

No 66.

1683. *March.* HISLESIDE *against* LITTLEGILL.

FOUND that goods confirmed in a testament may be proven by witnesses to be *male appretiata*, at the instance of an executor *ad male appretiata*, notwithstanding of the oath given as to the value by the principal executor at the confirmation, that being only an oath of credulity.

*Fol. Dic. v. I. p. 275. Harcarse, (EXECUTRY.) No 451. p. 124.*

No 67.

An executor estimating the sowing at the single curn, and selling the corn on the ground at the 5th or 6th curn, payment by the buyer was sustained as made *bona fide*, and it was found that there was no place for an executor *ad omissa*, but only *ad male appretiata*.

1714. *November 26.* ERSKINE *against* KERSE.

DAVID MITCHEL having confirmed executor to the Lady Blair, gives up in inventory the sowing of a certain number of bolls of victual, which in the testament are estimated only at the single value of the bolls sown, and thereafter sells the product of that sowing, which amounted to a considerable value, possibly four or five times more above the estimate in the testament. Erskine confirms executor *ad omissa*, and gives up in inventory the product of the sowing with deduction of one corn for the seed, and pursues John Corse as intromitter for the sum confirmed.

The defender *alleged*, That he had bought the victual from the executor, and paid the price *bona fide*.

It was *answered*; The defender could not be in *bona fide*, because the executor had only confirmed the seed, and the pursuer had confirmed the product with deduction of the seed, and he was in *mala fide* to pay the executor more than was confirmed.

It was *replied*; The executor had not confirmed the seed, but the sowings; for the seed was thrown in the ground to be consumed, and the common stile of the commissariot is to estimate the sowing, that is, the sowing of the seed; *2do*, The defunct dying in April, the testament was confirmed in May thereafter, when it was yet uncertain what the product would be; and though the estimate was indeed below what the reasonable expectation from the sowing might be reckoned, yet that is but a mal-appretiation, and the pursuer ought not to have confirmed executor *ad admissa*, but *ad male appretiata*, which would have afforded him action against the executor in so far as he had received more than the just value.

‘THE LORDS sustained the payment made by the defender *bona fide*, and that there was no place for an executor *ad omissa*, but only *ad male appretiata*.’

*Dalrymple, No 120. p. 167.*