another's confirmation as principal executrix-dative: since there cannot be two principal executors to the same defunct; as was found betwixt Kennedy and Cumming, and the Creditors of Kinfauns.

REPLIED for the Pursuer,—Albeit the relict's confirmation was prior to his, yet his confirmation was expede before she did eik the goods now pursued to her first confirmed testament; and the making the said eik could be of no import, since the goods therein mentioned had been formerly confirmed by the pursuer, as executor-creditor, who therefore ought to be preferred to them, as if he had been confirmed *ad omissa*. 2. It is *jus tertii* to Dinwidie to found upon the relict's confirmation, since he derives no right from her.

DUPLIED for the Defender,—The pursuer's confirmation cannot subsist as a dative *ad omissa*, because it bears not to be such. Nor was the principal executor called thereto, which is necessary to the obtaining a dative *ad omissa*; because the principal executor has the privilege to eik, and may object against the ground of the executorship. 2. It is *jus proprium*, and not *jus tertii*, for the defender to found upon the relict's testament; because he stands assoilyied in an action at her instance as executor, and so has interest to maintain that absolviture.

TRIPLIED for the Pursuer,—That he could not call the executrix-dative to his confirmation; because, though her confirmation was prior to his, yet it was after the taking out and executing of his edict. 2. The absolviture obtained by Dinwidie against the relict cannot be obtruded to the pursuer, being *res inter alios acta*, wherein he is not concerned.

The Lords found the confirmed testament at the pursuer's instance null; in respect that, before the date thereof, the defunct's relict was confirmed executrix-dative, and the pursuer is also confirmed a principal executor, and not *ad omissa*, without calling of the first executor-dative.

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1706. *July* 19. WILLIAM BLACK and other Tenants of Gogar's, *against* HUGH M'GILL of Grange, Bailie of the Regality of Culross.

IN the action of reduction and declarator at the instance of William Black and the other tenants of Gogar's, against Hugh M'Gill, bailie of the regality of Culross, for damages the pursuers were put to by a poinding that followed on an unjust decreet of poinding the ground, pronounced by the defender, wherein he repelled this defence, that the heritor was not called;—the pursuer founded his libel on several Acts of Parliament concerning judges' administration of justice, particularly the Act 12. Par. 6. Ja. 2. whereby any officer wilfully trespassing in the ministration of his office of the law, and the same proved against him, shall tine his office year and day, and assyth the party as effeirs; and by all law, a judge, *qui facit litem suam* by doing injustice, is liable to the party's damage thereby sustained.

ANSWERED for the Defender,—That such processes against inferior judges for determining wrongously in a point of form are unprecedented, and cannot be sustained: For it is well known that their decreets are daily reduced by the Lords, not only for escapes in some formalities, but also for material iniquity. And the Acts of Parliament concerning the punishment of unjust judges, as the Act 45. Par. 2. J. 1. Act 17. ibid. Act 76. P. 14. J. 2. Act 26. Par. 5. J. 3. and Act 104. Par. 7. J. 5. relate only to such as trespass wilfully and deceitfully, or by refusing to administer justice *animo protelandi litem*, or by giving partial counsel; none of which can be applied to the defender, who is a man of known probity and integrity, and therefore should not be brought upon the stage for an innocent mistake in such a point of form as is libelled against him.

The Lords assoilyied the Judge. *Page* 127.

1706. *July* 24. JOHN DONALDSON factor for the Earl of Panmure, *against* the MAGISTRATES and TOWN of Brechin.

JOHN DONALDSON, factor for the Earl of Panmure, having charged the Magistrates of Brechin, for 1200 merks due to him by the town per bond, they suspended upon this reason, That the charger is guilty of usury for exacting more annual-rent than is allowed by law; and therefore the half of the sum belongs to the Magistrates as discoverers; for which they repeated a declarator. And for instructing the reason of suspension and declarator, produced a discharge granted by the charger for L.45 Scots, as one year's interest of the debt. And to evince that the undue exaction was not through mistake, but of design, they pointed at a note written by the charger on the back of the discharge, bearing, that he allowed three quarters retention only.

ANSWERED for the charger,—That he opponed the discharge, which bore, that retention was allowed conform to Act of Parliament, and the superplus more than the due annual-rent was only 20 shillings Scots, an inconsiderable fourty-fifth part of what was truly due: and the Lords are not to cognosce *de minimis*. And the taking thereof can only be imputed to an error or mistake in the calcul; for if he had had an usurary design, he would never have made his discharge so particular as to principal and annual-rent, but would have worded it so as the usury behoved to be otherwise proved than by the writ itself. Again, what is minuted on the back of the discharge is so far from inferring a presumption of usury, that it evinceth the contrary, viz. that how soon the charger was sensible of his mistake, he minuted on the back of the discharge that three quarters retention was only allowed, to the end the suspenders might be redressed at the next payment.

REPLIED for the suspenders.—In crimes of this sort, the *animus delinquendi* is to be noticed, which is certainly as great in small matters as in affairs of higher importance, if not greater; as it is the sign of the greater baseness and depravedness of spirit to commit usury for a small matter, than for a considerable sum, where the power of the temptation might in some measure alleviate the crime. But then *majus et minus non variant speciem*: and our law sustained a criminal