

C O N F U S I O .

1610. *July 20.* JOHNSTON *against* IRELAND.

HE who had sums of money to crave of a defunct, falling heir to him, may not the less pursue the defunct's executors for that debt, which is not confirmed nor taken away by the creditor's becoming heir to his debtor.

Fol. Dic. v. 1. p. 195. Haddington, MS. v. 2. No 1978.

No 1.

1630. *March 18.* DR HAIRT *against* PATRICK his Brother.

If a creditor fall to be executor to the debtor, there can be no action at the creditor's instance against the heir for that debt; because both creditor and defender are confounded in one person.

Fol. Dic. v. 1. p. 195. Auchinleck, MS. p. 75.

No 2.

1630. *March 18.* DALGARNO *against* FORBES of Byth.

AN executor may not take an assignation to the defunct's debts, and make assignation thereof to another person, to the effect the assignee may pursue the heir; for the debt being confounded in the person of the executor, who should have paid the same, he might not assign the same to another.

Fol. Dic. v. 1. p. 195. Auchinleck, MS. p. 75.

No 3.

* * Durie reports the same case :

A WOMAN being made assignee by her own son Patrick Dalgarno, to certain debts addebted by umquhile Forbes of Byth, her own son also by another marriage, to divers his creditors, which creditors had made the said Patrick Dalgarno her cedent, assignee thereto; and she pursuing registration of these bonds against the heir of the said umquhile Forbes of Byth debtor thereof, wherein the defender compearing, this defence was found relevant by the Lords, to stop the registration against the heir of the defunct, at the instance of this assignee constitute by the son, who was made assignee by the creditors, because it was offered to be proven, that the assignee Dalgarno was executor decerned to the defunct debtor; which defunct's testament being confirmed, the

No 3.

free gear thereof amounted to greater sums than would satisfy the foresaid debts, whereto he was assigned by the creditors; and he being executor, and the testament containing more free gear than would satisfy the debts acclaimed, and being confirmed, and he decerned executor before the acquiring of the assignation from the creditors; the said assignation made by them to him, must of necessity be converted for the weil of the defunct's heir, whom in law the executor is obliged to relieve of the defunct's debt, so far as the free gear of the testament extends to; and no other assignation can be made by him to any other assignee, which might prejudice the heir of that relief, which the pursuer's cedent, being executor, was obliged to give him of the defunct's debt, by the defunct's moveables. This allegiance was found relevant against this pursuer, albeit she answered, that she was a singular successor, and that her cedent was answerable, and had found caution in the testament, and the defender might convene him for any thing wherein he was obliged in law, for which this pursuer could not be liable; for he might allege, that the free gear was otherways exhausted, or that after diligence, the gear of the testament was not recoverable, which she could not know, and was not competent to her to allege; notwithstanding whereof the allegiance was found relevant to meet this assignee, as it would have met the executor, who was cedent, and the first assignee constitute as said is.

Act. Baird.

Alt. Lermonth.

Clerk, Gibson.

Durie, p. 508.

No 4.

1662. July 10.

KER against KER.

AN apparent heir having purchased in an adjudication of his predecessor's estate, led upon the apparent heir's own bond, brought a process upon that title against some havers, for exhibition of the rights and evidents of the lands, and delivery thereof; the defender *alleged* absolutor, because the adjudication was extinguished *confusione*, which was repelled.

Fol. Dic. v. 1. p. 195.

* * See The particulars of this case, *voce* COMPETENT, No 8. p. 2701.

1664. December 22.

CALDERWOOD against PRINGLE.

No 5.
An obligation
in a tailzie,
prestable by
heirs-male, is

THE deceast John Pringle of Cortleferry, by his contract of marriage with Alison Pringie his spouse, in *anno* 1632, obliged him to resign his lands in favours of himself and his spouse, and the heirs to be gotten betwixt them; whilks