

kin, confirmed in terms of that statute. The executry was vested in the person of Mrs Blair, as trustee, or as *hæritrix fduciaria*. The interest of the nearest of kin was only residuary; and their creditors had no title to interfere till all the creditors of the defunct had received payment.

No 49.

The Lord Ordinary had found the assignee preferable; but the Court *altered* his Lordship's interlocutor, and 'preferred the arrester to the subject *in medio*.'

Lord Ordinary, *Kennet*. For Mr Campbell, *Crosbie*. Alt. *D. Armstrong*. Clerk, *Home*.
Fol. Dic. v. 3. p. 191. Fac. Col. No 8. p. 16.

S E C T. VI.

Interpellation.

1621. March 28. SCUGALL *against* HORSEBURGH.

JOHN SCUGALL writer pursues John Horseburgh, son and executor confirmed to Alexander of that ilk, for registration of a bond of 1000 merks, granted by Alexander to the pursuer. *Alleged*, The free gear confirmed is exhausted by sentences and exoneration obtained before the intenting of the action. *Replied*, He cannot obtrude the exoneration, because he was in *mala fide* to have paid, and not intimate the creditors' pursuits to the pursuer, who was such a creditor as he could not misken, because he offers to prove that there was a testament testamentar wherein the defender was nominate executor; and the pursuer's debt was therein given up by the defunct in the defender's presence; likewise the defender, after the nomination before the confirming of a dative, intromitted with the defunct's goods, and so acknowledged the pursuer's debt, and so cannot obtrude an exoneration upon the dative.

Admit the reply and summons to the pursuer's probation, who protested for incident.

Act. *Nicolson*.

Alt. *King*.

Fol. Dic. v. 1. p. 275. Nicolson, MS. No 154. p. 109.

No 50.

Found that an executor cannot pay even upon lawful sentences, in prejudice of debts given up as due by the defunct in his testament; but that he must raise a multiple-pounding.