

1671. *July 18.*ANDREW HARLAW *against* AGNES HUME.

## No 2.

An executor-creditor, long since confirmed, found liable in no diligence to other creditors.

ANDREW HARLAW having obtained decreet against Agnes Hume, as executrix to her husband, she suspends and raises reduction on this reason, that the inferior judge did wrong in decerning her, being only executrix-creditrrix, as being liable for the whole inventory, because by the law and custom of the kingdom, executors-creditors, who confirm only for obtaining payment of their debt, are liable for no more but what they intromit with above the debt due to them, and are not liable for further diligence as other executors: Yea it was found, 11th June 1629, that an executor having no interest, was not liable for diligence, but only to assign, Nivin against Hog, *voce* IMPLIED DISCHARGE and RENUNCIATION. It was *answered*, That executors-creditors are liable for intromission and omission as other executors, because they accept an office, and exclude others who would be liable for diligence, and they have no more advantage, but that they are preferred to others as being creditors, and may pay themselves in the first place, and it would be of pernicious consequence if their negligence should cause the interest of children, though orphans, as well as creditors, to perish; and therefore the LORDS did justly in *anno* 1667, in the case betwixt Bisket and Greig, find an executor-creditor liable for the whole inventory, both for intromission and omission. It was *answered*, That it hath always been heretofore holden, that executors-creditors were not in the case of other executors as to diligence, and that the ordinary remedy was, that creditors might pursue the executor-creditor, and thereupon would obtain assignations to any debts in the inventory they pleased, except such as had been uplifted by the executor for their own payment; upon which assignations they did always pursue for themselves, so that there was neither exclusion nor obstacle to the creditors, but, on the contrary, they got assignations without being at the trouble to confirm; so that this confirmation being many years ago, it were against all reason to make the executors-creditors further liable than they were then esteemed to be, which might also be drawn back against all executors-creditors, which are very many.

THE LORDS having considered the decision betwixt Bisket and Greig, that it was upon a recent confirmation, and in favours of a wife for her provision, out of whose hands the executor had recovered the goods, though she was a privileged creditor, they found, that this executor-creditor being long before confirmed, was not liable for diligence, but only for intromission, and resolved to take it into consideration, whether executors confirming in time coming should be liable for diligence, and to consider the inconvenience on both parts, and to make an act of sederunt thereanent.