

Sect. 9. *b. t.*; and 16th December 1674, Laird of Kilhead *contra* Irving, No 2. p. 3124. where a creditor of the defunct's was preferred to the creditor of the executor, because the goods are truly the defunct's, and his creditors and nearest of kin, so that the executor is no more but their fideicommissary and trustee, except as to the interest and share the law gives him; and an assignation made by an executor is no more but a mandate or a factory to uplift; but the assignee must be countable to all concerned, in the same way the executor would have been; and to turn them over to pursue the executor to account, is to evacuate the trust, seeing he is wholly bankrupt; and it is better for them to affect their own goods yet extant in the debtor's hands, than to be left to the uncertain event of a count and reckoning; and Mr Duncan *frustra petit* preference to a sum, *quod mox restituere tenetur* to the nearest of kin.—THE LORDS thought the nearest of kin had not taken the habile way of affecting the sum in question by a second confirmation; for the Commissaries ought not to make two principal confirmed testaments *quoad* the same subject; but their legal method was to have raised a process against the executor confirmed, to denude of their shares of the executry goods, and, on that dependence, to have arrested in Balnaves the debtor's hands; others thought their right of blood a sufficient title to claim their proportion. But the LORDS found the executor could not assign the whole to Mr Duncan, so as to prejudge the other nearest of kin; and found the assignation null *quoad* their parts of the sum assigned, so that the right returning to Donald, the cedent, as if it had never been out of his person, his brothers and sisters can oblige him to denude of their shares, on which assignation they will compel Balnaves the debtor to pay them their three parts of the 1000 merks in his hands, with their proportion of the annualrents resting, which in this process they cannot so formally do.

*Fol. Dic. v. 1. p. 272. Fountainhall, v. 2. p. 216.*

1738. November 8. EWART *against* CREDITORS of NEWLAW.

A WIFE being confirmed executrix *qua* nearest of kin, the husband, who was also conjoined in the confirmation, for his interest, did, after his wife's decease, lead an adjudication upon one of the bonds confirmed. Many years thereafter, in a competition of creditors, the adjudication was objected to, as deduced by a person who had no right to the debt, the husband being only confirmed for his interest, which was at an end by the death of his wife. When the question came before the LORDS, an inquiry was ordered into the practice of the Commissary Court, with regard to the confirmation of married women. It was reported as the practice of that court, for the wife only to be confirmed; and upon this the adjudication was sustained, seeing it appeared that the husband

No 8 was confirmed joint executor with his wife, and the office behoved to accrese to him after her decease. See APPENDIX.

*Fol. Dic. v. 1. p. 272.*

\* \* \* Kilkerran reports the same case :

WHERE a wife was confirmed executrix, and her husband for his interest, the husband, notwithstanding that adjection 'for his interest,' was found to be joint executor; and an objection made to an adjudication repelled, that the decree of constitution had been obtained only in name of the husband, in respect he being joint executor, and the wife dead, when the constitution was pursued, the whole office accresced to him.

THE LORDS having at first differed upon this, ordered an inquiry to be made into the practice of the Commissary Court; and it appearing that the practice uniformly was for the husband to give up the inventory in behalf of the wife, and she to be confirmed only, and not the husband, but only the powers of intronitting to be given to the wives and husbands for themselves and their interests, they found as above, the husband being in this case confirmed executor, though with the adjection of 'for his interest.'

*Kilkerran, (EXECUTOR) No 4. p. 172.*

### SECT. III.

#### Duties of Executors.

1546.

*A. against B.*

No 9.

EXECUTORIS may not give, dispone, or make ony assignee to the guidis and geer of the deid, utherwayis than conform to the deidis latter will and testament.

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