

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 concurrence 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 opposed 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