

* * * Gilmour reports the same case :

No 5.

THOMAS FAIRHOLM, as executor-creditor to Andrew Reid, pursues Margaret Bisset, for certain merchant ware intromitted with by her, belonging to the defunct her husband. It was *excepted*, That she intromitted as executrix-creditrrix to her husband, the samem goods being in her possession the time of the confirmation ; and the pursuer having done no diligence therefore, before her confirmation, she ought to be preferred, seeing confirmation and possession complete a right in her person, without farther execution, which a naked confirmation doth not in the person of the pursuer. It was *answered*, That the first confirmation, in the person of the executor-creditor, gives such a right, that it excludes all second confirmations in the point of law, except *ad omissa et non executata*, where the principal executor is dead. And albeit the English Judges, in whose time both testaments were confirmed, did bring in *pari passu* all creditors who did confirm within half a year after the defunct's death, and that the pursuer's testament was within half a year ; yet this excipient, by her confirmation, cannot have that benefit, far less can she be preferred ; because she was not confirmed till after the half year was expired. It was *replied*, That she was confirmed within nine days after the half year, and her edict was served within the half year.

THE LORDS preferred the pursuer.

Gilmour, No 17. p. 14.

1693. December 8. KINFAUNS *against* Her HUSBAND'S CREDITORS.

IN the cause between the Lady Kinfauns and her husband's Creditors, competing with her upon confirmations, the LORDS preferred her, as she who was first confirmed executrix-creditrrix on her contract of marriage, (though none of them was within the six months of her husband's death, and so not in the terms of the act of sederunt), as to the office, and brought in Scott in Dundee *pari passu* with her *quoad* the common sums, which each of them had confirmed ; because he was confirmed that same day with her ; and in so far as each of them confirms separate or distinct sums, which the other does not, prefer them *respective* to these, and find a general confirmation of a sum due by such a debtor, though it do not particularly condescend on the individual sum, (which they may be ignorant of), is sufficient to carry the right, and make them preferable to Ramsay of Cairnton, who, *qua creditor*, had confirmed the special sum ; (but some months after the Lady and Scott's confirmations were expedite ;) and that his having obtained the first decret gave no preference here, seeing the debtor Northesk had advocated the other creditors actions, and had so far colluded with him as to let his decret pass ; but found the debtors, not being

No 6.

A confirmation of a debt due by a debtor named, though neither the sum nor the security were condescended on, was preferred to a posterior particular confirmation of the same debt.

No 6.

in tuto to pay without a sentence, ought to be assoilzied from the penalties of their bonds; and found it was an error in the Commissary of St Andrews' to confirm two several testaments-dative *qua* creditors of the same individual sum, and subject matter, and that he ought to be censured for the same.

Fol. Dic. v. 1. p. 272. Fountainball, v. 1. p. 576.

1704. January 28. ROBERTSON *against* BALNAVES and ROBERTSONS.

No 7.

A sum due to a defunct fell to three brothers and a sister as nearest in kin. One of the brothers confirmed himself executor to the whole sum, and assigned it. The other three confirmed themselves executors; and both parties having charged the debtor, the Lords, in a suspension at his instance, thought the second confirmation was not valid, but found the assignation null as to three-fourths of the sum assigned, so that the right returning to the cedent, the others could oblige him to denude.

MR HENRY BALNAVES grants bond to Robert, Elspeth, and Margaret Robertsons for 1000 merks; they dying, this sum fell to Robert, James, and Donald Robertsons, their three uncles, and Grizel Robertson, their aunt, equally amongst them, as nearest of kin. Donald prevents the other three, and confirms himself sole executor to the whole sum, and assigns it to Mr Duncan Robertson writer in Edinburgh. The other three nearest of kin being ignorant country people, but unwilling that Mr Duncan should ingross and uplift the whole, and that they should only have recourse for count and reckoning against him, they also confirm executors. Balnaves, the debtor, being charged by both, he suspends, on multiple-pounding; and, at discussing, Mr Duncan craves to be preferred, because Donald, his cedent, being first confirmed, and having charged the debtor with horning, this established the right of property of the sum confirmed in his person, and the other nearest of kin have nothing but a personal action against him to denude and pay their shares; and Mr Duncan being assignee for onerous causes, he is not concerned in their claim against their brother, but the property of the confirmed sum is validly transmitted to him; and their posterior confirmation gives them no more but a personal action against the executor and his cautioner in the testament for their share of the executry goods; and so Donald, by his confirmation, became *dominus bonorum et hæres in mobilibus*. *Alleged* for the other three nearest of kin, That Donald, and Mr Duncan his assignee, could be preferred no farther than to a fourth part, and they had the right to the other three parts; because an executor confirmed has not *plenum dominium* of the goods in the inventory, but is only a *fiduciarius*, and trustee *ex fideicommisso* for the behoof of the legatars-creditors, relict and nearest of kin of the defunct, as to whom it is only an office and administration, and no right of dominion and property, unless the testament be executed by uplifting and discharging, or the debts innovate by new security in the executor's own name; none of which cases occur here, for the subject confirmed is yet extant, unuplifted, in the debtor's hand; so that if Donald the executor had died, the goods would not have fallen under his testament, except only his own fourth part; and if he had been denounced, and his escheat gifted, the other nearest of kin's share would not have fallen under his escheat, as has been oft decided, and particularly 21st December 1671, Gordon *contra* The Laird of Drum,