No 1. That, albeit the bairn had not executed the whole goods **before his decease, yet** there was no place to the nearest of the mother's kin to claim any part of these goods; but the same pertaining to the only bairn, must be transmitted in the person of the nearest of kin to the bairn. This allegeance was repelled; and the right of the goods unexecuted by the bairn was found (so far as might befall to the mother for her third) to pertain to the nearest of her kin, and not to the agnates of the bairn: Thereafter this cause was ordained to be heard in he Lords presence, and was heard, but not decided.

Durie, p. 667.

1662. *January* 25. BELLS *against* WILKIE.

No 2.
Any of the nearest of kin dying before confirmation of the defunct's testament, transmit nothing to their executors, their own right being established only by the confirmation.

Found that *jus representationis* had place, where the executor being nearest of kin died, the testament not executed.

ISOBEL, GRIZEL, and DOROTHY BELLS, executors confirmed to umquhile Patrick Bell their brother. Isobel dies before the said testament is executed. Her son James Wilkie is executor confirmed to his mother, and as executor, obtains a decreet before the English Judges, finding that he had right to his mother's third of the confirmed testament of his mother's brother. This decreet by a review, is brought in question before the Lords, upon this ground of iniquity, committed by the English Judges, that there is no representation in moveables; that the upgiving of an inventory, and confirming an executor, is only *nudum officium*, which dies with the executor, and if there be more executors, it accresseth to the rest, who, if they all die, there is necessity of a dative *quoad non executa* to the defunct, and the executry confirmed is noways transmissible by assignation before sentence; and consequently, not to any by way of representation. It was *alleged*, to have been the confirmed and constant tenet and custom that in such case there is no representation, but that the goods as well as the office accresseth, where the testament is not executed. It was *answered*, That the difference is great betwixt executors confirmed being nearest of kin, and executors strangers to the defunct, or who are not nearest of kin, as they have nature's right, and the legal right competent to them; so the confirming dative, has the same to be in their person as effectually as the serving of an heir doth in the case of heritable bonds, and heirship moveables; and it were against all reason, that the calamity of one dying executor having nature's right so established in her person, should prejudge her children, when the delay of new execution doth not probably lie upon her, but upon other impediments; and if her creditors should in her time arrest any of the executry before sentence, and she in the mean time die; it were also against reason and justice, that the creditors should be prejudged, who as they may affect the executry before sentence, so may the same executry be transmitted by an assignation, if the executor have right as nearest of kin, which is more than *nudum officium*, and our law and pratique make nothing to the contrary.

The matter being fully and learnedly disputed and seriously considered by the Lords; they found, that the son had a right to the mother's third, and that *jus representationis* had place where the executor being nearest of kin died, the testament not executed; and declared they would decide just so in time coming. No 2.

Fol. Dic. v. 2. p. 2. Gilmour, No 26. p. 21.

*** Stair reports this case:

1662. *February* 12.—GRIZEL and ——— BELLS, raise a reduction against James Wilkie, of a decreet obtained at his instance against them, in *anno* 1659, whereby the said James Wilkie being executor confirmed to his mother, who was one of the sisters and executors of umquhile Patrick Bell their brother, in which confirmation the said James gave up the third of the said Patrick's goods, and thereupon obtained decreet against these pursuers, as the two surviving executors, to pay to the said James his mother's third part of her brother's means. The reason of reduction was, that the decreet was unjust, and contrary to the law and custom of this kingdom, whereby there is no right of representation in moveables as in heritage, neither doth the confirmation of the executors establish in the executors a complete right, until the testament be executed, either by obtaining payment or decreet; and if the executor die before execution the right ceases, and is not transmitted to the executor's executor, but remains *in bonis defuncti* of the first defunct, and therefore executors *ad non executa* must be confirmed to the first defunct; which being a constant and unquestionable custom, one of the three executors deceasing before executing the testament, her right fully ceases; and both the office of executry and benefit accresces to the surviving sisters, as if the deceased sister had never been confirmed executrix. The defender in the reduction *answered*, That this reason was most justly repelled, because, albeit it be true, that the naked office of executry doth not complete the right in the executor's person, and doth not transmit, yet it is as true, that by the law of God, and of this land, (which is cleared by the express statute, Parliament 1617, anent executors), children surviving their parents, had always a distinct right from the office of executry, of their bairns' part of gear, which belonged to them without any confirmation, and could not be prejudged by the defunct, and was sufficiently established in their person *jure legitimæ*, if they survive their defunct parent, especially if they owned the same by any legal diligence; therefore, after which, if a child die, the child of that bairn will come in with the survivors; and yet there is no right of representation, because *jure legitimæ*, it was established in the bairn's person, by surviving and owning the same; as well as the goods, are established in the person of a stranger executor, by executing the testament; and by the said act of Parliament, that benefit is extended, not only as to the bairns' part, but to the bairns,

No 2.

in relation to dead's part, whereinto they succeed as nearest of kin, and therefore they have a right to the moveables, not by virtue of the confirmation or office of executry, which before that act carried the whole benefit, as is clear by the act, but by a several right, *jure agnationis*, as nearest of kin; and therefore, though the nearest of kin be not confirmed executor, but others be nominated, or datives confirmed, the executors are countable to the nearest of kin, who may pursue them therefor; and therefore, if the nearest of kin do any legal diligence, either by confirmation or process, yea, though they did none but only survive, the right of nearest of kin *ipso facto* establishes the goods in their person, and so transmits; and whereas it was alleged, that the contrary was found by the Lords, in *anno* 1636, observed by Durie;* it is also marked by him, that it being sofound by interlocutor, it was stopped to be heard again, and never discussed; neither can it be shown by custom or decision, that the executors of children, or nearest of kin, were excluded from recovering the part of their parent, which survived and owned the benefit of the succession.

"THE LORDS assoilzie from the reduction, and adhered to the former decreet."

Stair, v. 1. *p.* 96.

*** A similar decision was pronounced, 14th February 1677, Duke of Buccleugh against Earl of Tweeddale, reported by Gosford, No 15. p. 349. *voce* ADVOCATE; and, by Stair, No 8. p. 2366, *voce* COLLATION.

1662. *December.* HAMILTON *against* HAMILTON.

No 3.
Any of the nearest of kin dying before confirmation of the defunct's testament, transmit nothing to their assignees, their own right being established only by confirmation.

MR THOMAS HAMILTON advocate, being executor creditor to umquhile James Hamilton merchant, and having licence, pursues Hugh Hamilton for payment of a great sum of money, alleged due by him to the defunct. It was *alleged*, 1*mo*, That by back-bond it was declared, that this sum is not payable, unless Hugh Hamilton should obtain compensation for the like sum owing to him by the Heirs and Executors of umquhile Patrick Wood, and that by virtue of, and upon an assignation to the defender, by the said umquhile James, in and to an equivalent sum owing to him by the said umquhile Patrick, whereunto he did assign the said Hugh; *ita est*, he has not obtained the said compensation, but the process long ago having been pursued against the said Hugh, it is not as yet put to a close, nor do the executors of Patrick Wood insist, so that Hugh is not *in tuto*; 2*do*, Hugh offered to pay what was owing to this pursuer, and for which, he was decerned executor, which he is holden to accept, seeing his interest by payment ceaseth; and that as yet there is no testament confirmed, by which the pursuer may be obliged to do diligence for any inventory, or

* See No 1. p. 9249. and No 6 p. 8050.