

Alleged for the defenders; The decret dative is null, and no process can be sustained thereon; because, by the act 26th, Parl. 1690, none can be confirmed executors-dative to a defunct, but the relict, bairns, nearest of kin, or creditors: And the pursuer is neither creditor nor nearest of kin to him, William Dunlop his nephew being nearer.

Replied for the pursuer; 1st, The nearest of kin not having opposed the pursuer's being decerned dative *ad omnia*, it is *jus tertii* to the defenders, to found on the right of the nearest of kin. 2dly, The pursuer being heir to the defunct, and creditor to the executrix *qua* nearest of kin, for his relief of moveable debts, might, conform to the act 41st, Parl. 1695, obtain himself decerned executor-dative to the defunct, as if he were creditor to him; to the end he may have access to make effectual the goods and debts omitted by the principal executrix.

Duplied for the defenders; 1st, It is not *jus tertii* for them to object against the pursuer's title, in respect the nearest of kin compares and concurs. 2dly, The pretence, that the pursuer is creditor for his relief, is nothing to the purpose, seeing that debt is not yet constituted; and titles which ought to be made up by legal diligence, are not to be made up by reply at the bar.

THE LORDS sustained process; in respect the pursuer's title of executor could not be quarrelled summarily before their Lordships by the nearest of kin; but he behoved to apply first to the Commissaries for reduction of the decret dative and preference.

Fol. Dic. v. 1. p. 169. Forbes, p. 361.

SECT. IV.

Reduction of Services of Heirs.

1626. July 22. M'CULLOCH *against* L. MERTON.

IN an action of declarator of bastardy, at the instance of M'Culloch *contra* L. Merton, the LORDS sustained an exception, founded upon the service of an heir to the alleged bastard, which service being a sentence standing, the LORDS sustained as sufficient to elide the gift of bastardy, and to exclude the King's right, so long as the said service stands untaken away, and which the LORDS so found, albeit the service was not retoured, nor past the chancellary; and which, albeit it should never be retoured, seeing the person served died shortly after the service; and so the pursuer *alleged*, that the said service not retoured ought not to elide this pursuit, the same being an imperfect and null writ, which would

No 11.

found that his title, in a process at his instance against the defunct's debtors, was not quarrelable summarily before the Lords by the nearest of kin comparing for his interest, but that he must first apply to the Commissaries for reduction of the decret dative and preference.

No 12.

An exception in a declarator of bastardy was sustained, being founded on the service of an heir to the alleged bastard, which being a standing sentence, the Lords found sufficient to elide the gift, so long as it stood unreduced; and this was found, altho' the service was not re-

No 12.
retoured nor
past the chan-
cery, and al-
though it
should never
be retoured,
the person
having died
shortly after
the service.

never furnish action to him who was served, and which ought not to produce any benefit to him, and consequently ought not to furnish any argument in his favours against this pursuit; notwithstanding whereof the service was sustained, as said is.

Act. *Nicolson et Lawtie.*

Alt. *Aiton et Neilson.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 170. Durie, p. 224.

1627. February 16. Lo. COLVILL against HERD.

No 13.
A brother re-
toured heir to
his father in
an annual-
rent, prefer-
red to his sister
who had been
retoured heir
to the same,
when he was
abroad, with-
out necessity
of reduction.

IN a suspension of the Lo. Colvill against Mr Walter Herd, who was residenter, and dwelt with his family, in Vezon in France; and who, as served and retoured heir to his said umquhile father, craved payment of an annualrent out of the Lo. of Colvill's lands, wherein his said father died infest; and against Christian Herd, sister to the said Walter, who was retoured heir to her father, in the same annualrent also, before the said Mr Walter's retour, and who had thereupon obtained two sentences before the Lords against the suspenders; and so the brother and sister craving the right thereof, the sister, in respect of her prior retour standing, and sentences foresaid, which she alleged should give her preference, while the same were reduced, seeing also she produced a note of a sentence of excommunication against her brother for papistry, whereby she alleged, that he could enjoy no benefit within the kingdom; and the brother contending, that seeing he was retoured heir, and had of the law the preference to females, the excommunication should not debar him from his civil right, and the right due to him by nature, seeing there was also produced for him a testificate subscribed from the Magistrates of that town where he remained, bearing him yet to be living, and that he had wife and children begotten in lawful matrimony;—THE LORDS, notwithstanding of the excommunication and prior retours and sentences allèged for the sister, preferred the brother without necessity of reduction; and found, that he ought to be answered in this right; and if he was excommunicate, his right would accresce and pertain to the King, and not to the sister, *eo casu.*

Act. *Primerose et Bruce.*

Alt. ———.

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 170. Durie, p. 276.

No 14.
A person was
retoured heir
to his grand-
father, and
charged the
superior to
enter him.
Found, that

1627. December 14. BEG against The BAILIES of LANARK.

JOHN BEG being retoured heir in some lands in Lanark, as heir to his goodsire, charges the Bailies of Lanark to infest him therein, who suspend; and, in the suspension, compares one Gemmil, and is admitted for his interest, and allegeth,