

*officium*, being countable to those who, by law, have right thereto; and so, when the whole moveables fall to the nearest of kin without division, the law transmits the whole right and property, if there be but one, to him solely; and if there be more in *pari gradu*, to every one of them alike, if the defunct, by legacies or nominations, dispose not otherwise thereof. *2do*, They found that great inconvenience inevitable, if it should be otherwise, that where a defunct intended only to give a right of trust or office to an executor, or where the Commissaries do surrogate, the whole estate and goods might be taken away from the children or nearest of kin of the defunct, if the executors were either for the time at the horn, or should thereafter be denounced; neither could the finding of caution be sufficient remedy, few persons being refused, and it being enough to make them responsible that they are *tenti* and *reputati* to be such; neither does the finding of caution import that the executor hath the right of property of the whole goods which fall under testament, and that the nearest of kin have nothing but a personal action, because caution is found to secure against the malversation of executors, and that through their negligence and intromission, the nearest of kin or legatary shall not be prejudged; but, as to the goods themselves, or debts before they be actually intromitted with, they may pursue therefor; and, in case the executor die, or be at the horn, they may affect the same by real diligence, and obtain decreets thereupon. Albeit this decision was only where the competition is betwixt the nearest of kin and the donatar to an executor's escheat; yet it is thought, upon the same ground, if the case were betwixt the nearest of kin and an assignee constituted by an executor to a bond or decreet before payment be made by the debtor, that the nearest of kin will be preferred; as likewise to a creditor of the executor's arresting in the debtor's hands, albeit it was otherwise decided in a case of the Lord Southhall's *contra* the Lord Loudoun, but that it was in the time of the English.

Gosford, MS. No 428. p. 218.

1686. November 6. GRÆME of Claverhouse *against* —————.

WILLIAM GORDON, second son to French, having assigned a debt confirmed by him in his father's testament, to his eldest brother the heir, before the cedent had obtained a sentence for it, and the assignee being forfeited for treason, Colonel Græme of Claverhouse, the donatar of his forfeiture, pursued the debtor for payment.

*Alleged* for the defender; *1mo*, By our law executors cannot assign *ante sententiam*. *2do*, The pursuer must confirm before sentence; and this defence being against the pursuer's title is not *jus tertii* to the defender.

*Answered* for the pursuer; The executors that have *nudum officium* cannot assign till sentence is obtained, till which time the testament is looked upon as *non executum*; yet the cedent here being executor *qua* nearest of kin, *hære-*

No 86.

No 87.

A debt was assigned by an executor before he had obtained sentence for it. The assignation found good.

No 87. *ditas est adita* by confirmation in the name of himself, or any other executor, though a stranger; and his interest as nearest of kin, trasmits after the confirmation, as the right of legitim transmits before, or without any confirmation, albeit as to the point of execution there must be a new confirmation of *non executata*, when sentences are not recovered against debtors; and it may be debated, that as to the interest of nearest of kin, or legitim, there needs no confirmation *quoad non executata*, where the goods or debt were once confirmed, and the executor died before sentence, (though the custom of the Commissary court appoints confirmation of *non executata* in all cases) seeing the interest of nearest of kin is transmitted by confirmation; and an executor may receive the sums confirmed without sentence, if the debtor please, who will be effectually secured by the executor's discharge. *2do*, It is *jus tertii* to the debtor to require the pursuer to confirm before sentence, seeing that defence is only competent to another executor or creditor of the defunct; and the Lords' sentence will secure the debtor.

' THE LORDS repelled both the defender's allegiances in respect of the answers.'

*Fol. Dic. v. I. p. 278. Harcarse, (EXECUTRY.) No 471. p. 128.*

1737. June 23. JAMES MITCHEL *against* MITCHEL of Blairgorts.

No 88.

Though an executor-creditor, or nearest of kin, die before executing the testament, there is no place for an executor *ad non executata*.

MITCHEL of Alderston being debtor to James Mitchel taylor in Edinburgh, by bond, the same, after the creditor's decease, was confirmed by Patrick Mitchel his brother, upon the title of executor-creditor. Patrick the executor died, without renewing the bond in his own name; after whose death, his son James confirmed it, as *in bonis* of his deceased father, and then conveyed the bond to Mitchel of Blairgorts.

Another James Mitchel being creditor by decret to the said James Mitchel, the son of Patrick, obtained himself decerned executor-dative to James Mitchel, the original creditor, upon this ground, that, by Patrick's dying without executing the testament, the bond returned to be *in bonis* of the original creditor; to whom James Mitchel his debtor came to be nearest of kin, upon his father Patrick's decease; and, on this title, he insisted in a process, on the act 1695, against Blairgorts; concluding, it ought to be found, that he had the only right to the bond.

For Blairgorts it was *pleaded*; That the bond in question was fully established in the person of Patrick, without the necessity of any execution; and that, by his decease, it transmitted to his son, without falling back *in bonis* of the first defunct, so as to give access to a confirmation *ad non executata*; in support whereof it was observed, that, though executry is but an office, and, as such, gives no right of property, unless the executor execute the testament, either by getting payment, or renewing the bond, or taking decret; yet where