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still be confirmed executor to it, to whom it must be paid.

the executor, and to the defunct's nearest of kin as ann; and as to the profits of the glebe, it is part of the ann also.—*Replied*, That there is no ann due to the executor as executor, but only to the wife and bairns where there are any; nor can the profits of the glebe be due, unless the glebe had been sown.—*Duplicated*, That the ann is due to the nearest of kin, who may confirm the same if they please, and there is *par ratio* for the glebe.

THE LORDS found the ann due, and that it might be confirmed by the nearest of kin, but nothing due for the glebe, unless it had been sown before the defunct's death; and not being sown, the intrant might lawfully enter thereto, and to the manse.

Gilmour, No 160. p. 113.

1671. December 21.

Mr ARTHUR GORDON *against* LAIRD of DRUM and Mr FRANCIS IRVING.

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An executor having taken decree in his own name against a debtor of the defunct, but dying before payment was made; in a competition betwixt a donatar of his single escheat, and the nearest of kin of the first defunct, the Lords preferred the nearest of kin.

THE Laird of Drum being debtor in two bonds to Alexander Menzies, the same was confirmed in his testament by his two executors, who having obtained sentence, establishing the debt in their person; Margaret Gordon, one of the executors becoming at the horn, her escheat was gifted to Mr Francis Irving; the surviving executor having assigned these sums to the nearest of kin, he transferred the same to Mr Arthur Gordon, who now pursues the Laird of Drum for payment. It was formerly found in this process, No 78. p. 3884. that as to this sum, the testament was executed by sentences, establishing the debt in the executor's person, that the surviving executor could only assign the half, and that the other half did not accresce to him, but to the executors of Margaret Gordon; yet seeing the nearest of kin would have access against Margaret Gordon's executors, the LORDS allowed them to be confirmed executors to her, and thereupon to have sentence for the whole. Compearance was made for Mr Francis Irving, donatar to the escheat of Margaret Gordon, who *alleged*, That her executor could have no right, because she being rebel, all moveable sums fell under escheat, and belonged to the donatar, for she being executor to Menzies, was thereby proprietor, and *domina bonorum mobilium*, as *hæres in mobilibus*; for, though wives and children, nearest of kin, legatarys and creditors of defuncts, have an interest in their moveables, yet that is no right of property or dominion, but only an obligation lying upon the executor, to satisfy the several interests; but, the dominion is only in the executor, who may uplift, discharge, and dispoise at his pleasure; and the rebellion of the proprietor does confiscate every right. It was *answered*, That the office of an executor is not a right of property or dominion; but the executor is curator *honorum*, given, that the wills of defuncts be not ineffectual, or their goods dilapidated; and therefore the dominion, although it be not formal and complete, yet it is originally stated in the relict, whose share is no succession, but a division of that communion of goods betwixt the hus-

band and her, *stante matrimonio*, and in the bairns or nearest of kin, who in the same way have the dominion of moveables, as heirs unentered have of heritage; and as their forefaulture would forefault the heritage, so the escheat of the relict bairns, or nearest of kin confiscates their part of the moveables; neither have they only an obligation upon the executor, but they have an action of division and restitution, or *ipsa corpora*, if they be not disposed of, or redacted in money; and, albeit the testament be held executed by sentences, establishing the goods and sums in the executor's person, and that after such sentence, executors must be confirmed to these executors, because it is to be presumed, that they have satisfied the interest of the wife, bairns, and all others, after which indeed they have *plenum dominium*; but till then, or till they actually intromit, and uplift the defunct's goods and sums, and so by consumption, the property is altered, they have but an office and power of administration; and, it is evident, even in that case, they have no dominion, because they cannot gift, nor dispose the defunct's sums so established; but the defunct's wife, bairns, or legatars, or creditors arresting, if the debtors allege a discharge from the executor, if it be given *gratis*, it will not defend them, neither will an assignee of the executors be preferred, unless for an onerous cause; and that not upon the account that the discharge or assignation is fraudulent in prejudice of the parties having interest, who are all creditors to the executor; for then it would take no place, if the executor had a plentiful estate to satisfy *aliunde*; but even in that case, all parties having interest in the defunct's executry, will be preferred to any having right from the executor, unless it be *ex causa onerosa*; yea, if a creditor of the executors did first arrest, a creditor of the defunct arresting thereafter, would be first preferred. All which show, that the executor, even after sentence, hath not the *dominium* of the executry. *2do*. Though the executor were accounted heir, as having a power of disposal; yet that doth not import dominion, for so have factors, tutors, and curators; and yet any sentence or security taken by them, doth not alter the property of constituents or pupils, and though the executor be *quasi heres in mobilibus*, yet it is *ex fidei commissio*; and the executors are fiduciaries, who are obliged to restore to the wife, bairns, nearest of kin, legatars and creditors; and fiduciaries have not *plenum dominum*, but affected with an obligation to restore; but the restitution is a real burden, and if the rebellion of the executor should confiscate the goods, and exclude the wife, bairns, nearest of kin, legatars, and creditors of the defunct, the grossest inconveniencies would follow, that by collusion, parties already rebels, or that being insolvent, might become rebels, being executors, they or their confidants might take the gift of their own escheat, and enjoy the benefit of the executry, excluding all the defunct's interests; and albeit executors do find caution, yet that is but *ad majorem cautelam*, and goeth of course, most insufficient persons being accepted as cautioners. It was answered, That executors, after sentence, have certainly the dominion of the executry, which is necessary for the execution of testaments, and most conson-

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ant to our known custom, whereby after sentence, the goods ceased to be *in bonis defuncti*, and are *in bonis executoris*; neither doth it follow, though the executor is by law restrained to dispoise in some cases; for even though the defunct's interests had a privilege, yea, an hypothec, that hinders not the executor to be *dominus bonorum*, so that the interest of all others can be but an obligation, or at most a privilege or hypothec. But the forfeiture, or rebellion of the proprietor, must still make the goods to belong to the King; and, as to the inconveniencies urged, it were more just to reform the abuse in taking insufficient cautioners; and the defunct's interests have another remedy, by application to the Exchequer, who will prefer them to the gift, or take a back-bond in their favours; and whatsoever might be alleged for the relict, or for the legitim of the bairns, yet, as to the dead's part, the rebellion of the executor must make it fall to the fisk, as the rebellion of the defunct would have done, and it is against reason that the rebellion of none would confiscate these goods. It was answered, That the rebellion of the wife would confiscate her part, and the rebellion of the bairns, their part; and the rebellion of the nearest of kin, their part; and the rebellion of the executor, that which is proper to himself, *proprio nomine*, viz. the third of the dead's part, and so much of the executry as he had satisfied to the defunct's interests; and, it were against all reason, that the same goods and sums should become confiscated by the rebellion of two parties, viz. both of the executor and also of the wife, bairns, and nearest of kin; for there is no doubt but their rebellion would make the executor countable for for their share.

THE LORDS found that the escheat of the executor could carry no more than what was proper to himself, and not the share of the relict, bairns, or nearest of kin, but that their rebellion would confiscate their share.

But whether thereby the legatary and creditors, as to the interest of the wife, bairns, and nearest of kin, that should happen to fall under rebellion, would be excluded, and the goods belong to the King, without burden of these debts in the same way, as if the defunct had been in rebellion,

THE LORDS here had no opportunity to determine.

Fol. Dic. v. 1. p. 277. Stair, v. 2. p. 31.

* * * Gosford reports the same case :

THE Laird of Drum being debtor by two bonds, which were assigned to Alexander Menzies; the said Alexander did nominate Margaret Gordon and William Menzies his son, his only executors, who having confirmed these bonds, and obtained decret against Drum; before payment, the said Margaret died; and her son being then only executor did assign these two bonds and decret, which, by progress, came in the person of Mr Arthur Gordon, who thereupon did charge Drum for payment; who having suspended, in the discussing thereof, compearance was made for Mr Richard Irving, and produced for his in-

terest a gift of the escheat of the said Margaret Gordon, one of the two executors who had recovered sentence against Drum; and thereupon *alleged*, That he ought to be preferred as to the equal half of these two bonds confirmed, because the testament being executed by both the executors jointly, the equal half of the sums decerned belonged to the said Margaret, and were *in bonis ejus* when she died; and, as none could have right thereto but her executors, so she being denounced rebel and at the horn, it did fall in escheat to the King and his donatar. *2do*, Executors, after sentence recovered against the debtors of the defunct, have *absolutum dominium* as to these debts or moveable goods, for which sentence is recovered, seeing they may grant valid discharges thereof, or assign the same to their own creditors in satisfaction of their own private debt; and as, *per cessionem*, they may transfer the right and property to their assignees, so *delinquendo*, the right thereof falls to the King *de jure*. *3tio*, It appears that the right and property belong to executors after testament is executed *per sententiam*, because the executor dying who recovered sentence, the nearest of kin of the defunct, to whom he was executor, can have no right thereto; but, his own executors, or nearest of kin, will have right, and can only be confirmed as to those debts or goods; and there remains nothing but a personal action to the nearest of kin, or legatars of the first defunct, against his executors on their caution to make the same furthcoming; seeing, by our law, an executor is *heres in mobilibus*; and as *heres in adeundo hereditatem* by service and retour acquires the right and property of heritage, so executors by confirmation and sentence recovered, establish in their person an undoubted right of property as to all debts and moveables. It was *alleged* for the charger, That he ought to be preferred notwithstanding, because the conjunct executors not being nearest of kin, but having *nudum officium* only, albeit sentence was recovered at her instance and her sons, who was nearest of kin to the defunct, Alexander Menzies his father, yet the money not being uplifted by virtue of the decret, and actually intromitted with by the conjunct executor, the dominion and property thereof was never settled in her person, but belonged to William Menzies, as nearest of kin and only child to Alexander his father; seeing, by our law, the nearest of kin or legatars of the defunct have the right of property transmitted to them by the death of the testator, at least have *jus tacite hypothecæ* in all goods and debts before they be actually intromitted with by the executor, and so confounded with his own goods and moveables, that *corpora non extant*, and the debts which were due by bonds or decreets, are taken up *et numeratione consumuntur*: But where decreets are only gotten at an executor's instance who hath no interest to pursue but *ratione officii*, the nearest of kin, or legatar's pursuing the debtor before payment, will be preferred to the executor or his creditors, or the fisk and King's donatar, who, by the executor's escheat can have right to no more but his own debts and moveables settled in his person, and whereof he had *plenum dominium*, and might dispose thereof as his own property. As to the arguments adduced for the donatar, it was an-

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swered, That an executor, by our law, was not truly *hæres in mobilibus*, but analogically and *tanquam hæres* only; and, by confirmation, he only becomes administrator of the defunct's will, and thereby obtains the office and trust so settled in his person, that he may pursue or grant discharges or assignations of the defunct's debts or moveables, which factors or procurators may likewise do, having sufficient warrants or mandates for that effect, and yet they have no right of dominion or property but in the case of actual intromission; and therefore, so long as the debts remain in being, and not confounded by numeration or possession, the granter of the trust or office himself will always be preferred to the administrators or his creditors or the donatars to his escheat; and, albeit an executor recovering sentence die before intromission, his nearest of kin can only be confirmed executor as to these debts, yet it does not thereby follow, that he had *plenum dominium* and property; seeing, when his nearest of kin are confirmed, they are liable to the legatars and nearest of kin of the first defunct, in that same manner as the first executor was. Likewise, the finding of caution to be countable implies no less, but, that any interest they had, was only as administrators or executors of the defunct's will; and the reason why the nearest of kin must be confirmed, is, that the first testament being fully executed by sentence recovered, there can be no executor *quoad non executata*, and the forms and solemnities of the commissariat court admit only of an executor to be confirmed to the first executor who did execute the office, and can only properly give a discharge to the debtors against whom sentence was recovered; and, if this were not admitted, that an executor had only a right of trust *et ratione officii*, then this great inconvenience and absurdity will follow, that a stranger being nominated executor, or surrogated by the Commissary, who is at the horn, or may be denounced for his own debt, the whole estate or goods belonging to the nearest of kin of the defunct, would be taken away from them to their utter ruin, and of their creditors, they having no remedy but to pursue the cautioners of the executors, who, for the most part, are irresponsible persons, and only taken *pro more*. THE LORDS, after they had fully considered this case, and all that was alleged for both parties, so as to make this decision a practice for the future, did prefer the charger, as having right from the surviving executor, who was nearest of kin; and found, that by the rebellion of an executor, nothing did fall under his escheat, but what properly belonged to him, either as legatar or as having right to the third part of the defunct's third, by act of Parliament, to which they were moved by these two reasons: *Imo*, That when any person dies, having a moveable estate, that in case he leave a wife and children, or children only, there is a bipartite or tripartite division; and accordingly, the law transmits and settles the right of property and dominion, and the executor, by act of Parliament, hath only right to the third part of the defunct's third, whereupon he may dispose by legacy; and that, in contemplation of the trust and pains he is to take in the execution of the defunct's will, which supposes necessarily, that as to all the rest, he hath only *nudum*

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 legatars 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 decret 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-*

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