No 2.

in relation to dead's part, whereinto they succeed as nearest of kin, and therefore they have a right to the moveables, not by virtue of the confirmation or office of executry, which before that act carried the whole benefit, as is clear by the act, but by a several right, *jure agnationis*, as nearest of kin; and therefore, though the nearest of kin be not confirmed executor, but others be nominated, or datives confirmed, the executors are countable to the nearest of kin, who may pursue them therefor; and therefore, if the nearest of kin do any legal diligence, either by confirmation or process, yea, though they did none but only survive, the right of nearest of kin *ipso facto* establishes the goods in their person, and so transmits; and whereas it was alleged, that the contrary was found by the Lords, in *anno* 1636, observed by Durie;* it is also marked by him, that it being sofound by interlocutor, it was stopped to be heard again, and never discussed; neither can it be shown by custom or decision, that the executors of children, or nearest of kin, were excluded from recovering the part of their parent, which survived and owned the benefit of the succession.

"THE LORDS assoilzie from the reduction, and adhered to the former decreet."

Stair, v. 1. *p.* 96.

*** A similar decision was pronounced, 14th February 1677, Duke of Buccleugh against Earl of Tweeddale, reported by Gosford, No 15. p. 349. *voce* ADVOCATE; and, by Stair, No 8. p. 2366, *voce* COLLATION.

1662. *December.* HAMILTON *against* HAMILTON.

No 3.
Any of the nearest of kin dying before confirmation of the defunct's testament, transmit nothing to their assignees, their own right being established only by confirmation.

MR THOMAS HAMILTON advocate, being executor creditor to umquhile James Hamilton merchant, and having licence, pursues Hugh Hamilton for payment of a great sum of money, alleged due by him to the defunct. It was *alleged*, 1*mo*, That by back-bond it was declared, that this sum is not payable, unless Hugh Hamilton should obtain compensation for the like sum owing to him by the Heirs and Executors of umquhile Patrick Wood, and that by virtue of, and upon an assignation to the defender, by the said umquhile James, in and to an equivalent sum owing to him by the said umquhile Patrick, whereunto he did assign the said Hugh; *ita est*, he has not obtained the said compensation, but the process long ago having been pursued against the said Hugh, it is not as yet put to a close, nor do the executors of Patrick Wood insist, so that Hugh is not *in tuto*; 2*do*, Hugh offered to pay what was owing to this pursuer, and for which, he was decerned executor, which he is holden to accept, seeing his interest by payment ceaseth; and that as yet there is no testament confirmed, by which the pursuer may be obliged to do diligence for any inventory, or

* See No 1. p. 9249. and No 6 p. 8050.

No 3.

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 refound *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.

No 4.
A testament being confirmed, the nearest of kin *ipso momento* have *jus quæsitum* 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.

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 intenting of the cause.

In the same cause it was found, that a testament being confirmed, the nearest of kin *ipso momento* have *jus quæsitum* 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,