

No. 76. curators, whereof two or three were necessary, and were given *sine quibus non*, &c. one of these could not insist in a pursuit without concurrence of the rest, for the satisfying of this executor would not be an exoneration to the defender at the hands of the rest of the executors.

Clerk, *Scott*.

Fol. Dic. v. 2. p. 382. Durie, p. 710.

No. 77. 1738. November 7. INGLIS of Murdiston *against* MIRRIE.

FOUR creditors of a defunct having been conjoined in the office of executry, and the debtor of one of the bonds confirmed having made partial payments to one of the executors confirmed, but within the fourth part of the bond, the same was objected to, as being more than the creditor's claim extended to. The debtor pleaded, That without regard to the extent of their respective debts, executors creditors conjoined in the office have an equal interest in the administration, and debtors are in safety to pay an equal proportion to each of them. It was the unanimous opinion of the Court, That co-executors must all concur in pursuing or discharging, because they have but one office, are one body, and represent the defunct as one person, and therefore any one making payment to a co-executor, without concurrence of the rest, does it at his peril. It is true the danger is not great, where the co-executors are nearest of kin, who have an equal interest, in case the payment does not exceed the co-executor's share; but the case of co-executors creditors is different; a voluntary payment in that case to one will be sustained or not, according as the person receiving payment shall, in the event, be found a lawful creditor; and therefore it was agreed, that in this case the payment was not lawfully made.

Fol. Dic. v. 2. p. 383.

* * * For Kilkerran's report of this case see TITLE TO PURSUE.

1764. July 11.

SIR ALEXANDER GRANT and JOHN GREGORY, *against* REPRESENTATIVES of CAMPBELL of Monzie.

No. 78.
Three executors being named by the testator of her last will, can two of them pursue without the third?

MRS CAMPBELL, by her last will and testament, executed at London, 28th March, 1763, after bequeathing some legacies, " Settles the remainder of her goods, chattels, and personal estate, upon her executors after named, to be applied and disposed of in such manner as the survivors or survivor of them shall think fit; and nominates and appoints Sir Alexander Grant of London, John Gregory of Conduit-Street, and Matthew Gregory of the Island of Jamaica, executors of

this her last will and testament ; but, in case the said Matthew Gregory shall happen to die in her lifetime, she appoints Thomas Coussans executor in his stead."

No. 78.

A few weeks after Mrs. Campbell's death, the two executors first named, without giving notice to Matthew Gregory, residing in Jamaica, proved her will in the prerogative court of Canterbury, and obtained letters of administration, with power reserved of making the like grant to Matthew Gregory when he shall apply for the same. And as a considerable debt was owing to Mrs. Campbell in Scotland, these two executors proceeded with all expedition to take out a confirmation from the commissary court ; and upon that title insisted in a process against the representatives of Patrick Campbell of Monzie, for payment of £.800 due by them to Mrs. Campbell. It was objected, That the pursuers had no title without Matthew Gregory, the third executor named in the testament. It was answered, That though the process cannot be sustained at the instance of any one executor, when a plurality are named and confirmed, yet that any one executor may confirm the testament, and upon that title may insist against the debtors of the deceased for payment. And the reason of the difference was alleged to be, That it is in the power of the Commissary Court to bestow the office upon any person they think proper ;—and, *2do*, That it is *jus tertii* to the debtors of the executry to object to the title, having no concern but to pay safely, which will be their case when they pay *auctore Pratore*.

Replied, That by naming a number of executors, it appears to be the will of the testator not to trust any one independent of the rest, but that they shall act jointly as one body or one person. It is for this reason that one of a number of executors named and confirmed cannot act separately, and has no title to sue without concurrence of the rest ; and for the precise same reason one of several executors named has no title to take out a confirmation independent of the rest ; because even this first step is an act of administration, which no one executor can take alone. And if it be an illegal step for a single executor of several named to follow out separate measures by obtaining a confirmation to himself alone, it must be equally illegal in the Commissary to give him that confirmation.

With respect to the other branch of the argument, it can never be *jus tertii* in a debtor to object the want of title in the person who claims ; because he pays *suo periculo* if he pay to one rashly who has no title. And if this answer were good, it would equally apply in favour of one of several executors confirmed pursuing for payment. But further, whatever may be in the *jus tertii*, it is clearly *pars judicis* to refuse action to a person who has no good title to found his suit upon.

It is a different case where one of several executors named refuses to accept, or dies after acceptance. For here, though at common law the nomination falls, as the trust is given to all jointly without naming a quorum, yet equity interposes and authorises the remaining executors to carry on the administration, as it is supposed that the executor himself would have done had he foreseen the event. So that this is no other than a *casus incogitatus*, where a court of equity supplies the defect of will, by ordering what the defunct himself would have ordered had the case oc-

- No. 78. curred to him in making his testament. But had the present case occurred to Mrs. Campbell, that two of her three executors named jointly, would immediately proceed to the administration, without so much as giving notice to the third that he was named executor, it must be presumed that she would have discountenanced that partial step, by an express prohibition of taking any step but by joint concurrence. "The Court notwithstanding sustained the title."

Fol. Dic. v. 4. p. 297. Sel. Dec. No. 221. p. 285.

SECT. XV.

Tutors and Curators.

- No. 79. 1602. March 11. LD. AIRTH *against* ———.

A BOND having been found null, as granted by a minor, having curators, without their consent, this objection was also repelled, That the act of curatory was null, eight being chosen, one of whom had neither made faith nor found caution; notwithstanding whereof, the Lords found the act of curatory complete.

Fol. Dic. v. 2. p. 384. Kerse.

* * This case is No. 48. p. 8938. *voce* MINOR.

No. 80.

Three tutors, being equally nominated by the testator, one dying, and another refusing to accept, the Lords found, that the whole office devolved on the third.

1609. December 12. FAIRSIDE *against* ADAMSON.

GEORGE FAIRSIDE charged Adamson, the eldest son and apparent heir of umquhile James Adamson of Cowthrole, to enter heir to his umquhile father. The minor offered to renounce. It was alleged, That the renunciation could not be valid, because he was not authorised with tutors. It was answered, That the minor's mother, who was nominated tutrix-testamentar, would authorise. The pursuer replied, That her consent was not valid, because, by the testament, the Laird of Smeiton, Hepburn, the bairn's good-dame, and his mother, were nominated tutors equally, and therefore, the good-dame being dead, and the Laird of Smeiton renouncing the office, the mother's office was extinguished. Notwith-