

No 34.

son, *IBID.*; and 15th January 1674, Paton, *IBID.*; they found a relict being executrix nominate, had no right to a third of the dead's part.

In the preceding decision the question was, where the creditor died, whether his heirs or executors had right to the money? In the first branch of this decision, the doubt is just in the opposite case; the debtor dying, whether his heir, or his executors are *primo loco* liable in payment of the debt, and which of them is bound to relieve the other in case of distress?

Fol. Dic. v. 1. p. 240. Fountainhall, v. 2. p. 250.

1708. July 23.

The LORD ELIBANK and his Sisters *against* LORD PRESTONHALL and ALEXANDER MACKENZIE of Frazerdale, his Son.

No 35.

An executrix was found liable for diligences and omissions, although by the testament the legatees and others therein honoured, had power, in case of her refusing or delaying to implement the defunct's will, to pursue for and affect the whole goods conveyed to her, as effectually as if the same had been directly disposed to themselves by the defunct.

ALEXANDER, late Archbishop of St Andrews, having, by his principal testament, ' named the Lady Prestonhall, his second daughter, his executrix and ' universal legatrix, reserving to himself to burden her with what debts and legacies he thought fit, and power to the persons in whose favours these should ' be granted, to pursue her for implement, and she refusing or delaying to do ' the same, to pursue for and affect the whole goods conveyed in her favours, ' as freely and fully as if they were disposed directly to themselves by the testator.' Thereafter by a codicil, he burdened his executrix with the payment of some particular debts and legacies, and ordained her to divide the remainder of his effects betwixt herself, and her eldest sister the Lady Elibank, and her children. Both the sisters being now dead, the present Lord Elibank and his Sisters, as representing their mother, pursued the Lord Prestonhall to count and reckon for his and his Lady's intromission with the Bishop's executry, and Alexander Mackenzie of Frazerdale their son, as executor to his mother.

Alleged for the defenders; The Lady Prestonhall was not bound to do diligence as an ordinary executor, but only liable for the equal half of her actual intromissions; and being equally concerned in the subject, law presumes she acted providently. So they are willing to assign the equal half of all outstanding debts, which is all that the testament and codicil obligeth them to: It being provided in the testament, ' That in case that the executrix should refuse or ' delay to make payment, the legatars might pursue and affect the defunct's ' goods and gear, as effectually, as if they were immediately conveyed to ' themselves;' which argues, That the Bishop did not intend to oblige the executrix and her husband to more diligence for his sister's half of the executry, than for their own.

Answered for the pursuers; Executors are liable for diligence, when they have little or no benefit by the testament; and the Lady Prestonhall, who had

the half the executry, was under a more particular obligation to execute the defunct's will nicely. *2do*, Had she abstained from or repudiated the office, it had fallen to another that would have been liable to have done diligence; and an intromitter, who by a title debarred another, is liable for diligence. Again, the executrix, at giving up of the inventory, did not protest not to be liable for diligence, but only for actual intromissions; nor would the commissaries have admitted such a protestation, as being directly contrary to the nature of the office. Nay, it is questionable in law, if the defunct at the time could have dispensed with the giving up of inventory, or the being liable for omissions.

THE LORDS found the executrix liable for diligence, reserving all defences.

Fol. Dic. v. I. p. 240. Forbes, p. 274.

No 35.

1744. December. 18. JOHN DUN against JOHN BLAIR.

THE LORDS found, 'That an executor was not obliged to charge himself with particulars omitted out of the inventory, unless he intromitted therewith.'

Act. *Lockhart.*

Alt. *H. Home.*

Clerk, *Murray.*

Fol. Dic. v. 3. p. 181. D. Falconer, v. I. p. 29.

No 36.

SECT. VI.

Diligence prestable by Tutors and Curators.

1623. February 6. WATSON against MATHEWSON. &c.

IN a tutor count and betwixt Watson and Mathewson, Lang, John Callender in Leith, and others, the LORDS found, That a tutor was not obliged to pursue unresponsal debtors, unless the minor could say that they were repute responsal. That the tutor could not buy the quarter of ane minor's ship better cheap, nor he had bought ane other quarter according to the price given up in testament by himself; and that a tutor might compensate a part of the minor's stock and annuals thereof, with the expenses for his entertainment for years after the tutory expired.

Fol. Dic. v. I. p. 241. Haddington, MS. No 2749.

No 37.

A tutor was not found liable to pay a debt due to his pupil, by a bankrupt, tho' he had no diligence against the debtor, unless it were alleged that the money might have been recovered by diligence.