

1681. *January 25.*The LEGATARS of ARNOT of Dulcome *against* GEORGE LINDSAY his Executor.

No 103.

An executor cannot have both a third of the confirmed testament and his legacy besides, but may chuse the most beneficial.

THE LORDS found the executor could not have both a third of the confirmed testament and his legacy bond, but he behoved to make his election, and if he choiced the legacy, then, if it was short of a just third, he might claim as much of the defunct's part as will make it up, in case the defunct's part be not exhausted with legacies; and that the other legacies come in *pari passu* with his: But found, that the legacies were preferable to the executor's third; so that, if the executor should renounce his legacy, and take him to his third, all the legatars would be paid before him, because his accepting the office is *voluntatis*.

*Fol. Dic. v. 1. p. 278. Fountainball, MS.*

\* \* \* Stair reports the same case :

The deceast Alexander Arnot of Alcarno, having nominated George Lindsay his executor, and left him a legacy of 1500 merks, and also legacies to several other persons, they pursue the executor for payment of their legacies, who *alleged*, That, by the act of Parliament 1617, anent executors, executors nominated, being strangers, have the third of the dead's part for executing that office, and though a legacy be left to the executor, he may, at his option, either crave the legacy alone, or the third of the dead's part alone; and here he craves the third of the dead's part: And, by the said statute, it is appointed, 'That after satisfaction of the relict, bairns, and creditors, the executor has the third of the dead's part,' wherein the act doth not prefer the defunct's legatars to the executor; and therefore he must first deduct the third of the dead's part, and, if the legacies exceed the other two thirds, they must suffer a proportional abatement. It was *answered*, That albeit the statute mentions not legatars, being correctory of a former evil custom, which it only considers, yet the case of legatars is not thereby determined, and the Lords have always preferred particular legatars to the stranger executor nominated, or to any universal legatar.

THE LORDS found, That if the executor nominated reject his legacy, and crave a third of the dead's part, he could only have a third of what was free after satisfaction of creditors and particular legatars.

*Stair, v. 2. p. 840.*

No 104.

A relict being executrix nominated, has no right to a third of the dead's part.

1686. *March.* LADY INCHDARNIE *against* ALEXANDER NAPER.

IN the reduction of James Stuart's testament, at the instance of the Lady Inchdarnie, his nearest of kin, raised after that Alexander Naper had recovered