1703. *December* 24.

George Lockhart of Carnwath, and other Creditors of Sir James Cockburn, *against* Charles Jack, Merchant in Edinburgh.

No 83.
An executor-creditor decerned, but not confirmed, having taken a license to pursue, and having executed inhibition on the depending process, died before confirmation. The diligence done by him was found effectual to be followed out by the next executor who should make up titles. This afterwards altered; *See* Forbes's report of the case, p. 3890.

Rachel Wilkie being creditor to Dean-of-Guild Wilkie, her father, in 4000 merks, by a bond of provision; and he having been partner with Sir James Cockburn, Sir Walter Seton, &c. in the tack of the customs in 1663; and thereafter, she confirms herself, with the concourse of Charles Jack her husband, for his interest, executrix-creditrix to her father, and gives up the sum of L. 90,000 Scots, as her father's proportional share of the profit of that tack-duty; and getting herself decerned executrix, she obtains a license to pursue, and thereon intents a process for payment of the balance foresaid, and on the dependence serves and executes an inhibition against Sir James; and, after many debates, Rachel dies, and Charles, instead of decerning his children executors to Rachel, their mother, takes out a decreet-dative, making them executors-creditors to umquhile David Wilkie their grandfather, and obtains a decreet in their favour against Sir James, with this quality, they always confirming before extract. Thereafter compearance is made for Sir James's Creditors; for whom it was *alleged*, that Charles Jackson's children could never reduce *ex capite inhibitionis*, because the process, on which the inhibition was served, fell by Rachel's death before her confirmation; and if the process was extinct, then the inhibition raised thereon must fall in consequence; *sublato principali et diruto fundamento corruit accessorium;* even as a creditor insisting against his debtor's heir as lawfully charged, if the heir die before sentence, all that inchoate diligence dies with him, and he must begin of new by charging the next heir; and if inhibition or arrestment had been raised on the dependence, all that falls to the ground; just so an executor dative decerned, pursuing on a license, is a mere personal office and faculty, and evanishes where the executor dies before confirmation. *Answered*, The design of executry was to secure the moveables to poor orphans, and nearest of kin, and was trusted and concredited to the Bishops as fittest administrators and dispensers of such a pious and charitable office, and their court was called *episcopalis audientia;* and what was introduced in favour of minors, ought not to be detorted to their ruin and prejudice; and it is no new thing for diligence to subsist though the party die before confirmation, seeing none are prejudged by such an interlocutor; but if it be annulled, pupils are manifestly lesed; and such a process (though the pursuer die before confirming) would be a sufficient interruption of prescription, which is an evident demonstration that it is not totally extinct, else it could not have so much as the effect of an interruption; and Charles Jack is willing to supply this defect by confirming his children executors to their mother; and the Lords have admitted such informalities to be supplied and made up, as on the 11th of February 1680, Gordon *contra* Hunter, No 3. p. 170. where an adjudication

for an heritable sum was quarrelled as null, because it did not mention that requisition on forty days was used; the LORDS permitted the adjudger to reply, that requisition was used, though omitted to be libelled in the summons of adjudication, and found it sufficient to support the diligence; and, on the 13th of July 1664, Earl of Lauderdale *contra* the Laird of Woolmet, No 5. p. 26. the LORDS found a decreet of certification obtained by Swinton, when donatar to Lauderdale's forfeiture, accresced to Lauderdale now restored, and that he might found on it, though the decreet of forfeiture, on which the certification stood, was now rescinded, and *funditus* taken away.——THE LORDS, at the first advising, found, by the plurality of a vote or two, (there being sundry *non liquet*), that the inhibition raised at the instance of Rachel Wilkie and Charles Jack her husband, with all that had followed thereon, were now fallen by her death, being founded only on a decreet-dative and license in the person of the said Rachel; which license never having taken effect in her person by confirmation, was ceased, and could not now have any effect after her decease, and the confirming her children to her could not make it reconvalesce. But, on a bill given in by the said Charles, and answers thereto, the Lords this day, by a plurality of five to four, (besides some *non liquet* still), altered their interlocutor, and found the inhibition did not fall, but in equity accresced to her nearest of kin confirming to her, and transmitted, as in the parallel case of Bell against Wilkie, 12th February 1662, *voce* NEAREST OF KIN. For the Lords thought the diligence used by an executor-creditor accresced to the *hæreditas jacens*, the subject of the executry, and might be beneficial to others, *ergo*, it might subsist *quoad* their nearest of kin. Charles Jack did likewise plead a defence on *res judicata*, that he had obtained a decreet *in foro*, where this nullity was competent and omitted. *Answered*, The decreet bore a quality, he always confirming before extract, and was still open till that was done; but there was no need of determining this, seeing he carried it on the former nice precise point of law, which some thought more consonant to equity, than to the principles and analogy of our law.

Fol. Dic. v. 1. p. 276. Fountainhall, v. 2. p. 205.

No 83.

*** Dalrymple reports the same case:

RACHEL WILKIE being executor-creditor decerned to David Wilkie her father, upon her bond of provision, and having license to pursue, she and Charles Jackson her husband pursued Sir James Cockburn, and, upon the dependence, did inhibit him; and the said Rachel Wilkie deceasing during the dependence, the process was carried on by Charles Jackson her husband, and her children; and, after many years, there is at last a decreet *in foro* obtained for a considerable sum of money, the pursuers confirming before extract; and accordingly the sum decerned was confirmed in the testament of David Wilkie, Rachel's father.

No 83. The decreet being extracted, an adjudication was led thereupon, and likewise a reduction raised *ex capite inhibitionis*, against the posterior real Creditors of Sir James Cockburn.

Sir James's affairs being in disorder, and his estate sold by roup, the Creditors object against the pursuer's inhibition, that the same was used upon a dependence at the instance of Rachel Wilkie, as executor decerned, and having a license to pursue; which decreet-dative, license, and process, and inhibition, did all die with herself, whereof the pursuers were so conscious, that they did only obtain themselves executors decerned to David Wilkie her father, altogether passing by her.

It was *answered*; The pursuers did acknowledge their error in passing by Rachel Wilkie, which they had supplied by confirming a-new, executors to her, and likewise executors-creditors to David her father; and having obtained a decreet *in foro*, the nullity objected is now supplied, and the benefit of Rachel's inhibition accresces to the pursuer.

The precise point in question is, whether the process and inhibition did altogether fall by the decease of Rachel, or if it was suppliable?

It was *alleged* for the pursuers; 1*mo*, That Rachel dying when Sir James Cockburn's credit was entire, and he having suffered the process to proceed in the name of her husband and children, without objection, when it had been easy for the pursuers to have obtained another license, and inhibited of new, it was against reason to make all the procedure ineffectual by his omission. 2*do*, The care of executing testaments being anciently committed to the church, and by our law to the Commissaries, any party having interest applying, obtains the office of executry, and becomes accountable to any other party who may afterwards appear to have a better right, for whose security caution is found; and, if the executor die, leaving the testament unexecuted, in whole or in part, the goods remain *in bonis* of the first defunct, and there is place for an executor *ad non executa*; nevertheless, all inchoate diligence, by inhibition, arrestment, or the like, at the instance of the executor, doth accresce to any that hath the true interest; as also, if no party compear to confirm, the procurator-fiscal to the commissariot moves an edict, obtains himself decerned executor, and might for the behoof of the nearest of kin and creditors confirm; but, to save expense, the procurator-fiscal may obtain license to pursue for discovering the defunct's effects; and at whatsomever time the nearest of kin or creditor doth appear and apply, he is of course surrogated in place of the procurator-fiscal, and thereby would have right to any diligence done in the name of the procurator-fiscal; and, in this very case, the edict was moved by the procurator-fiscal, and Rachel Wilkie appearing and applying, was decerned upon his edict. In like manner, a creditor decerned, and pursuing on a license, and likewise in the pursuit inhibiting or arresting, must confirm before extract of any decreet; and, if a co-creditor shall crave to be conjoined with such a creditor, who had done diligence, the commissaries, of course, must conjoin; and, in that case, it is not to

be thought, that the diligence of arrestment or inhibition would be void, in whole or in part; for the same would accresce to the creditor conjoined, who would obtain decreet extracted in his name as conjoined, though he had never appeared in the process. And the principle that rules all that matter is, that what is done by an executor confirmed or decerned, is for the behoof of any party who has the true interest in the moveables, and does not fall to the ground, though the user of the diligence fail, or an equal or more preferable interest appear; and, for the same reason, an executor decerned and pursuing, though never confirming, interrupts prescription. This is also agreeable to the analogy of law in other cases, whereby whatever is done by any person in another's right does accresce, though there were no true, but an imaginary right, as the deeds of a *pro-hæres*, pro-tutor, pro-curator, and pro-possessor; as was found 13th July 1664, the Earl of Lauderdale against Woolmet, No 5. p. 26. where the Earl of Lauderdale having founded upon a certification in an improbation, at the instance of Swinton, donatar to the Earl's forfaulture, by a gift from the usurper, it was *answered*, The Earl derives no right from Swinton, whose right is now found null *ab initio;* yet the certification was sustained as proceeding upon his right. No 83.

To all which it was *answered*; 1*mo*, No regard to the decreet, or any omission by Sir James Cockburn; because it was the pursuers' part to have seen to their own title, and that nullity can never be supplied; and it falls very justly and favourably to be so; because Sir James Cockburn did propone a defence, upon a discharge by Rachel's brother, who was executor confirmed to his father, which was repelled; because this particular sum was omitted in the testament; and, if there be any omission on the pursuers' part, it is very just they be left without remedy. 2*do*, The process and diligence falls upon the death of Rachel, and that is the peril which all parties undertake, who rely upon licences; for, whatever is alleged in the case of a confirmation, which is the known method of conveying moveables, and whereby all the deeds of an executor, towards the execution of a testament, doth accresce; yet every thing is contrary in the case of an executor decerned, and dying unconfirmed; for there it is but a bare office, and incompleat title. And as to what is alleged, that such a process would interrupt prescription; no such case hath occurred to be determined: but, however, it is of no consequence; for prescription is odious, and the action may be reckoned a document taken upon the creditor's right, which is good in many cases, though the process interrupting be never wakened or prosecuted. But here the process supports the inhibition, and the testament dative the process, which cannot be conveyed after Rachel's death; and so the inhibition falls. Neither does the case of the Earl of Lauderdale quadrate; for there the certification was obtained on the Earl's right for the time, which, though it resolved, yet judicial processes were preserved.

'THE LORDS found, That the pursuer's confirmation of Rachel and David

No 83. ' Wilkies' testament did supply the nullity of the decreet, and support the ' process and inhibition upon the dependence.'

Dalrymple, No 44, *p.* 56.

*** Forbes also reports the same case:

1705. *June* 30.

Rachel Wilkie spouse to Charles Jackson, having a bond of provision for 4000 merks from David Wilkie her father, obtained herself decerned executrix *qua* creditrix to him *ad omissa*, and took out a licence to pursue a debt due to him by Sir James Cockburn, omitted in the confirmation of the father's testament by her brother Archibald, the principal executor. The pursuit was raised, and inhibition used upon the dependence, but Rachel happened to die before sentence: Her children were decerned executors dative as nearest of kin to her, and also executors *qua* creditors *ad omissa* to David Wilkie their grandfather; and having got licence to pursue, insisted in the process commenced at their mother's instance against Sir James Cockburn, and at length obtained a decreet, and confirmed the sum decerned before extract. Upon which decreet an adjudication being led against Sir James Cockburn's estate, and founded on in the ranking of his creditors, the Lords found, That Rachel Wilkie, who as executrix decerned to her father, commenced the process against the common debtor by virtue of a licence, and used diligence by inhibition upon the dependence, dying before decreet or confirmation, the inhibition fell; and the decreet and confirmation at the children's instance as nearest of kin to her, and executors creditors to their grandfather with the adjudication thereon, could not supply the defect to make the inhibition subsist in their favours, in a competition with Sir James Cockburn's other creditors.

Albeit it was *alleged* for Charles Jackson and his children; 1*mo*, The diligence at Rachel Wilkie's instance, was not done merely *proprio nomine*, but by authority of the Commissaries, whose licence was not a simple permission, but a positive title, sufficient to force the defender to contradict: And permissive laws have the effect of positive statutes, where any thing is once done by authority of the permission. Again, action being intented, and sustained at the instance of a creditor, upon an estate, by virtue of a commission from the Lords of Session, impowering him for himself, and for the common behoof of other creditors, to pursue for recovering their debtor's effects; would any man doubt but his diligence would stand, and be effectual after his death? Which parallel answers exactly the present question: For a person that pursues by authority of a decreet and licence from the Commissaries, is not understood to act *sua tantum gratia*, but for the common benefit of all concerned; and is obliged upon that account to confirm before sentence; 21st June 1624, Lady Carnousie *contra* ———, *voce* Title to Pursue; June 30. 1665, Stevenson *contra* Crawford, Ibid. So that a licence to an executor creditor being a sufficient title flow-

ing from the authority of the proper Judge, to do every thing, except to extract or obtain payment, for the behoof of creditors, as well as for himself; and since neither the interest nor power of the commissaries, nor interest of the creditor ceaseth by his decease, no reason or law can be assigned why the diligence should fail. 2*do*, It cannot be contraverted, but that, if the diligence had been done by one surrogated to the Procurator-fiscal, it would have subsisted; and all decreets dative not in favours of the nearest of kin, are truly surrogations to the fiscal. For originally here, and in other places where the common law prevailed, the ecclesiatick court was bound to confirm the executor nominate or nearest of kin, or these failing, to execute the testament, which power of execution was exerced by the Fiscal. But time and custom introduced decreets dative in favours of creditors, whereby they are truly surrogated and come in place of the Fiscal. 3*tio*, Licences may be taken out to a certain time, and such are daily renewed when the time is out, without falling of the process. Nor doth it alter the case, that the licence is not renewed to the same person; for if the expiring of the licence made the process fall, the renewing of it, whether to the same or some other person, cannot revive it. But then again, the licence in question is upon the matter renewed to the same party; Rachel Wilkie's children being not only *hæredes ab intestato* to her *in mobilibus*, but actually confirmed executors, and so in the sense of law, *una et eadem persona* with their mother. It is true they are not confirmed executors to her till after the decreet: But this defect is suppliable by the regulation act, the decreet being obtained *in foro*. 4*to*, It is clear from the common principles of justice, custom of other nations, and the analogy of our law in parallel cases; that a party's acting in his own name, and for his own proper use, is profitable to those having interest in the subject. And if *titulus mere putativus* will have such effects in law, much more ought a title granted and sustained by authority: For *titulus putativus* never goes further in law than to excuse, or afford *bonam fidem*, and cannot make any deed or right to subsist. The true reason why the deeds of parties acting *titulo putativo*, are sustained, is, because of the rights and interests of others therein. So actions and decreets at the instance of the Laird of Swintoun, as donatar to the estate of Lauderdale, were found to stand, because the Earl of Lauderdale's right was the immediate productive cause of these deeds, No 5. p. 26. And the *jus persequendi* in this case was David Wilkie's right, which subsists albeit Rachel be dead. Nay, further, seeing an interruption at the instance of an executor would subsist, no solid difference can be assigned why Rachel Wilkie's process and inhibition should not. No 83.

In respect it was *answered*, 1*mo*, A licence is a mere personal and limited permission, founded upon a decreet dative, and prosecuted *periculo impetrantis*; therefore the person licenced dying *ante sententiam*, the decreet dative, licence, and personal inhibition, all evanish and die with her; because they could never take effect but by a sentence. It is vain to say that Rachel's children, her near-

No 83. est of kin, have both the right of blood and title of credit, and so being *eadem persona* with her, might have got her licence renewed, as she herself might have got a licence limited to a certain time renewed again in her own person, after elapsing thereof; for here the children had not their mother's right of credit settled by confirmation in their person when they first took a licence, but were ineptly decerned executors *qua* creditors to their grand-father, and thereupon took out a licence; which was a new decerniture, and a licence in place of their mother's decreet and licence, which evanished with all that followed upon it; whereas a licence to a limited time, after expiring thereof, is renewed to the obtainer upon the foot of the same decreet dative; and if Rachel's decreet dative died with herself, as no doubt it did, her licence died also; for how can a licence transmit, if the decreet be not transmissible? A licence is indeed a title to pursue, but gives no right to the executry, nor so much as to obtain a decreet for it, without confirmation. The case of a factor appointed by the Lords to do diligence for himself and others, for recovering their common debtor's effects, is not parallel with the point under debate, unless such a factor's power to pursue, bear the restriction and quality of *excludendo sententiam;* and then, if he happened to die, any pursuit commenced by him, or inhibition thereon, would certainly evanish. For when a factor pursues upon his commission *qua* factor, that commission not being limited, another factor may be appointed in his place; whereas an executor's licence doth last only *usque ad sententiam*, and if he die before sentence, it falls with all that followed upon it; *2do*, Where a licence is given to a procurator-fiscal, if he die, the next procurator fiscal may insist on the same licence; because the licence in that case is given to an office, which dies not. But if one who is surrogated in place of the procurator-fiscal take out a licence and die, both his surrogation and licence die with him, and there must be a new surrogate. Besides, Rachel Wilkie was decerned executor dative at the procurator-fiscal's instance, and was not his surrogate; so the decreet *in foro* in the person of the children, before they were confirmed executors to their mother, was fundamentally null, and not suppliable by the regulations; *3tio*, He who acts upon a *titulus putativus* acquires the subject, and his right stands for a time, though it be afterwards reduced or declared void; as in the case of rights reduced upon old inhibitions, or in the case of a co-heir struck out by the appearance of the more righteous heir. And the *ratio rationis* is, because in all cases where he that hath *titulum putativum* meliorates the subject, all must stand when it returns to the true proprietor, though nothing that is done to his prejudice will be effectual against him. But what is all this to an executor dative having a licence expressly limited to a time, or *ad sententiam*, whose title is not transmissible, and whose proceedings thereon are *periculo impetrantis?* It is not to the purpose to allege, that the diligence of a person licenced will make an interruption without confirming; for every inchoated diligence, though never perfected nor taking effect, serves as an inter-

ruption; because in that case law requires only some document that the action pretended to be pursued was not neglected. No 83.

Fol. Dic. v. 1. *p.* 277. *Forbes, p.* 19.

1744. *December* 18. DIN *against* BLAIR.

No 84.
Executors are liable to diligence for the subject of the inventory confirmed; but are not liable for their omission in not confirming.

EXECUTORS are liable to diligence for the subject of the inventory confirmed; but are not liable for their omission in not confirming, in respect every party having interest may confirm *ad omissa*.

And accordingly, in the process at the instance of John Din, in the right of Anne Blair his wife, as one of more nearest of kin of James Blair her father, against John Blair son and executor nominate of the said James, to account for his wife's share of her father's moveables, and that not only to the extent of the inventory confirmed by him, but to the full extent of the effects known to the executor to have belonged to the defunct, which it was insisted he was, by the trust conferred on him, bound to have confirmed; especially in this case, where, by a special clause in the nomination, all other executors were debarred, the LORDS 'found the defender only liable for what he had confirmed or intromitted with;' for even such debarring clause was not understood to preclude the nearest of kin from confirming *ad omissa*.

Fol. Dic. v. 3. *p.* 192. *Kilkerran*, (EXECUTOR.) *No* 8. *p.* 174.

*** *See* This case by D. Falconer, No 36. p. 3501.

*** *See* Bell against Wilkie, *voce* NEAREST OF KIN.

SECT. IX.

In how far, and by what means, the executor is constituted proprietor.

1665. *July.* COLVIL *against* LORD BALMERINO.

No 85.
A party had paid to the intrant minister a sum claimed as ann by the nearest in kin of the defunct incumbent. Found, that the nearest in kin might

MR JOHN COLVIL, as executor to Mr John Colvil, his uncle, minister at Kirk Newton, pursues my Lord Balmerino for the stipend of the said kirk, crop 1663, the defunct having died in February that year, and also for the profit of the glebe that year.—It was *alleged*, That Balmerino had *bona fide* paid it to the intrant minister, who was presented to that year's stipend.—It was *answered*, That he could not have been legally presented thereto, it having belonged to