

be drawn to be subject to pay the sum for not apprehending the rebel, seeing the witnesses inserted in the execution were all conjunct persons to the pursuer, and could not be received witnesses to prove against him, in that part of his indorsation that the rebel was present when the charge was given : Which was more nor he ought to have inserted in his execution ; for it was sufficient for him to have indorsed, that he had charged the Sheriff ; to the which any witnesses might have been inserted for proving the charge : But seeing that he hath indorsed, That the rebel was present at the giving of the charge,—that part ought to be proven by other honest and unsuspected witnesses ; seeing it might infer upon the Sheriff the payment of the sum due by the rebel. The Lords ordained the charger and messenger to prove that part of the indorsation, that the rebel was present when the charge was given, by honest and unsuspected witnesses.

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1631. *January 20.* WILLIAM BROWN'S CREDITORS *against* GEORGE BAILLIE
his EXECUTOR DATIVE.

In an action pursued by the creditors of umquhile William Brown, burghess of Edinburgh, against George Baillie his executor dative,—the Lords ordained the hail creditors to count and reckon with the executor, before two Lords appointed for that effect. Of which creditors some of them intented pursuit against the said executor, before the Commissaries of Edinburgh, and had obtained decreets. Thir creditors, in respect of their diligence, craved to be preferred to the other creditors ; who, having intented their pursuit before the Lords, had not so far advanced in obtaining decret. The Lords found, No preference should be granted for this diligence, in respect their process before the commissaries might be, by favour or moyen, sooner brought to an end than before the Lords.

In the same count, some of the creditors had no other probation to prove their debt but that the debt was inserted in the defender's own count-book, written by his own servant that wrote his counts, but not subscribed by the defunct. The Lords would not respect this kind of probation *per se*, without other adminicles, in prejudice of the other creditors who had bonds for their debts acclaimed. But, if the creditors will prove the delivery of the goods contained in the count-book, and give their oath that the same rest unpaid, the Lords sustain the debt.

Item, In the said count, the Lords admitted the creditors to whom the defunct was only cautioner, to come in with the rest, they making assignation to the rest of the creditors, to pursue the principal, that what may be obtained against the principal may be divided amongst them *pro rata*.

Item, In the said count, the relict of the defunct is preferred to all the rest of the creditors, in so far as she was provided by her contract of marriage allenarly.

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