1565. *July* 15. ——— *against* HAMILTON.

No. 69.
Where one of more executors was appointed to be intromitter, it was found that he might pursue without concourse of the rest.

IN an action pursued by ———, as executor to umquhile ———, against Hamilton of Stainhouse, as heir to his father, to hear a contract transferred *active* in the pursuer, and *passive* in the defender, it was opponed by the defender, that there were more executors than he, and so he could not desire the contract to be transferred in him only. It was answered, that the pursuer was constituted by the deed universal intromitter, and therefore the rest of the executors had no interest to pursue any action. It was replied, that if they should not have that interest, the office of executry was of no effect nor avail. It was found by the Lords, that the pursuer only without the rest might pursue, by reason he was constituted only intromitter; and towards the rest of the executors in this case, that their office was frustrate, and of no avail.

Fol. Dic. v. 2. p. 382. Maitland MS. p. 201.

1566. *February.* 1. BORTHWICK *against* DOUGLAS.

No. 70.

IN an action moved by Michael Borthwick, as executor to ———, against Elibabeth Douglas, Lady Elphinston, it was objected, That there was another executor than the said Michael within the said jurisdiction in life, and so the said Michael could not pursue alone. It was answered, That one of many executors may pursue, for that is to follow the will of the deed, albeit that many cannot be compelled to answer without the rest of the executors be called; at least one of more executors may pursue for their own part, as one of three for the third part. It was found by the Commissaries, that one of many executors no way may pursue, yea, not for the part of the debt which they will get by their office.

Fol. Dic. v. 2. p. 382. Maitland MS. p. 209.

1575. *December* 9. MARJORIBANKS *against* BALFOUR.

No. 71.
One of more executors cannot transact or grant discharge without his colleagues.

MR. JOHN MARJORIBANKS, executor to umquhile Thomas Marjoribanks, pursued the Laird of Balfour for the sum of £.700 owing to the said Thomas. The defender alleged, that James Johnston, executor with Mr. John, had transacted with him for £.200, which £.200 he had received, and got his discharge thereupon, and of the whole sum. The pursuer alleged, that albeit James Johnston was executor, yet he might neither transact nor compound without the pursuer with any part, nor yet give quit without the pursuer's consent, being his colleague; which

allegeance of the pursuer the Lords found relevant, and repelled the defender's allegeance. No. 71.

Fol. Dic. v. 2. p. 382. Colvil MS. p. 250.

*** Balfour reports this case:

IF there be divers and sundry executors, and one of them, without consent of the rest, compone, transact, or give quit, renounce, and discharge, any sum of money or debt owing to the dead the time of his decease, the same is null in the self, and of no avail.

Balfour, No. 7. p. 220.

1617. *February* 20. HALLIDAY *against* HALLIDAY.

No. 72.

IN an action pursued by Halliday against Halliday, upon the old dative *ad omissa*, the Lords admitted this exception for the one half, that there being two executors confirmed, the one who had intromitted with the just half was deceased, and so the other could not be pursued for the whole.

Fol. Dic. v. 2. p. 382. Kerse MS. p. 133.

*** A similar decision was pronounced in the case of Peacock against Peacock, 16th July, 1628, No. 26. p. 2189. *voce* CITATION.

1625. *January* 13. M'MITCHEL *against* M'QUHARG.

No. 73.

FOUND that the executors are not liable *in solidum* to pay legacies, but *pro virili*.

Fol. Dic. v. 2. p. 382. Kerse MS. p. 133.

Durie reports this case:

IN an action betwixt M'Mitchell and M'Quharg, where two executors of a defunct were convened, for payment of a sum of money, left by the defunct to the pursuer, the Lords found, that where there are more executors to a defunct than one, that any one of them cannot be convened by the defunct's creditors *in solidum*, for the whole debt owing by the defunct; but that they ought all to be convened, each one proportionally, for their own parts, according as they are in number; except that where there is one of more only convened, that that one convened had in-