for, specially seeing at the time of the confirmation she made protestation, that she should be no further obliged than as said is, albeit the same was confirmed at the rate foresaid; and also, that after the confirmation, the same were apprised by unsuspected persons, for a less price and quantity, for which she was content to be answerable; and as the bairn should want nothing of his own, so it were against equity, to lay more on her nor she got; it being improbable, that she would not make the best use of the corns, and others, to the use of her own only bairn. THE LORDS found, that notwithstanding of the protestation foresaid, made by the relict, and the apprising of the goods and corns thereafter; yet that she should be answerable, both for the prices of the corns and goods, as they are given up by herself in testament, without respect to the prices of the comprisers, specially the alleged comprising in May, which ought to have no respect for the goods, viz. oxen, kine, and other bestial, which then were at the worst estate, viz. after bear-seed, whereas the defunct died in October, at which time the goods were at the best; and so the prices given up, were found to oblige the upgiver thereto. *Item*, The relict defending herself with a decreet of exoneration, wherein the Commissaries had found her super-expended in L. 800 more nor the whole free gear of the testament, the LORDS found not this sufficient, seeing it was general, and bore not the particular debts paid by her, wherein she was super-expended, nor the instructions of the particulars; therefore ordained her to qualify the same in this place; and she *alleging*, That she had produced all her instructions and discharges before the Commissaries, in that process of exoneration, and that the Commissary, nor his clerk, would never give them up again; likeas, it is the custom of all the Commissaries of Scotland, to keep the instructions for the warrant of their sentence, and never to give them up again, and both the Commissary and his clerk being dead, the party ought not now to be prejudged thereby, seeing his sentence must put her *in tuto*, which it is probable the Commissary would never have pronounced, nor no public judge in his office, without clear probation. THE LORDS found, That they would try, if there was such a custom, and consider thereof thereafter.

No 61.

Act. *Advocatus*, *Nicolson*, & *Mowat*. Alt. *Stuart*. Clerk, *Gibson*.

Fol. Dic. v. 1. *p.* 276. *Durie*, *p.* 628.

1662. *February* 1. BELSHES *against* BELSHES.

No 62.

IN an account and reckoning betwixt Belshes and Belshes, concerning executry, the LORDS found, that the prices given up by the defunct in his testament of his own goods, should stand, and the executor be accountable accordingly, seeing there was no enorm prejudice alleged, as if the defunct had

No 62.

prized the goods within a half or third of the true avail, to the advantage of the executor, and prejudice of the wife, bairns, or creditors.

THE LORDS did also allow aliment to the wife out of her husband's moveables to the next term, albeit she liferented an annualrent, payable at the next term. *See* HUSBAND and WIFE.

Fol. Dic. v. 1. *p.* 275. *Stair, v.* 1. *p.* 90.

1667. *July* 18. JOHN KER *against* JEAN KER.

No 63.
An executor is obliged to depone both upon subjects omitted, and the wrong appretiation of those confirmed, at the instance of the executor *ad omissa.*

JOHN KER being executor-dative *ad omissa et male appretiata,* pursues Jean Ker, as principal executrix, for payment, and referred the particulars to her oath. She *alleged,* That she had made faith at the time of the confirmation, that nothing was omitted or wrong prized, she could not be obliged to depone again. It was *answered,* That this was the ordinary custom, and was no more than a re-examination, and that it would not infer perjury though it were different; because, if she had any thing omitted that had come to her possession and knowledge after the inventory, or if she had then possessed it, but did not know, or remember, that it was in her possession, or in *bonis defuncti,* and ordinarily the prices are made by the Commissary, and but upon conjecture, and may be much better known thereafter.

THE LORDS repelled the defence, and ordained the executrix to depone.

Fol. Dic. v. 1. *p.* 275. *Stair, v.* 1. *p.* 477.

1672. *February* 2. WILLIAM MARTIN *against* AGNES NIMMO.

No 64.
The estimation put upon goods by the defunct himself, must be the rule, in which case, there is no place for an executor *ad mala appretiata.*

WILLIAM MARTIN, as executor *quoad non executa et appretiata,* pursues the said Agnes Nimmo, who was executrix confirmed to her husband, Abraham Pargillies. It was *alleged,* That he could have no right, because he was neither a creditor nor nearest of kin to the defunct; neither were the particulars libelled *dolose* omitted, seeing they consisted of a number of bolls of corn, which were estimated by the defunct himself to the third curn of the growing crop, and was so given up in inventory. It was *replied,* That the crop being then in the barn-yard, and in the defender's possession when the testament was confirmed, she knowing that they amounted to much more than the husband did estimate, was in *pessimo dolo* to make that inventory, and make faith thereupon, and so ought to forfeit her right, which must fall and belong to the pursuer, as executor *ad omissa* and *male appretiata.* THE LORDS, in *hoc facti specie,* did not find that the executor was *in dolo* being a woman, and having given up inventory by a procurator, as her husband had estimated the same, and therefore assoilzied her; but they did not decide, if she had been *in dolo,* that a