

## EXECUTOR.

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**No. 1. 1736, July 6. LUNDIE *against* LUNDIE.**

THE Lords found, that though the testament be the presumptive rule, yet overseers having been appointed by the Court, therefore the report of the overseers is the rule in this case, unless the creditors will prove greater quantities.

**No. 2. 1737, June 23. MITCHELL *against* MITCHELL of Blairgorts.**

THE Lords found, that Patrick Mitchell having confirmed the 2000 merks and interest thereof as creditor to his brother James Mitchell, tailor, to whom he was nearest of kin, the property thereof belonged to Patrick from the time of the confirmation, and was *in bonis* of Patrick at his death; and that James Mitchell the son and executor of Patrick having confirmed the same might habilely assign the same to Blairgorts; and found the confirmation of James the pursuer executor *quoad non executata* to old James *qua* creditor to James the son of Patrick was inept and void;—and therefore found Blairgorts the assignee preferable, and remitted to the Ordinary to proceed accordingly.

**No. 3. 1737, July 5. CORNETT OGILVIE *against* STEWART.**

THE Lords altered the interlocutor, and because of the executrix's renunciation of the office in England, found she or Matthew Stewart has no right to sue for this note; and *separatim* sustained the discharge by the administrator, reserving Matthew Stewart's action against the administrator in England as accords. This carried by a great majority, *inter quos* Arniston, though he had been Lawyer and wrote the answers for Mr Stewart.

**No. 4. 1737, July 27. ROCHEAD *against* MR HUGH MURRAY.**

THE Lords preferred the trustee Mr Murray to the office, seven to six. The Justice-Clerk did not vote.—15th November The Lords adhered.

**No. 5. 1738, Nov. 7. MIRRIE, and LOCKHART, *against* INGLIS.**

THE Lords were all of opinion, that when there are more executors-creditors confirmed, a debtor of the executry cannot lawfully pay one of these executors, without the knowledge or consent of the other executors-creditors but upon the peril of the payer; and as Mr Inglis did not pretend to a *bona fides*, and indeed was *in mala fide*, the Lords disallowed the payments made by him to William Inglis, and adhered to the Ordinary's interlocutor.

**No. 6. 1738, Dec. 6. JOHN NORRIS *against* BETHIA LAW.**

A WIDOW having confirmed her husband's testament omitted his first wife's tocher of 2000 merks. Another creditor raised an edict *ad omissa*, and the executor craved to be pre-

ferred and to have it eiked to her confirmation because not *dolose* omitted, having been discovered by her to a meeting of her husband's creditors before the confirmation, but left out because it was payable only after the debtor's death, who was and is still alive ; and the other denying that discovery and insisting on the point of law, that being omitted he who raised the first edict *ad omissa* should be preferred, I am told, (being myself in the Outer-House) that the Lords before answer allowed the executrix to prove the above fact.

No. 7. 1739, Nov. 7. MRS JEAN CRAICK *against* ANN NAPIER.

THE Lords adhered to their former interlocutor, and found that an assignation even to a curator which was in effect but a settlement of his succession of a moveable estate was valid in law ; 2dly, That the general nomination of executor and universal legatee carries the subject, notwithstanding the substitution made by the father.

No. 8. 1741, Feb. 26, 27. MARGARET MOUBRAY *against* AGNES SIMPSON.

SEVERAL of us, particularly the President, Drummore, and I, thought that all executors whether creditors or nearest of kin being confirmed, must communicate cases of all transactions made after confirmation ; 2dly, That executors-creditors are not obliged to communicate the benefit of transactions before they were decreed ; 3dly, That neither are they obliged to communicate cases obtained betwixt the decret-dative and the confirmation. Arniston differed as to this last. But as the defender here was relict of the defunct, and by law had a share of executry unless excluded by contract of marriage, 2dly, we were told that the transaction with Primrose the creditor was in effect to pay him out of the executry,—we delayed till these writs were produced ;—and on the 27th in respect of the contract betwixt her and Primrose, where she acts as executrix, obliges herself to confirm and assign a subject part of the executry to Lord Primrose in security of the debt,—remit to the Commissaries with instructions, that they cause the executrix communicate the benefit of the transactions.

No. 9. 1742, Feb. 19. COLONEL M'DOUALL *against* MR C. M'DOUALL.

THE Lords found that the citing within six months an intromitter with a defunct's effects, who afterwards confirmed as nearest of kin, though not within the six months but about a month or two after, did not give that creditor a preference to other creditors who did no diligence within six months ; and refused a bill without answers, and adhered to Drummore's interlocutor preferring them *pari passu* ;—though a petition against an interlocutor of mine in another cause to the same effect, on a citation against an executor *qua* nearest of kin confirmed in six months, but when no creditor had obtained any preference (was ordered to be answered.)

No. 10. 1742, July 21. CREDITORS of JOHNSTON *against* DICKIESON.

A CREDITOR citing an executor *qua* nearest of kin within the six months, when no other creditor used diligence within that time, found to give no preference to him exclusive of the other creditors, since no creditor had used complete diligence, but only to prefer him *pari passu* with them ; and adhered to my interlocutor unanimously, only Dun seemed to