

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-poiding; 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,

Sect. 9. *b. t.*; and 16th December 1674, Laird of Kilhead *contra* Irving, No 2. p. 3124. where a creditor of the defunct's was preferred to the creditor of the executor, because the goods are truly the defunct's, and his creditors and nearest of kin, so that the executor is no more but their fideicommissary and trustee, except as to the interest and share the law gives him; and an assignation made by an executor is no more but a mandate or a factory to uplift; but the assignee must be countable to all concerned, in the same way the executor would have been; and to turn them over to pursue the executor to account, is to evacuate the trust, seeing he is wholly bankrupt; and it is better for them to affect their own goods yet extant in the debtor's hands, than to be left to the uncertain event of a count and reckoning; and Mr Duncan *frustra petit* preference to a sum, *quod mox restituere tenetur* to the nearest of kin.—THE LORDS thought the nearest of kin had not taken the habile way of affecting the sum in question by a second confirmation; for the Commissaries ought not to make two principal confirmed testaments *quoad* the same subject; but their legal method was to have raised a process against the executor confirmed, to denude of their shares of the executry goods, and, on that dependence, to have arrested in Balnaves the debtor's hands; others thought their right of blood a sufficient title to claim their proportion. But the LORDS found the executor could not assign the whole to Mr Duncan, so as to prejudge the other nearest of kin; and found the assignation null *quoad* their parts of the sum assigned, so that the right returning to Donald, the cedent, as if it had never been out of his person, his brothers and sisters can oblige him to denude of their shares, on which assignation they will compel Balnaves the debtor to pay them their three parts of the 1000 merks in his hands, with their proportion of the annualrents resting, which in this process they cannot so formally do.

*Fol. Dic. v. 1. p. 272. Fountainhall, v. 2. p. 216.*

1738. November 8. EWART *against* CREDITORS of NEWLAW.

A WIFE being confirmed executrix *qua* nearest of kin, the husband, who was also conjoined in the confirmation, for his interest, did, after his wife's decease, lead an adjudication upon one of the bonds confirmed. Many years thereafter, in a competition of creditors, the adjudication was objected to, as deduced by a person who had no right to the debt, the husband being only confirmed for his interest, which was at an end by the death of his wife. When the question came before the LORDS, an inquiry was ordered into the practice of the Commissary Court, with regard to the confirmation of married women. It was reported as the practice of that court, for the wife only to be confirmed; and upon this the adjudication was sustained, seeing it appeared that the husband