

* * Gosford reports the same case :

No 101.

In a pursuit at James Paton's instance against Leishman, who was left executor by the pursuer's father, for making count and reckoning for the whole inventory of the testament, deducting debts and legacies, it was *alleged* for the defender, That he ought to have retention of the act of Parliament 1617, anent executors, whereby it is expressly provided, that whereas, before that time, executors had right to the whole third, whereupon the defunct could dispone by legacy, albeit he were only nominated executor, and not left universal legatar, he being a stranger, that as to the future, they should only have right to a third part of the defunct's third, as to which they are secured by the said act of Parliament. It was *replied*, That the act of Parliament did only militate and take effect where the defunct did not exhaust his third part of the free goods by legacy, and so did not hold in this case, where the legacies did amount to the whole third, as had been found by several practicks in the year 1638, and others.—THE LORDS having seriously considered the act of Parliament, and the common law before the act of Parliament, whereby testators had full power to exhaust their third by legacies, as also the former practicks, did find, that the act of Parliament did not derogate from the former law, and that, accordingly, it hath been since decided, and never controverted since these decisions; as also, that the act of Parliament did not restrain testators to dispose by legacy of their whole third part, and was only corrective of the former custom giving to strangers-executors, the full right of the whole third, where no legacies were left; and therefore they found, that the act of Parliament could only be in force in that same case where the defunct's third was not exhausted by legacies, and so repelled the defence; and found the defender could not crave retention upon that ground, especially seeing executors nominated for strangers have it in their power to accept of the office, or refuse the same.

Gosford, MS. No 674. p. 398.

* * See 25th January 1681, Bathgate against Bowdown, No 140. p. 1049.

1676. November 28.

KER against KER.

No 102.

Executors-
dative *qua*
nearest of kin
have no right
to a third of
the dead's
part.
See No 34.
p. 3498.

JOHN KER, as having right by assignation from Robert Ker, and also as having the gift of the escheat of Mark Ker, and being confirmed executor-creditor to Mark, pursues Jean Ker as executrix confirmed to James Ker her brother, for payment of the shares of the executry befalling to Robert and Mark Kers. The defender *alleged* no process upon the pursuer's title as executor-creditor, because it is posterior to the summons. It was *answered*, That he having pur-

sued *ab initio* upon the gift of Mark's escheat, and finding, by the defences, that a part of the executry was bonds bearing annualrent, without a clause of infestment, which falls not under escheat, he did confirm, and which the Lords ordinarily allow.

THE LORDS sustained both the titles.

The defender further *alleged*, That Mark could have no share, because he died after confirmation of his brother's testament, but before execution; and there being no place for representation in moveables, none representing him can have interest. *2do*, The escheat can only extend to what was established in Mark's person, and not to an action against the executor, upon the interest of nearest of kin. It was *answered*, That albeit there be no representation in moveables, so that those who die before the defunct can have no right; yet those who survive the defunct have the right of children, and the right of nearest of kin, whereby all executors are liable to them for their share, and as to their interest, they neither need nor can do more; but they, or those representing them, may at any time pursue therefor. *2do*, Whatever belongs to defuncts, if moveable, whether obligation or action, it falls in their escheat.

THE LORDS repelled both these defences; and found, that albeit Mark died after the confirmation, and before execution, the pursuer, as executor or donatar to his escheat, had right to his share.

The defender further *alleged*, That as to Robert's share, he had discharged the same by a minute of contract produced. It was *answered*, That the minute was null wanting witnesses, and exprest nothing of the discharge of James's executry, but only of the executry generally. It was *replied*, That, by a back-bond produced, it is evident that Robert's assignation is without a cause onerous, and therefore the cedent's oath is relevant against the assignee.

Which the LORDS sustained.

The defender *alleged* further, That she had right to a third, for executing the office, by the act of Parliament.

Which the LORDS repelled as competent only to strangers when executors nominated, whereas the executrix was executor-dative, and one of the nearest of kin. See QUOD AB INITIO. VIHIOSUM.

Fol. Dic. v. r. p. 278. Stair, v. 2. p. 467.

*** See This case by Dirleton *voce* NEAREST of KIN.