No 75.

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

2*dly*, 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 decreet 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 decreet of registration, or transference, would not change the nature of the first bond, so neither would this decreet.

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

1666. *November* 16. Reid *against* Telfer.

No 76.
A testament is to be reckoned as executed, and no place for a confirmation *ad non executa*, when a decree is recovered against the debtor, tho' the executor die before payment is made. *See* No 79. p. 3884.

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 executa*, when a decreet 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 decreet; 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 quæsitum* by a decreet, 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 evanish; which would necessarily follow, if there were place to a *non executa*; seeing the decreets and rights foresaid followed thereupon, could not be transferred or settled in the person of the executor *ad non executa*, who doth represent the defunct only, and not the executor, at whose instance the decreet 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 executa*, to his goodsire, and pursues the debtors for payment of the bonds. Compearance is made for Robert Young, who *alleges*, That he is exe-

cutor dative to Mr John Hay, who executed Downy's testament, by obtaining sentence for payment of these bonds; so that the bonds were no more *in bonis* of Alexander Downy, but of Mr John Hay; and that the testament being executed by decreet there could be no executor *ad non executa* to Downy the first defunct. It was *answered*, That the testament was not executed by a decreet, unless the executor had obtained payment; especially where the executor was a mere stranger, and was neither nearest of kin, creditor, nor legatar. No 77.

THE LORDS found the testament of Downy executed by Hay, by the sentence obtained in Hay's name; and therefore found that Alexander Downy, the oye, his confirmation as executor *ad non executa*, was null.

It was further *alleged*, That Downy being not only executor, but assignee by his goodsire, the assignation, though it had been but a legacy, would have been sufficient against Mr John Hay, who is the cedent's executor; and therefore is also sufficient against Young, who is the executor's executor, and so represents the first defunct, Downy the cedent. It was *answered*, That Young was not only *legitimo modo* the executor, but he is also creditor of the first defunct, Downy, in so far as he is donatar of the escheat of John Hilston, and thereupon has obtained declarator, and so is in the place of John Hilston, to whom umquhile Alexander Downy was debtor, by his ticket produced, whereby Downy acknowleges that he had in his hands goods worth L. 6000 belonging to him and Hilston, in co-partnery, and obliged him to be countable therefor; which is anterior to the assignation granted to Downy's own oye for love and favour; whereupon he hath reduction depending against the assignation, as *in fraudem creditorum*. It was *answered*, that the ticket, in relation to the co-partnery, was not liquid, bearing only an obligement to be countable, with express exception of desperate debts, and others.

THE LORDS found, that in respect the debt was not liquid, Downy the assignee ought to be preferred, and get payment, but ordained him to find caution, that in case Young prevailed, he should refund.

Fol. Dic. v. 1. *p.* 277. *Stair, v.* 1. *p.* 405.

*** Newbyth reports the same case:

IN a competition of rights to two bonds granted to umquhile Alexander Downie, and which competition was debated betwixt Robert Young and Alexander Downie, son to the defunct; and it being contraverted in this process, when, and at what time, a testament was said to be sufficiently executed; THE LORDS found that a testament was sufficiently executed, by the executor's recovering of decreets for the debts therein confirmed, so that thereby the same came to be *in bonis executoris*.

Newbyth, MS. p. 84.