

1705. December 26.

ROBERT DICKIE Maltman in Alloway, *against* MARGARET COWIE and Others.

No 5.

An heir having made himself liable for his predecessor's debt by entering, the creditors were found entitled on his death to confirm themselves executors creditors to him, without taking decree of constitution.

ROBERT DICKIE maltman in Alloway, creditor to John Cowie elder of Mainsbothkenner in the sum of 500 merks and some annualrents thereof, having confirmed himself executor *qua* creditor to John Cowie (who was heir served and executor confirmed to old John his father) without constituting the debt by a sentence against him in his lifetime, THE LORDS sustained process at Dickie's instance against Margaret Cowie and others, as debtors to John Cowie younger; because, young John by entering heir, and confirming himself executor to his father being subjected in his own lifetime to the father's debts; as the Commissary might have decerned him, if alive, to pay the debt, so he might, upon an edict served without objection, and caution found, justly decern one of the father's creditors executor *qua* creditor to the son.

*Fol. Dic. v. 1. p. 279. Forbes, p. 58.*

1708. January 2.

MR DAVID RAMSAY Writer to the Signet, *against* WILLIAM NAIRN of Dunsinnan, Commissary-clerk of Edinburgh.

No 6.

Two persons, who successively confirmed the same subject as executors creditors within six months of the common debtor's decease, were brought in *pari passu*, the posterior executor paying a proportion of the expenses of the first executor, decerned and confirmed.

WILLIAM NAIRN having, as executor-creditor to Thomas Young, confirmed and got payment of forty bolls bear and malt belonging to him at his decease; Mr David Ramsay, within six months of Young's death, did also confirm himself executor dative *qua* creditor, and pursued Dunsinnan for payment of a proportional part of the price of the subject confirmed, as having an interest therein by doing diligence within the six months, in the terms of the act of sederunt, February 28, 1662.

*Alleged* for the defender; That he ought to be preferred, in regard he first confirmed the bol's, and the posterior confirmation is null; because, there cannot be two principal testaments, and goods once confirmed can only be pursued for at the instance of other creditors *via actionis* against the executor-creditor confirmed. Nor can there be two distinct executors confirmed upon the same subject, more than there can be two services of heirs; an executor being *hæres in mobilibus*: And the act of sederunt relates only to more executors conjoined in one testament, who are but as *cobæredes*.

*Replied* for the pursuer; Though two testaments simply dative as to the same subject, or one simply dative, and another wherein the executor is confirmed *qua* creditor, would be inconsistent; two executors creditors may be confirmed upon the same subject, as well as two heirs portioners may be served;