

No 78.

Found the reverse of Menzies against Drum, No 75. p. 3881.

1671. June 22. MR ARTHUR GORDON *against* LAIRD of DRUM.

MR ARTHUR GORDON, as assignee to a decret recovered against the Laird of Drum, charges him thereupon. He suspends on this reason, that the debt being originally due to a defunct, his two executors nominate recovered the decret, and the one only assigned the whole to Mr Arthur, whereby he can only have right to the half. It was *answered*, That the other executor being dead before the assignation, the office accresced to the survivor, who might uplift all that was *in bonis defuncti*, not uplifted. It was *answered*, That this debt was no more *in bonis defuncti*, but being established in the executor's person by sentence, *testamentum fuit executum*, and the deceased executor's half behoved to belong to his executors, and not to accresce.

Which the LORDS sustained.

*Fol. Dic. v. 1. p. 277. Stair, v. 1. p. 739.*

No 79.

Found in conformity with Reid against Telfer, No 76. p. 3882.

1671. November 21. COLLISON *against* The LAIRD of DRUM.

COLLISON, as executor *quoad non executata* to Alexander Menzies, to whom the Laird of Drum was debtor in the sum of 4000 merks by bond, one of the executors of Alexander Menzies, did pursue Drum for payment thereof. It was *alleged* for Drum, That the pursuer had no title as executor *quoad non executata* to Alexander Menzies, in so far as William Menzies having recovered sentence as executor to Alexander, who was creditor to the Laird of Drum, the debt was fully established in the executor's person, and there could be no place for an executor *quoad non executata*; especially in this case, where the executor being denounced to the horn, the gift of his escheat was taken to the Laird of Drum's behoof. It was *replied*, That nothing could fall under the escheat of William the executor, who had recovered sentence, but the rebel's own moveables, and ought not to prejudge a lawful creditor of the said Alexander's, to whom the bond was granted, who ought to be satisfied before any who were creditors to the executor, or donatar to his escheat. THE LORDS did find that the executor *quoad non executata* had no title, there being a sentence recovered at the instance of the executor dative; but when Collison should pursue as a creditor to Alexander Menzies, if that he ought to be preferred to the said William's creditors, who was his executor, or to the donatar of the executor's escheat, they reserved to themselves to determine that case.

*Fol. Dic. v. 1. p. 277. Gosford, MS. No 397. p. 199.*