn, her escheat was gifted to Mr Francis Irving; the surviving executor having assigned these sums to the nearest of kin, he transferred the same to Mr Arthur Gordon, who now pursues the Laird of Drum for payment. It was formerly found in this process, No 78. p. 3884. that as to this sum, the testament was executed by sentences, establishing the debt in the executor's person, that the surviving executor could only assign the half, and that the other half did not accresce to him, but to the executors of Margaret Gordon; yet seeing the nearest of kin would have access against Margaret Gordon's executors, the LORDS allowed them to be confirmed executors to her, and thereupon to have sentence for the whole. Compearance was made for Mr Francis Irving, donatar to the escheat of Margaret Gordon, who *alleged*, That her executor could have no right, because she being rebel, all moveable sums fell under escheat, and belonged to the donatar, for she being executor to Menzies, was thereby proprietor, and *domina bonorum mobilium*, as *hæres in mobilibus*; for, though wives and children, nearest of kin, legatarys and creditors of defuncts, have an interest in their moveables, yet that is no right of property or dominion, but only an obligation lying upon the executor, to satisfy the several interests; but, the dominion is only in the executor, who may uplift, discharge, and dispoise at his pleasure; and the rebellion of the proprietor does confiscate every right. It was *answered*, That the office of an executor is not a right of property or dominion; but the executor is curator *honorum*, given, that the wills of defuncts be not ineffectual, or their goods dilapidated; and therefore the dominion, although it be not formal and complete, yet it is originally stated in the relict, whose share is no succession, but a division of that communion of goods betwixt the hus-