

but the intromission is committed to the other, who uses solely to be confirmed, and uses not to be done after they are confirmed, but yet it was sustained here after the confirmation.

No 73.

Act. ———.

Alt. *Aiton.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 277. Durie, p. 451.*

1634. July 8.

DAME MARGARET PRESTON *against* The EXECUTORS of her SON.

DAME MARGARET PRESTON pursuing the executors of umquhile John Hepburn her son, to warrant her from a debt decerned against her as executrix to her umquhile husband, Sir Robert Hepburn, and whereof the said umquhile John Hepburn should have relieved her said husband his father, the defender *alleging*, That the whole goods of the testament of the said umquhile John were exhausted, by sentences obtained by other creditors of the defunct's against them; this allegiance was repelled, and it was not found sufficient to liberate the executors, that sentences were obtained by other creditors against them, for as much as would exhaust the inventory of the testament, except also that payment had been made by the saids executors to the creditors, conform to their decreets; for, before payment the executors could not be exonered, and when this pursuer had recovered sentence, as the other creditors have done, the executors might convene them, or suspend all their sentences; in which process the creditors might dispute upon their preference, if there was not enough to pay them all, and then the executors could not be obliged, but *secundum vires inventarii*.

No 74.  
Every creditor may take decree against an executor, and the defence of exhaustion will be reserved *contra executionem*.

Act. *Stuart.*

Alt. ———.

Clerk, *Hay.**Fol. Dic. v. 1. p. 276. Durie, p. 724.*

1665. January 25.

WILLIAM MENZIES *against* LAIRD of DRUM.

WILLIAM MENZIES, as executor to Alexander Menzies, and umquhile Margaret Gordon the other executor; having obtained decree against the Laird of Drum, for 8000 merks, the said Margaret being dead, William charges for the whole: Margaret having died at the horn, compearance is made for the donatar. It was *alleged* for Drum, that he could not be convened at the instance of this pursuer, without concurrence of the other executor, or some to represent her, had been called; for they might have *alleged*, that this charger is satisfied of the half of his executry.

No 75.  
Two executors obtained decree against a debtor of the defunct; one of the executors died, and the other having charged for the whole debt, the Lords sustained the charge. See No 78. p. 3884.

No 75.

' THE LORDS found, that seeing the testament was executed by a sentence; the other executor needed not be called.'

2dly, Drum *alleged*, That he could not be liable to this executor, but for the half. It was *alleged* for the donatar, that he craved preference for the other half. It was *answered*, that the donatar could have no interest, because the sum was heritable. It was *answered*, that albeit it was heritable, yet it became moveable, by the executors taking a decret therefor, in the same case as if requisition had been used.

In this the LORDS did not decide, some being of opinion, that it was moveable, others contrary; because an executor being but a successor, as a decret of registration, or transference, would not change the nature of the first bond, so neither would this decret.

*Fol. Dic. v. 1. p. 277. Stair, v. 1. p. 254.*

No 76.

A. testament is to be reckoned as executed, and no place for a confirmation *ad non executam*, when a decree is recovered against the debtor, tho' the executor die before payment is made.  
See No 79. p. 3884.

1666. November 16.

REID *against* TELFER.

IN the case, William Reid *contra* Telfer and Salmond, it was found, that a testament is to be thought executed, so that; thereafter, there is no place to a *non executam*, when a decret is recovered against the debtors; though the executor decease before he get payment; because the right of the debt is fully established in his person by the decret; and he having done diligence, it ought not to be imputed to him, that the debtor is *in mora* as to the payment of the debt; and there being *jus quaesitum* by a decret, and execution having followed thereupon by horning, after which annualrent, though not due *ex pacto*, yet becometh due *ex lege*, or by comprising at the instance of the executor, and infeftment thereupon, it were absurd, that all these rights should vanish; which would necessarily follow, if there were place to a *non executam*; seeing the decreets and rights foresaid followed thereupon, could not be transferred or settled in the person of the executor *ad non executam*, who doth represent the defunct only, and not the executor, at whose instance the decret is obtained and executed.

*Fol. Dic. v. 1. p. 277. Dirleton, No 49. p. 20.*

1666. November 17.

ALEXANDER DOWNY *against* ROBERT YOUNG.

No 77.  
Found as above.

UMQUHILE Alexander Downy granted an assignation to his oye, Alexander Downy, of two bonds, who finding that after his goodsire's decease, Mr John Hay was confirmed executor to his goodsire, and had given up these bonds in his inventory, but had not recovered payment, he confirms himself executor, *ad non executam*, to his goodsire, and pursues the debtors for payment of the bonds. Gompearance is made for Robert Young, who *alleges*, That he is exo.