

No 72.

* * * Nicolson reports the same case :

JAMES Duke of Lennox, as executor decerned, and having licence to Esme his father, and as executor decerned, and having licence to Ludovick his uncle, pursues transferring of an action and process pursued by Esme, as executor decerned and having licence to Ludovick, against Sir James Cleland, and Alexander Wemyss, to be transferred in the pursuer *active* the hail process, and namely, the act of litiscontestation therein made. *Parte comparante, excepted,* na transferring of the action in the pursuer as executor to Esme, because the process was at his instance as executor decerned and having licence, and sua pursued *ratione officii* of executry to Ludovick, whilk office is dead with Esme, and so falls ; and the clame of the process and right to the goods and debts therein contained are in *bonis non executis* of Ludovick, and will pertaine to his executors *ad non executata* ; but the first action and litiscontestation at Esme's instance perishes ; and, as executor having licence to Ludovick, he has no right to crave transferring, the first action not being pursued at Ludovick's instance. *Replied,* The litiscontestation cannot evanish, and cannot pertain to any other but Esme's executors, and *res ipsa* the goods pertains to Ludovick, to whom the pursuer pursues also as executor. THE LORDS will not sustain action *hoc ordine* ; but reserve to the pursuer to acclaim the goods and debts contraverted be any other lawful manner of way.

Nicolson, MS. No 161. p. 114.

1629. June 26.

YOUNG against MURRAY.

No 73.

A co-executor having been excluded from his office by decree of the commissaries, the office was found to accresce to the remaining executor.

Two being confirmed executors to a defunct, and a pursuit being moved in both their names against the debtor, one of the two not assisting the pursuit ; this action was sustained at the executor's instance, who insisted without concurrence of the other, for the whole debt acclaimed ; because the Commissaries of Edinburgh, who had also confirmed both the two alike executors by their decret, after the said confirmation, had secluded that executor from the office and benefit of the executry, seeing he had refused to concur with the other in doing diligence, and making equal charges for recovery of the debts and goods pertaining to the defunct ; but the decret which secluded him, was not given upon trial and probation of his not concurrence, but only for not compearance, being summoned for that effect, and absent ; notwithstanding whereof, it was sustained, with the action at the executor's instance for the whole ; albeit the decret which secludes an executor from his office, is ever in use to be given before the confirmation, for either refusing to accept or to make faith, or to find caution, or such like other causes, he is debarred and not confirmed executor,

but the intromission is committed to the other, who uses solely to be confirmed, and uses not to be done after they are confirmed, but yet it was sustained here after the confirmation.

No 73.

Act. ———.

Alt. *Aiton.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 277. Durie, p. 451.*

1634. July 8.

DAME MARGARET PRESTON *against* The EXECUTORS of her SON.

DAME MARGARET PRESTON pursuing the executors of umquhile John Hepburn her son, to warrant her from a debt decerned against her as executrix to her umquhile husband, Sir Robert Hepburn, and whereof the said umquhile John Hepburn should have relieved her said husband his father, the defender *alleging*, That the whole goods of the testament of the said umquhile John were exhausted, by sentences obtained by other creditors of the defunct's against them; this allegiance was repelled, and it was not found sufficient to liberate the executors, that sentences were obtained by other creditors against them, for as much as would exhaust the inventory of the testament, except also that payment had been made by the saids executors to the creditors, conform to their decreets; for, before payment the executors could not be exonered, and when this pursuer had recovered sentence, as the other creditors have done, the executors might convene them, or suspend all their sentences; in which process the creditors might dispute upon their preference, if there was not enough to pay them all, and then the executors could not be obliged, but *secundum vires inventarii*.

No 74.
Every creditor may take decree against an executor, and the defence of exhaustion will be reserved *contra executionem*.

Act. *Stuart.*

Alt. ———.

Clerk, *Hay.**Fol. Dic. v. 1. p. 276. Durie, p. 724.*

1665. January 25.

WILLIAM MENZIES *against* LAIRD of DRUM.

WILLIAM MENZIES, as executor to Alexander Menzies, and umquhile Margaret Gordon the other executor; having obtained decret against the Laird of Drum, for 8000 merks, the said Margaret being dead, William charges for the whole: Margaret having died at the horn, compearance is made for the donatar. It was *alleged* for Drum, that he could not be convened at the instance of this pursuer, without concurrence of the other executor, or some to represent her, had been called; for they might have *alleged*, that this charger is satisfied of the half of his executry.

No 75.
Two executors obtained decree against a debtor of the defunct; one of the executors died, and the other having charged for the whole debt, the Lords sustained the charge. See No 78. p. 3884.