

No 36.

mere fiduciary for the behoof of legatars, creditors, and nearest of kin, he could not validly assign or transmit the right of the inventory of the testament; and by the executor's civil rebellion no more could fall but his own part. *Answered*, The executor was a creditor, and likewise one of the nearest of kin; and so his assignation is good, at least *quoad* his own interest. *2do*, This is *jus tertii*, and not competent to the debtor. THE LORDS found it *jus tertii*, and so repelled the defense.

Fol. Dic. v. 1. p. 518. Fountainhall, v. 1. p. 426.

* * * This case is reported by Harcarse, No 87. p. 3899, *voce* EXECUTOR.

No 37.

1688. *July 17. HOGG against JEAN DOBIE and her HUSBAND.*

HOGG, as heir served to William Hogg his cousin, pursues a reduction and improbation of Jean Dobie his mother's adjudication of some houses and acres. She repeated a reduction which she had depending of his retour, on this reason, that her son was but a young man, and went abroad some ten or twelve years ago, and so *præsumitur vivere donec probatur contrarium*; as found, 25th June 1622, Erskine, *voce* PRESUMPTION. *Answered*, They had searched for him, and put him in all the foreign gazettes, and there was no account of him; but he was *tentus habitus et reputatus* dead, and that it was *jus tertii* to her, seeing there was not a nearer heir quarrelling the retour; and they offered to count with, and pay her. THE LORDS repelled the allegiance proponed for her, and sustained process at the pursuer's instance upon the retour produced, in regard there is no nearer heir quarrelling the same, and of the pursuer's offer to make payment to the defender of what shall be found due to her after count and reckoning.

Fol. Dic. v. 1. p. 519. Fountainhall, v. 1. p. 511.

* * * Harcarse reports this case:

1688. *July 19.*—A PERSON as heir served to one who had been abroad seven years, without any account from him, having questioned an adjudication against his predecessor's estate;

Alleged for the defender; No process, because the pursuer's service and retour is null, there being no certainty that his predecessor is truly dead; and *semel vivus semper præsumitur vivus*.

Answered for the pursuer; The retour cannot be questioned after 20 years, conform to the act of Parliament; 2. The defender pretends not to be a nearer agnate, who can question the retour.

“THE LORDS sustained proces, and repelled the defences against the retour.”

Harcarse, (INFESTMENT.) No 613. p. 170.