

for a legacy left to her husband by her brother, upon condition that he should renounce all right that he could claim to his succession in favours of the said Marion Whyte, whom he had left his executrix,—one reason was proponed, that the said Helen should warrant according to the condition foresaid. But the Lords found, That it was sufficient to her to warrant for the sum received, seeing her husband's brother was dead, and his children very young; *et factum hoc non satis præstabile ut alienum*. The other reason did take away the legacy; in the which it was alleged, That the testament was exhausted by creditors who had gotten decreet, as was alleged. *Sed amplius inquirendum censuerunt Domini*; because it was opponed to those decreets, that they were simulate: the libel being referred to her oath only, and she holden as confessed; the which cannot be thought relevant to exhaust a testament.

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1649. *November 27.* WILLIAM KEITH *against* LADY MARSHALL.

IN the advocation pursued by William Keith against Lady Marshall, pursuer of a removing before the sheriff, but had not warned ——— Forbes, his mother, tackswoman, who had a tack from Earl George fifty years since, suppose alleged to have been denuded of the fee before the setting of the same; —the Lords thought good to advocate that process, for trying of both their rights, after so long alleged possession.

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1649. *November 28.* JEAN BOSWELL *against* ELIZABETH HAMILTOUNE, Relict of JOHN KIRKALDIE.

IN the process pursued by Jean Boswell against Elizabeth Hamiltoune, relict of John Kirkaldie, for 300 merks addebted by the said John to the said Jean, as intromissatrix with her umquhile husband's goods and gear;—it was excepted, That there was an executor confirmed; and, suppose he died within two or three months thereafter, yet there was another confirmed, *quoad non executata*; being a creditor, who had obtained sentence against the relict for those goods intromitted with by her, and that before the intention of the pursuer's cause. But the Lords would have all the testaments, and decreets or other writs, produced: because that common exception is receivable, where executors, merely representing the defunct, are confirmed, and not a creditor; especially seeing the first executor was the defender's brother, and the second, John Kirkaldie his son or nephew; and it seems collusion for to purge the universality of intromission two three years after the said intromission.

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