1557. *March* 7. BOGLE *against* STEWART.

No 10.

THE executour may make the creditour assignee to ony pairt of the gudis and geir aucht to him be the person that is deceist.

Balfour, (EXECUTOR) *No* 6, *p.* 220.

1561. *June* 8. MARION LEARMONT *against* GEORGE HOME.

No 11.

AN executour may renunce the office of executrie in presence of ane Judge, except he, as executor, has intromitted with ony gudis or geir pertening to the deid; for in that cais he may not renounce, because *res non est integra.*

The like decided 7th March 1569, Alexander Murray's renunciation.

Fol. Dic. v. 1. *p.* 273. *Balfour*, (EXECUTOR) *No* 13, *p.* 221.

1666. *December* 13. SHAW *against* ——

No 12.
An executor who had not recovered the effects, obtained suspension of personal diligence against him.

SHAW being confirmed executor to his brother a factor at London, and divers decreets being recovered against him, at the instance of the defunct's creditors; he desired a suspension upon that reason, that he had done diligence to recover the defunct's debts and goods; and that he could not satisfy the decreets obtained against him, until he should recover the defunct's estate; and that he was content it should be divided amongst the defunct's creditors, according to their diligences; and therefore craved a suspension without caution, being content to make faith that he could not get a cautioner.

THE LORDS past a suspension as to personal execution only.

Dirleton, *No* 62, *p.* 26.

1674. *November* 24. BUSSIE *against* ARNOT.

No 13.
An executor cannot assign a debt *cum effectu*, until he obtain decree for it in his own name. He cannot however uplift a debt in prejudice of an assignation granted by him, after the assignation is intimated.

UMQUHILE John Arnot having granted a bond of 500 merks to umquhile Janet Cave, John Cave her brother being surrogate executor dative to her, assigns this bond to Harry Bussie, who thereupon pursues David Arnot as representing his father for payment; who *alleged*, 1*mo*, no process because the sum is heritable, the bond bearing annualrent before the time that such bonds were declared moveable; 2*do*, absolvitor, because the said John Cave the cedent had discharged the debt; and albeit the discharge be posterior to the assignation and intimation, yet it is valid against the assignee, because executors before the debt be established in their persons by sentence, cannot effectually assign; for if they die before execution, their title as executor falls, and it is not transmitted to their executor, but to the executors *ad non executa* of the first defunct, and

No 13. yet the executor before any sentence may receive payment, and thereupon discharge; for by the discharge the testament is execute, and all representing the executor are liable, so that the discharge is valid, and the assignation unvalid. The defender *answered*, that his cedent having assigned *pro omni jure*, and being nearest of kin, and both heir and executor, he would expede his retour and confirmation before extract; and as to the discharge, it being after intimation, could not militate against the assignee; for though assignees constituted by executors run that hazard, that if the executor die before sentence, the assignation becomes void; yet here the executor lives, and by the sentence upon this process the testament will be executed.

The Lords repelled the defences, and decerned, the assignee producing a confirmation and retour before extracting.

Fol. Dic. v. 1. *p.* 273. *Stair, v.* 2. *p.* 284.

*** Gosford reports the same case:

In a pursuit at Henry Bussie's instance, as assignee by John Cave his uncle, as nearest of kin (and having licence to pursue) to Janet Cave his sister, against David Arnot, as representing his father, who was debtor in the said bond to the said Janet, for payment of the sums therein mentioned, it was *alleged* for the defender, that the pursuer had no title by virtue of the assignation, because his cedent was not executor confirmed, and so could not have right to grant an assignation. It was *answered*, the executor concurred and offered to confirm before sentence, which was sustained and found relevant. 2*do*, It was *alleged*, That the defender had a discharge of the debt from the cedent. It was *replied*, That the discharge was after intimation of the pursuer's assignation, which put the defender *in mala fide* to make payment, or accept of a discharge; likeas if the cedent, as executor decerned, had not power to assign, neither had he power to discharge; but the cedent being nearest of kin to the creditor, and being yet in life, having assigned his right, which was intimated to the debtor, the same could never be questioned by him. It was farther *alleged*, that the executor decerned was apparent heir to the defunct, to whom the bond was granted, and the assignation bears not only as executor, but also as having any other right to the said bond; and the bond being heritable as to the principal sum, the discharge cannot be valued unless the granter were served heir, *quo casu* the right would accresce to the assignee, whose right being prior to the debtor's discharge, undoubtedly he would be preferred. The Lords did prefer the assignee upon these reasons, that his assignation was intimated before the debtor's discharge, which put him *in mala fide* to accept thereof, as likewise, whatever legal titles, either as executor or heir, were fully settled in the person of the granter of the assignation to the cedent, the same would accresce to the assignee, as having the first right by intimation, so that it was sufficient to confirm before the extracting of the sentence, as was formerly decided.

Gosford, MS. No 714, *p.* 431.