

## S E C T. III.

## Is Reduction requisite of Decrees-dative ?

No 9. 1627. *February 27.* ROSS *against* KELLIE.

A DEFUNCT'S only child pursuing her stepmother as executrix, for her bairn's part, viz. the third of all, the LORDS sustained this action, although there was a standing confirmed testament, where the division was only made *bipartite* ; but they found no necessity of reduction here, because the daughter was not called to the said confirmation.

*Fol. Dic. v. I. p. 169.*

\* \* \* See The particulars of this case, No 2. p. 2366.

No 10. 1707. *December 10.*  
JAMES LEES, Merchant in Glasgow, *against* ROBERT DINWOODIE, Merchant there

THE debtor of a defunct assoilzied in a pursuit at the executor's instance, by compensation upon a debt due by him to the defunct, being reconvened on the same account by another executor, who offered to improve *incidenter*, the execution of the edict whereupon the first confirmation proceeded, the LORDS found, that the defender was not obliged to abide by the verity of the execution, and that improbation was not competent in that state of the process.

*Fol. Dic. v. I. p. 169.*

\* \* \* See The particulars of this case *voce* EXECUTOR.

No 11. 1709. *December 6.*  
JOHN HAMILTON of Bangour, *against* The LADY ORMISTOUN, SIR JOHN INGLIS and his SISTERS.

No 11.  
A party being decerned executor-dative, *quia* nearest of kin, when there was nearer, the Lords

IN the action at the instance of Bangour, as executor-dative *ad omisssa, qua* nearest of kin to Sir William Hamilton of Whitelaw, against the Lady Ormistoun, and her children of the first marriage, as debtors to the defunct, whose debts had been omitted in the principal testament confirmed by the Lady Houshill ;

*Alleged* for the defenders; The decret dative is null, and no process can be sustained thereon; because, by the act 26th, Parl. 1690, none can be confirmed executors-dative to a defunct, but the relict, bairns, nearest of kin, or creditors: And the pursuer is neither creditor nor nearest of kin to him, William Dunlop his nephew being nearer.

*Replied* for the pursuer; 1st, The nearest of kin not having opposed the pursuer's being decerned dative *ad omissa*, it is *jus tertii* to the defenders, to found on the right of the nearest of kin. 2dly, The pursuer being heir to the defunct, and creditor to the executrix *qua* nearest of kin, for his relief of moveable debts, might, conform to the act 41st, Parl. 1695, obtain himself decerned executor-dative to the defunct, as if he were creditor to him; to the end he may have access to make effectual the goods and debts omitted by the principal executrix.

*Duplied* for the defenders; 1st, It is not *jus tertii* for them to object against the pursuer's title, in respect the nearest of kin compares and concurs. 2dly, The pretence, that the pursuer is creditor for his relief, is nothing to the purpose, seeing that debt is not yet constituted; and titles which ought to be made up by legal diligence, are not to be made up by reply at the bar.

THE LORDS sustained process; in respect the pursuer's title of executor could not be quarrelled summarily before their Lordships by the nearest of kin; but he behoved to apply first to the Commissaries for reduction of the decret dative and preference.

*Fol. Dic. v. 1. p. 169. Forbes, p. 361.*

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#### SECT. IV.

#### Reduction of Services of Heirs.

1626. July 22. M'CULLOCH *against* L. MERTON.

IN an action of declarator of bastardy, at the instance of M'Culloch *contra* L. Merton, the LORDS sustained an exception, founded upon the service of an heir to the alleged bastard, which service being a sentence standing, the LORDS sustained as sufficient to elide the gift of bastardy, and to exclude the King's right, so long as the said service stands untaken away, and which the LORDS so found, albeit the service was not retoured, nor past the chancellary; and which, albeit it should never be retoured, seeing the person served died shortly after the service; and so the pursuer *alleged*, that the said service not retoured ought not to elide this pursuit, the same being an imperfect and null writ, which would

#### No 11.

found that his title, in a process at his instance against the defunct's debtors, was not quarrelable summarily before the Lords by the nearest of kin comparing for his interest, but that he must first apply to the Commissaries for reduction of the decret dative and preference.

#### No 12.

An exception in a declarator of bastardy was sustained, being founded on the service of an heir to the alleged bastard, which being a standing sentence, the Lords found sufficient to elide the gift, so long as it stood unreduced; and this was found, altho' the service was not re-