Pleaded for the Heirs of John Macwhirrich; All the claims William Mackay could pretend against him, including this L. 1000, were transacted for L. 300, and he has already got payment thereof, by being allowed it in the account of William Macwhirrich's executry. No 24.

The shape of the process being a count and reckoning, in which the accountant had made a report, disallowing of this L. 1000 stated by William Mackay;

THE LORDS, 28th June, approved of the report made by the accountant, in respect that William Mackay had credit for the L. 1000 out of the executry of William Macwhirrich: And this day adhered.

Reporter, *Lord Murkle.* Act. *A. Macdoual.* Alt. *Borwell.* Clerk, *Forbes.*

D. Falconer, vol. 1. *p.* 14. *and* 114.

1744. *December* 21. The CREDITORS of M'DOWAL *against* M'DOWAL.

No 25.
An executor-testamentary is preferable before all the creditors, for payment of debts where he is cautioner, and also for payment of debts due to himself.

AN executor nominate confirming after six months, and while no creditor had done any diligence, was, in the action against him at the instance of the defunct's creditors, found "to have right to retain for payment of what debts were due to himself, whether they had been originally due to him, or acquired by him before the confirmation."

And so far the Court was pretty unanimous, in respect that a confirmation, whether as executor nominate or *qua* nearest of kin, is considered partly as an office, partly as a step of diligence for recovering payment of whatever may be due to the executor himself before confirmation: For, as to the difficulty urged by some, that, at that rate, any executor nominate, or nearest of kin, intending to confirm, might prefer what creditors he pleased, by picking up their debts before the confirmation; the answer was, That every creditor has a remedy by confirming himself within the six months.

But there was another point in this cause which was of more dubiety, Whether the executor should also have preference for his relief of debts, wherein he stood cautioner for the defunct, and which were yet standing out unpaid? Several of the Lords were of opinion, That he ought not to have any preference for such relief, agreeable to the decision, Feb. 2. 1628, recited in the case, Adie *contra* Gray, No 193. p. 9866.; and gave this reason for the difference, That where the debt is in his person, he may pay himself without a decree, which he cannot take against himself, and the law does not require the circuit of an assignation; but that does not apply to the case where he is only creditor in relief.

It was notwithstanding found by the plurality, That the executor was in this case also preferable for his relief: As confirmation was the proper method for securing his relief, so the law was considered not to stand on so narrow a bot-

No 25. tom as this, that the executor, where the debt was in his person might pay himself; but on this more general one, that such confirmations was not merely offices, but also steps of diligence for obtaining payment, and for the same reason for obtaining relief. It would perhaps not have been amiss, to have at least added a quality, The executor finding caution to pay those debts, (as an arrester for relief was obliged to do; *Vide* December 14. 1743, Lord Holyroodhouse, No 24. p. 695.;) lest the creditors might thereafter draw payment thereof out of the executry, from which they are not precluded by the preference now sustained to the cautioner; but of this nothing was said.

A third question also occurred in this case, viz. What should be the import of a clause in the testament, whereby the executor was nominated, with this express quality, and under the condition, 'That he should pay all the defunct's 'just and lawful debts?' And the LORDS without hesitation found, "That it imported no more than what *inerat de jure*."

Fol. Dic. v. 2. p. 54. Kilkerran, (EXECUTOR.) *No 9. p. 175.*

*** This case is also reported by Lord Kames:

PATRICK M'DOWAL of Crichen, in April 1734, executed a testament in favour of Charles his son, appointing him sole executor and universal legatee, with the burden of his just and lawful debts. Patrick M'Dowal died in May thereafter, in good circumstances, so far as appeared. The six months were allowed to elapse without diligence; after which, Charles the son confirmed executor-testamentar; and upon that title had an universal intromission. It afterwards appearing that Patrick the father had died utterly insolvent, Charles who was bound cautioner with his father in many debts claimed credit for such of these debts as he had paid, some before confirmation, and some after. He also claimed preference for such of these debts as were yet standing out, and also for other debts which he had paid voluntarily, and taken assignments to the same before confirmation.

In support of his claim, it was *pleaded*, That the law is not so whimsical as to make it necessary, that an executor who has an universal title of intromission, should take a decree against himself, or assign his debt to a trustee in order to take a decree. It considers the general confirmation to be virtually a confirmation *qua* executor-creditor. Nor is any injustice thereby done to the creditors; seeing a bare citation within six months will bring them in *pari passu* with the executor confirmed. The authority of Lord Stair was also urged, B. 3. T. 8. § 73, in these words: 'The executry is likeways exhausted by 'debts due to the executor himself without any process, but merely by excep-'tion of compensation, though he be not confirmed executor *qua* creditor, but 'executor otherwise.' And again § 76, 'For instructing exhausted, executors 'may found upon payment of the privileged debts at any time, upon the ex-

'pence of confirmation, upon debts due to themselves before confirmation, but 'not upon debts assigned to them after confirmation.' No 25.

In answer to this claim the Creditors reasoned thus: The powers of an executor are by no means so extensive as those of a tutor. A tutor as to administration has the full powers of a proprietor; he may pay the debts in what order he thinks proper; he may prefer one creditor before another, as the deceased himself might have done. An executor has no such powers; his business is to gather in the effects, and to convert the same into money; but he is not trusted with the distribution, which is the province of the commissaries, whose factor or trustee the executor is. He cannot pay to any mortal, but by their warrant or decree; so far as he pays upon their authority, it is a sufficient exoneration; but if he make voluntary payments without such authority, he pays at his peril; he will not be allowed credit for such payment, unless where the debt would in all events be preferable. His case is precisely similar to that of a factor upon a sequestrated estate, who can make payment to no creditor without a special warrant of the Court. And this is the solid foundation in law for the rule, that an executor cannot pay without a decree; not even excepting an executor-testamentar, who without decree cannot pay any debts but what are given up in the testament, and appointed to be paid by the executor.

If this doctrine be well founded, an executor cannot in his exoneration take credit for debts due to himself. The nomination of an executor, whether by the Commissary or by the deceased, implies no privilege as to debts due to the executor; he cannot pay to himself more than to other creditors, without the authority of the Judge Ordinary; and he must have a decree for his warrant in the one case, as well as in the other. Nor is there any difficulty of obtaining such a warrant, either by applying in his own name, or by assigning his debt to a trustee in order to sue for payment. And, if the law stood otherways, it would be gross iniquity to give any creditor the office of executor; for it would be giving him a preference before all the other creditors, without the least colour of justice or equity. It could never certainly be intended to give the Commissaries such an arbitrary power over the property of others. But what is still worse, it may often happen that the Commissaries have it not in their power to remedy this evil. It is an established rule, that the next of kin claiming the office, must be preferred before the creditors; the Commissaries are not at liberty even to conjoin a creditor with them. Here will be injustice established by law; for it is in other words giving a preference to a creditor who is the next of kin before all the other creditors; though in all other cases debts *inter conjunctas personas* lie under the strongest suspicion. But the most glaring absurdity of all will be in the case of an executor-testamentar. A man who knows his circumstances to be wrong, has no more ado, but to appoint his favourite creditor to be his executor. The other creditors have no means to remedy this injustice; they cannot crave to be conjoined with an

No 25. executor-testamentar; he must enjoy the office alone, though the consequence be, that at one sweep he exhaust the inventory by the debts due to himself.

If such be the undeniable consequences of the executor's doctrine, his claim can have no foundation in the common law of Scotland; for it would be absurd to suppose the law of any civilized country so unjust. It is true, the act of sederunt 1662, puts it in the power of creditors to prevent this injustice. But then, if an executor had not this privilege originally, which is endeavoured to be made out above, he cannot have it at present; for it is not the intention of the said act to bestow such a privilege, but rather the contrary. At the same time, this act is but an imperfect remedy, since its benefit subsists but for six months; and when persons die in credit, this short time elapses without any diligence.

At the advising the cause, Elchies gave his opinion upon the authority of Sir Thomas Hope, that an executor may make paymens to himself. But he distinguished betwixt debts due to the executor himself, and debts outstanding, where he is only cautioner; with regard to the latter, he admitted, that an executor can have no preference, because the debts are not paid. Arniston observed, that Lord Stair puts this matter upon the footing of compensation, which extends the privilege to a cautionary engagement.

" Found, that the petitioner, being confirmed executor-testamentar to Patrick M'Dowal his father, was preferable before the other creditors of the said defunct, for payment of the debts wherein he stood cautioner, or otherways bound for the said defunct; and likewise found, that the petitioner as executor foresaid, was preferable before the other creditors for the debts paid by him, and to which he obtained assignation before the date of his confirmation."

What prevailed here over principles of law and equity, was an established opinion, founded on the authority of Lord Stair, and of some singular decisions, that an executor is entitled to plead compensation. The pernicious consequences, however, of this judgment may be prevented by diligence within the six months. And hereafter, it is supposed, no creditor will neglect the privilege given by the act of sederunt.

Rem. Dec. v. 2. No 63. p. 98.

*** D. Falconer reports the same case.

1744. *December* 22.—PATRICK MACDOUALL of Crichen named his son Mr Charles Macdouall, advocate, his sole executor and universal legatar, and burdened him with the payment of his just and lawful debts. On this testament, Mr Macdouall was confirmed executor more than six months after his father's death, under protestation, that his acceptance of the foresaid nomination, with the burden of the defunct's debts, should only subject him thereto to the extent of the inventory given up, and what he might thereafter eik to the same, and as accorded of the law.

Mr Macdouall had been bound with his father in some debts that were outstanding at his death, part of which he had paid before confirmation, and since the same, and had also, before confirmation, paid some debts, for which he was not engaged, for all which he claimed a preference to the other creditors, as being creditor to his father for relief, and alleged, that this preference was due to an executor. No 25.

The Lord Ordinary, 15th February 1743, found, "That the debts paid by the executor before confirmation, and those debts paid by him since confirmation, or for which he stood bound, were only to be ranked on the subject of the father's estate, *pari passu* with the debts due to the other creditors; and, 23d November 1743, adhered."

Pleaded in a reclaiming bill for Mr Macdouall, In competitions amongst creditors, the laws of all countries favour the vigilant, the first arrestment by an hour is preferred; and thus it was amongst executors, till, by the act of sederunt 1662, it was ordained, "That all creditors of defunct persons using legal diligence at any time within half a year of the defunct's death, by citation of the executors-creditors, or intromitters with the defunct's goods, or by obtaining themselves decerned and confirmed executors-creditors, or by citing of any other executors confirmed, should come in *pari passu* with any other creditors who had used more timely diligence, by obtaining themselves decerned executors-creditors, or otherwise." But this is not extended *in infinitum*, nor is it reasonable the most negligent creditor should be brought in *pari passu* with those who have properly attached their debtor's effects.

Had Mr Macdouall confirmed himself executor-creditor, he would doubtless have been preferable, and the Lord Ordinary has found him entitled to a *pari passu* preference, though he has done no other diligence than his general confirmation; and if it be once admitted, this gives a preference, there is no medium, it must give it for the whole, as being equal to a confirmation as executor-creditor. When any one is possessed of two characters, it were whimsical to require the title to be made up on both; the general comprehends the particular; and therefore, if one is confirmed executor-nominate, or nearest of kin, it were absurd he should also be confirmed as creditor. The law in this case does not oblige him to take a decreet against himself, nor to assign to another to have it taken in that person's name; and nobody can with reason complain, since, by doing diligence within six months, they can bring in themselves *pari passu*; and here Mr Macdouall did not stir till the six months were out; so that, during that time, any body might have applied. Stair is express on this point, B. 3. T. 8., § 73, 76, and 77; and here this author makes no distinction betwixt debts originally due to the executor, and debts paid by, or assigned to him after the death, and before confirmation. The law has inhibited him from voluntary payment, after he is actually in the office, but it has gone no further. It was found agreeably to what Mr Macdouall here pleads,

No 25. 19th December 1740, Hamilton of Olivestob, and Mr James Baillie, against the Creditors of Menzies of Gladstanes, No 29. p. 2099. Mr Thomas Menzies being confirmed executor to Sir William, his father, the Creditors pursued his cautioners, who excepted upon debts paid by the executor before confirmation, and for which he had taken discharges or assignations.

Answered, The powers of an executor, by the law of Scotland, are not equal to those of a tutor, who can pay creditors at his own hand, and prefer one to another, as the proprietor might, unless interpelled; but an executor's business is to get in the defunct's effects, and, as he is the Commissaries' factor, he cannot dispose of them without their warrant: Hence it is, that he cannot take credit for debts due to himself; he cannot pay himself more than any other, without the authority of a judge; and he may obtain a decreet for his warrant, by assigning his debt to a trustee for that purpose.

Were it otherwise, it would be iniquious to give the office to any creditor of a defunct; and this the Commissaries often could not help, since they are obliged to prefer the nearest of kin, and if such be a creditor, he is thereby preferred to all the rest; but the thing is still more absurd in the case of an executor-testamentar; for, by the rule contended for here, it is in the power of a man not solvent to prefer his most favoured creditor, by naming him his executor. Such are the consequences of this doctrine by the common law, and it may be doubted if they are at all obviated by the act of sederunt 1662; by it all creditors are preferred *pari passu*, who do diligence within six months, by obtaining themselves decerned executors-creditors, or by citing the executors; but there is here no mention of debts due to the executor himself, and if they are privileged, there are no words in the act to deprive them of that privilege, and bring in others *pari passu* with them.

The petitioner's argument, that a general title comprehends a particular, is specious, but fallacious, and not founded on principles; for as two confirmations are incompatible, a confirmation *qua* nearest of kin, or testamentar, is so far from implying one *qua* creditor, that it excludes it. It has already been noticed, that a confirmation on a general title gives no authority to pay without warrant from the Commissary; it does not give the executor power to pay himhimself more than any other; therefore it is not a confirmation as creditor, which is nothing else but the obtaining power to intromit with the defunct's effects, and to apply them to the person's own payment; so that this argument is plainly begging the question.

It is taken for granted, without reason, that if the petitioner had confirmed as executor-creditor, he would have been preferable; but probably the event would have been otherwise; for such a step, either before or after the six months, would have alarmed all the creditors, who would have got themselves conjoined; and it is plain he has lain by till the time was over, depending on a preference, as executor-testamentar; which office, he knew, could not be refused him.

No 25.

The opinion of Lord Stair, in a point whert he is single, cannot be sufficient to establish a doctrine, which is an inlet to so much injustice; and as he carries it so far as to give a preference to debts acquired never so short while before confirmation, it would put it in the power of an executor to prefer any creditor he pleased, by taking assignations to their bonds, giving his own in their place, and then confirming; and here he might make his own profit, by preferring those that offered him the largest compositions. In the case Olivestob and Baillie against the Creditors of Menzies, there was this particularity, that Mr Menzies being served heir to his father, was obliged to pay his debts, for which he had relief of the executry; and he being also confirmed executor, the Lords sustained these payments to exhaust the inventory against negligent creditors; but here they have put in their claims *quamprimum*, and no good reason can be given to prefer an executor more than an heir *cum beneficio*, who must do diligence, if he has a mind to compete on his debt.

Laying aside this general topick, the petitioner ought to have no preference, because he is named with the burden of the defunct's debts, and gets a subject assigned him for that purpose. In this trust he must deal equally, he cannot prefer one creditor to another, nor himself to them all. Suppose the testament had contained a particular list of debts, he could have paid them without decreet; but he must have paid all alike, as the purchaser of an estate, bound to pay creditors in a particular list, must do, if the debts exceed the value, 20th July 1714, Blair against Graham, No 22. p. 7744. By accepting the testament, he becomes bound to pay all his father's debts, if not universally, at least as far as the subject will go; the obligation is equally to all, and this bars all preference, except in so far as a creditor forces it by diligence.

The Lords found, That the petitioner being confirmed executor-testamentar to his father, was preferable to the other creditors of the defunct, for payment of the debts whereon he stood creditor to him at his death, for relief or otherwise; and also found, that the petitioner, as executor foresaid, was preferable to the other creditors for the debts paid by him, and to which he obtained assignation before the date of the confirmation.

Act. *H. Home.* Alt. *Lockhart.* Clerk, *Murray.*

D. Falconer, v. 1. *p.* 33.

1745. *June* 7. The Lady Crowdieknows *against* The Creditors.

No 26.

If a trustee of an adjudication recover payment out of a collateral security for the same debt, though

William Crichton of Crawfurtown left several children, amongst whom were John his eldest son, and Anna a daughter, married to John Bell of Crowdieknows; and having died in bad circumstances, several adjudications were led against his son, which, upon his death also, were purchased in by Crowdieknows, and an adjudication led by him besides for his Lady's portion. This