

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 exe.