

was a diligence that could be followed furth, and so remained effectual in terms of the last clause in the statute ; though neither was this expressed as the *ratio decidendi*, for, as said is, the interlocutor went in general repelling the defence.”

---

1738. June 15. JOHN PHIN, Wigmaker in Edinburgh, and OTHERS, *against* HENRY GUTHRIE, Writer in Edinburgh.

THIS case is reported by Elchies, (*Legacy*, No. 5.) Lord KILKERRAN'S note of it is as follows:

“It was observed by ELCHIES, that here was an ingenious distinction between legacies, which, *de solemnitate*, require writ to their constitution if above L.100 Scots, and *fidei comisses*, whether they can be proved by oath when above L.100 Scots, though legacies cannot ; or, in other words, legacies are void if without writ, when above L.100 Scots, although the executor should acknowledge he heard them left ; and the question is, whether the law is not the same as to *fidei comisses* ; and as this case was to be advised *ex parte*, it was said this was a delicate point to determine *ex parte*.

*Nota.*—“The interlocutor reclaimed against here was wrong, because the defender was not only executor, but was intromitter and general disponee ; and, therefore, no doubt the action was competent to the legators, and all the question was upon the relevancy. It was observed, that whatever was the case of legacies, yet where a general disponee had promised to pay such and such sums to certain persons, there could be no doubt but that such promise might be proved by oath.

“ELCHIES *et alii* would not enter on the argument, but thought the point of consequence ; and as the reason given by the defender was, that as the subject did not exceed the special legacies, he was safe whether the interlocutor was altered or not ; I say, as this was the reason why the case was advised *ex parte*, he moved, that without determining the above general point, the case should be remitted to the Ordinary. But the PRESIDENT, not seeming to apprehend the difficulty, moved that the Court should find, &c. *ut infra* ; and no other scrupling but ELCHIES and K. who only wanted the point to be farther heard, they having declared they would not vote, the interlocutor was pronounced without a vote, and is in these words :

“The Lords having heard this bill, and no answers, they, in respect of the acknowledgement on oath of the executor, who, by the will, hath right to the residue of the effects, if any be, after payment of the legacies, that he understood it to be the will of the defunct that he was to account to the legatees, proportionally to their several legacies, for the remainder of the effects, after payment of the legacies, and a reasonable gratification to himself, Find him liable to account ; and remit to the Ordinary to proceed accordingly.

“I own my present opinion is for the interlocutor.”