

No. 73. tromitted with as much of the defunct's goods as would pay the whole debt acclaimed without defalcation completely.

Act. *Nicolson & Mowat.*

Alt. *Laurie & Hope.*

Clerk, *Gibson.*

*Durie, p. 155.*

A similar decision was pronounced 12th July, 1626, Turnbull against Matheson, No. 285. p. 7574. *voce* JURISDICTION.

1630. *March 24.*

SEMPLE *against* DOBIE.

No. 74.

As one of several executors may be sued alone, if he has intromitted with as much as will pay the debt, so may payment be made to one, of the whole debt, when the others have intromitted as far beyond their share.

THIS is mentioned in the 17th of March, 1630, No. 75. p. 2739. *voce* COMPETENT, where the payment alleged made to one of the two conjunct executors, was sustained to liberate from the whole; and that the other executrix, who acclaimed her own half of that debt alleged paid, could not seek any part thereof, nor oppose to that discharge, because she had intromitted with her own half of the whole goods, and with also much more, as the debt now paid to the other executor extended to, which allegiance was sustained to maintain the said payment and discharge; and it was not respected what the said executrix answered, that this was not pertinent to this debtor to allege, that an executor had intromitted with more than his own part, and more than the others; for that was proper to the executors among themselves to count thereon, and which they would do in their own competent time; but this not being alleged by the co-executor, it could not be proposed by the debtor; which was repelled, and the said allegiance sustained: For as an executor may be convened alone, where there are two or more executors, by the creditor for the whole debt, if he has intromitted with as much as may pay it, so may payment be made to one of the whole debt, where the other executor has intromitted with the like quantity more than his own part.

*Fol. Dic. v. 2. p. 382. Durie, p. 514.*

1630. *July 22.*

WILLIAM SALMON *against* EXECUTORS OF JOHN ORR.

No. 75.

Two executors being confirmed, one of them cannot be pursued *in solidum*, except it be replied, that the executor pursued intromitted, or might have intromitted with as much as might have satisfied the pursuer.

*Fol. Dic. v. 2. p. 382. Auchinleck MS. p. 75.*

Durie reports this case:

JOHN ORR being infeft in an annual-rent out of a tenenement pertaining to Salmon, redeemable upon 800 merks, and the said John Orr thereafter resigning the

said annual-rent to one of his bairns, who thereupon was infeft, reserving his own liferent; thereafter the annailzier of the annual-rent to John Orr, not knowing of the infeftment given by John Orr's resignation in the hands of the Bailies of Edinburgh, to his bairn, pays the sum whereupon the annual-rent was redeemable to the said John Orr, and obtains his renunciation. After the decease of the said John, his said daughter being infeft, obtains pointing of the ground for the said annual-rent, notwithstanding of the renunciation granted by the father, whereupon the heritor of the land being distressed, pursues warrandice of the said renunciation granted to him by the father, against the two executors confirmed to the father, wherein he convenes them conjunctly and severally, to warrant the same, and for that effect, to make payment of the principal sum paid to the father, and of the annual-rent thereof paid since then to the daughter, of the years for which she had obtained decret of pointing. In which process the Lords found, that there being two executors, they could not be convened but for their own halves, and not one of them for all, seeing one of them was not alleged to have intromitted with so much as would pay the sum acclaimed. And it being also alleged, that this action of warrandice being for warranting of an heritable infeftment, that fact was not prestable by the executors, but by the heir; the Lords repelled this allegiance, and found the same prestable by the executors, viz. to pay a sum for which the defunct had given renunciation of an annual-rent; but because the annual-rent was for more than ten for each hundred, the Lords found, that the executors should refund no more than that proportion, albeit that decret was obtained by the daughter against this pursuer, to point for the annual-rent libelled, which was more than ten; for that was his own fault, who proponed not that allegiance in that pursuit, without prejudice to him to repeat from the daughter what he had paid, more than the annual-rent allowed by act of Parliament.

Act. Mowat.

Alt.

Clerk, Gibson.

*Durie, p. 533.*

1634. March 8.

— against L. LAG.

THERE being four executors conjunctly nominated by the defunct, and all the four obtaining licence from the Commissaries to pursue for the debts, albeit the testament was not confirmed; one of the four pursuing alone at his own instance, without concurrence of the rest, and without inserting of their names in the pursuit, for registration of a bond of £.100 made to the defunct by the defender; it was found, that one executor of four nominated, (the licence being granted to all the four) could not alone seek this registration, except all the rest should either concur in the pursuit, or else should refuse to assist, and that they were excluded from their office; even as more tutors being conjunctly nominated, one of them could not assist the pupil's pursuit, without concurrence of the rest, and such like in

VOL. XXXIII.

80 D

No. 75.

No. 76.

Found, that one of a number of executors conjunctly nominated, could not sue alone.