

and so far as she had paid ready money, the same might be imputed in the price of such parts of the furniture as fell not within the donation; which the Commissaries "refused," in respect a legacy must give place to debts; and of this she also complained.

As to this the Lords remitted to the Ordinary to "Refuse the bill," but to give this instruction, "That the Creditors should be obliged to assign to the Lady so much of their debts as might correspond to the price of the particulars purchased by her at the roup, to the end she might operate her relief for the said price as accords."

*Fol. Dic. v. 3. p. 374. Kilkerran, (HUSBAND and WIFE.) No 10. p. 262.*

No 26.

1747. February 24.

ELIZABETH SYME *against* M'FARLANES.

ELIZABETH HAMILTON, relict of the late John M'Farlane, writer to the signet, executed a deed in favour of Elizabeth Syme her servant-maid, whereby, on the narrative of the care she had taken of her, she legated and bequeathed to her 400 merks; and, for her further security, assigned her in and to as much of the first and readiest of her effects as should satisfy and pay the said 400 merks, and annualrents thereof after her death. Upon this title, Elizabeth Syme pursued Alexander Bell, town-clerk of Linlithgow, as executor confirmed *qua* nearest of kin, and also John and Robert M'Farlanes, sons-in-law to the defunct, as intromitters with effects not contained in the executor's inventory.

*Alleged* for the executor, That he was exhausted; and for the other defenders, it was *objected* to the pursuer's title, That there was another confirmed *qua* nearest of kin, to whom only they were answerable.

THE LORD ORDINARY, "In respect the pursuer is not confirmed executor-creditor *ad omissa*, found no process against the said John and Robert M'Farlanes, without prejudice to her insisting against the executor confirmed, as accords."

The pursuer reclaimed; and having in her petition set forth the case as of a common bond granted to her in remuneration of her service, the LORDS, on moving thereof, thought that it deserved an answer; for that although, where there is an executor confirmed, action will not lie against another person as vicious intromitter, yet it was thought action might lie to a creditor, against an intromitter with effects omitted out of the inventory, *in valorem*; Durie, June 20. 1629, Douglas *contra* Tours, *voce* PASSIVE TITLE.

But in the answer to the petition, the truth of the case being set forth, that the ground of the pursuer's process was not a common bond, but a legacy; the Lords having advised petition and answers, and considering that the pursuit is at the instance of a legatary, "Adhered to the Lord Ordinary's interlocutor."

*Kilkerran, (LEGACY.) No 3. p. 327.*

No 27.

Where there is an executor confirmed, a legatee cannot pursue a debtor of the defunct, if not confirmed *ad omissa*.