NEAREST OF KIN.

1633. *January* 31. WILSON *against* NICOLSON.

No 1.
The nearest of kin of a married woman, and not the agnates of her children deceased, found to have right to confirm her third of the moveables: Not however finally decided.

THE only bairn, surviving both father and mother, being confirmed executor to both, and thereafter dying before all the goods were executed, the nearest of kin to the mother obtains himself executor-dative *ad non executa*, and pursues for her part of these goods, wherein the nearest of kin to the bairn, claiming the whole right of all the goods, as well not executed as executed, to pertain to him, as for the mother's part, (which was only claimed by the executor *ad non executa*) in respect that he *alleged*, That that bairn being the sole bairn of his father and mother, he had only right to the mother's part of the goods, he being the only bairn, and having the only right of succession to her, without division; for albeit the bairn was confirmed executor to his mother, yet that confirmation, which was the only way that gave him a right and title to pursue for the goods, albeit not executed in his lifetime, yet took not away from him the right of blood and nature, which gave him full right to the total succession, *ex asse* to his mother, without division; for, in this case, *quoad matrem*, the bairn, as he succeeds to her *in toto asse*, which is the legitim, *quoad matrem*, there being *quoad eam nulla divisio vel distinctio assis per partes*, where no testament is made by her, so that the confirming of him executor to her, could not derogate to that right of his universal succession, as in other executries, where the executor will not have right to the whole; for, in this case he *alleged*, That the confirmation of the bairn as executor, is not the confirming, nor giving an office to him, as in other cases, where the confirmation of an executor is but an office, which makes the executor liable to the nearest of kin; whereas, here it is not an office, which another may execute, and become accountable therefor; but the whole right remains with the bairn, and must follow such as may be his heirs; and, therefore, he *contended*,

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.