

make the same furthcoming. It was *answered* to the *first*, That the executors of Patrick Wood will possibly never insist, nor will Patrick urge them to insist; and the pursuer was content to find caution to refund *cum omni causa*, if he should not obtain compensation, when he should be pursued. To the *second*, The pursuer was not obliged to accept of this debt, seeing he was content to confirm before sentence. Likeas, he had a right to the whole moveables of the defunct from ——— Hamilton the defunct's sister, and only nearest of kin. It was *answered ut supra*, and that the sister was dead before confirmation, and consequently the moveables in law belong to the next nearest, and the right made by the sister is void by her death, in regard her own right was never established in her person, nor in the person of any executor, whom she as nearest of kin could pursue. Likeas, Hugh Hamilton was, by this latter will, left universal legatar, which being lost, he has no process for proving the tenor depending.

THE LORDS found the offer to pay the debt relevant; and that the right from the sister was void and null by her death.

Fol. Dic. v. 2. p. 2. Gilmour, No 55. p. 40.

1676. November 28.

JOHN KER *against* JEAN KER.

In a pursuit at the instance of a donatar, it was *alleged*, That the debt pursued for was heritable *quoad fiscum*; and it being *replied*, That the pursuer had right thereto as executor creditor; the LORDS found process upon that title though supervenient, the testament being confirmed after the intending of the cause.

In the same cause it was found, that a testament being confirmed, the nearest of kin *ipso momento* have *jus quaesitum* to that part of the goods which belong to them, and do transmit the same to their executors, and those who represent them; though the testament was not executed before the decease of the nearest of kin; and that the said interest and action, being in effect a *legitima*, and competent to them by the law and act of Parliament, is settled in their person and doth transmit, though the same be not recovered in their own time. *See QUOD AB INITIO VITIOSUM.*

Fol. Dic. v. 2. p. 2. Dirleton, No 389. p. 191.

. Gosford reports this case :

JOHN KER as executor creditor confirmed to Mark Ker, and as donatar to his escheat, did pursue Jean Ker for the fourth part of the executry of James Ker, to whom the said Jean was confirmed sole executrix, upon that title that the said Mark Ker was one of the four nearest of kin to the defunct James,

No 3.

No 4.

A testament being confirmed, the nearest of kin *ipso momento* have *jus quaesitum* to that part of the goods which belong to them, and do transmit the same to their executors, though the testament has not been executed before their decease.

No 4.

whose testament was confirmed by the said Jean. It was *alleged* for the defender, That the pursuer could have no right by any of these titles, because the said Mark himself died before James' testament was confirmed, or any sentence obtained, or established for the fourth part in his person, and so by our law they were in the case of *hereditas non adita*, and were transmitted to surviving nearest of kin, who were his brethren and sisters. It was *replied*, That James Ker's testament being confirmed by the defender before Mark's decease, *ipso facto* she was liable to him for a fourth part as executor creditor to Mark. It was *secundo alleged*, That the pursuer could not have a right as donatar to Mark's escheat, because nothing could fall under his escheat but what was actually established in his person; but so it is, he never did obtain decret for the fourth part, and so it could not fall under his escheat. It was *replied*, That the fourth part of his brother's testament being a moveable sum, and he dying at the horn, did fall to his donatar. ~~THE~~ LORDS did repel the first defence, and found that James' testament being confirmed, the defender as executor was liable to Mark for his fourth part and consequently to the pursuer as his executor creditor, as to all sums due by bonds bearing annualrent, but as to all other sums or moveables they found they fell under Mark's escheat, and belonged to his donatar conform to the act of Parliament 1641, and so found that Mark dying, who had never a sentence establishing a fourth part in his person, nor confirming himself, did not take away from his executors his right, which was transmitted to them so soon as his brother James' testament was confirmed.

Gosford, MS. No 910. p. 588.

. Stair's report of this case is No 102. p. 3926, *voce* EXECUTOR.

1686. November.

INGLIS and ANDREW CHARTERS her Spouse *against* M'MORRAN.

No 5.

There having been a partial confirmation, it was found that the right of what remained unconfirmed, did not pass to the executors, but remained in *bonis defuncti*.

THOMAS INGLIS, executor *qua* nearest of kin to his mother, having confirmed a short inventory, and yet discharged the whole debt due to the defunct, particularly a debt resting by one M'Morran, which was not confirmed, his sister Janet, who had renounced in his favours, her interest in their mother's executry, and taken the gift of his escheat for repairing the prejudice she sustained by the renunciation, did after his decease confirm herself executrix *ad omnia et non executata* to the mother, and pursued M'Morran.

Alleged for the defender; That the pursuer was cut off from her interest, as nearest of kin to her mother, by the renunciation to the brother, who had discharged the defender.

Answered for the pursuer; The renunciation was granted without any onerous cause, before the mother's decease, when there was only *spes successionis*; *2do*, It imports only a *non repugnantia* to the brother, in case he had confirmed the whole estate; but since he hath omitted a part, the right is devolved by