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. *Fountainhall, 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

several sums therein, by virtue of a right from Catharine Naper the defunct's mother and executor, the Lords reduced the testament, because the witnesses inserted deponed, that they subscribed it without seeing the defunct subscribe. No 104.

Thereafter Naper founded on a prior holograph testament, wanting witnesses, bearing date a year after the defunct was fourteen years of age.

Alleged for the pursuer; That the testament is presumed to have been made by the defunct *ante pubertatem*, when he had not *testamenti factionem*, unless the user would prove it was subscribed after pupillarity, for the same reason that holograph writs *non probant datum*, and are presumed to have been done on deathbed *contra* heirs; now, the nearest of kin is *hæres mobilium*.

Answered; A holograph testament was never quarrelled upon such a head; and the same objection might be made, though the testament had borne a date after majority; besides, the means whereby the objection of deathbed, proponed by an heir, is taken off, viz. the proving that the party had the holograph bond in his hand, while the granter was *in liege poustie*, could not be effectual in the case of a testament; for it was delivered after the testator was fourteen years old, and might have been signed when he was under that age; whereby no holograph testament would be of use except witnesses saw it signed after pupillarity.

THE LORDS sustained the allegeance against the holograph testament, unless the executor will prove, that it was signed after the defunct's pupillarity. But this testament being founded on after the other was reduced, it was the more suspect. Castlehill's Prat. tit. EXECUTRY, No 99. *See* WRIT.

1688. *January* 27.—A relict pursued as executrix, craved a third of the dead's share as a stranger, viz. one not of blood to the defunct, in so far as her relation being dissolved by death, she was in the same condition as if she had been named before the marriage; and, by the ancient law, the whole dead's part belonged to all executors, *qua tales*, which, by the late act of Parliament, is restricted to a third in favours of strangers. 2*do*, Though she had a share *jure relictæ* of moveables and bonds not bearing annualrent, yet she has no interest in the fee of sums bearing annualrent, in respect of which she is considered as a stranger.

Answered; The reason for allowing a third to strangers and executors only, is, because such would not probably put themselves to the trouble of executing another testament without some benefit; whereas a relict-executrix has sufficient encouragement to do it, by her legal third's depending on the confirmation, and so cannot be considered as a stranger; and the speciality of bonds bearing annualrent doth not alter the case, seeing she has her share of the annualrent of these, and consequently an interest to confirm.

THE LORDS repelled the defence in respect of the answer. *Quær.* If a wife having renounced her legal provisions, or a child forisfamiliated, who had re-

No 104. nounced his legitim, or any other who had renounced their interest of nearest of kin, must by the consequence of this interlocutor be considered as strangers? Castlehill's Prat. tit. EXECUTRY, No 110. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 278. *Harcarse*, (EXECUTRY.) *No* 469. *p.* 128. & *No* 476. *p.* 130.

Executors if they can pursue or be pursued separately;—*See* SOLIDUM ET PRO RATA.

In what cases liable for annualrent;—*See* ANNUALRENT.

Who is executor *qua* nearest of kin;—*See* SUCCESSION.

Diligence prestable by executors;—*See* DILIGENCE.

Executor's oath if good against creditors;—*See* PROOF.

Executor may pay himself in the first place;—*See* PAYMENT.

Creditors have a direct action against the intromitter with goods left out of the inventory, without necessity of confirming *ad omissa*;—*See* SERVICE AND CONFIRMATION.

See Inglis against Bell, No 73. p. 2737.

See Robertsons against Baillie, No 34. p. 3498.

See SURROGATUM.

See NEAREST OF KIN.

See APPENDIX.