

The executor may be thought confounded after confirmation and sentence, with the executor's proper goods. Yet seeing the right of the office and right of Disposal was to execute for the Benefit of the Heir Children or other Heir of kin and Creditors of the Deceased, Deeds or Bonds granted to him for the Means and Estate of the Deceased, may be affected for Debt due by the Deceased and in a Competition betwixt his Creditors and the Creditors of the Executor, the former will be preferred to the goods of the Deceased while extant, tho' the latter have done more Diligence 16 Decemb. 1674 L. Gel had contra Goring and others. Stewart's Inquest to Dirlol. Doublet's Exccutors. Nor yet doth the goods of the Deceased established in the executor's possession by a sentence, fall under his escheat except as to his Interest therein; but shares of the Heir Children or Heir of kin can only be confiscated for their own rebellion 21 Decemb. 1677 Gordon contra L. Drim & Goring because the executor by his office had not a Right of property or Dominion of the whole good and gear of the Deceased, but a Curator's behavior, that the will of such person be not inefficual and his goods squandered away: the property of the shares of the Heir and children or Heir of kin is still in them respectively, who have not only an obligation upon the executor but a Right of Diversion and Retention of ysa Corpora while and is proved of or not he need Money. It is true a Testament which executed by sentence establishing the good and farms in the executor's person, do as their executor must be Confirmed to him, upon provision that he has satisfied the Interests of the Heir Children and others. But Executors like these Interests be Discharged, or till they voluntarily suborned with or uplift the effects of the Deceased, and by consequence have altered the property, have but a naked office and power of Administration. Nor can executors even in their case gift or Discharge Gratuitously. 2^o An Executor's power of Disposal doth not Impair a right of property: for factors tutors and Curators have such upon and ysa any sentence or security taken by them doth not alter the property of their Beneficiaries or assignees. Albeit the Executor is quasi Heir in Mobilibus, he is but a fiduciary, who had not plenum Dominium but only a right affected with an obligation to restore to the Heir Children Heir of kin Creditors and Legators

Legatories of the Deceased. 3^o If the Escheat of the Executor should Carry more than his own proper Interest, Executors at the same might take the gifts of their Escheat in their own or in Compendious persons Names, and thereby Enjoy the whole benefit of the executor's excluding the Heir Children Legatories and Creditors of the Deceased. Which Inconvenience could not be saved by the Caution which Executors find being such papists of course in Majorum Cautalam, and most Insufficient persons are ordinarily accepted as Cautioners. A Cautioner for an executor in the Confirmed Testament cannot take from him a Disposition of all the goods Confirmed, so as thereby to make them his own property to the prejudice of the Creditors Legatories &c. of the Deceased 17 June 1712 Ler of Challo contra Creditors of Hadden. For the Design of such Caution, it to make the goods for the committing to the executor's use and benefit, Multo Gratias agentem Repevit Excelsio. A Heir being Deceased executor Dative qua Heir of kin when there was a Heir, his title in a process at his Heir's against Debtors of the Deceased before the court of session is not quarrellable summarily upon Act 26 Feb. 2 Carl. 4th M. by the Heir of kin appearing for their Interest; but they must first apply to the Companies for Reduction of the Decree Dative and preferance 6 Decemb. 1709 Hamilton of Bangour contra Lady Armes contra her Children. A Testament is understood to be executed when the Executor has obtained payment or Decree 16 Novemb. 1666 Reid contra Gelzeifer Absore. by Dirlol. cum 2^o June 1671 Gordon contra L. Drim or New security in his own name for the Debt or goods belonging to the Deceased stat. lib. 3 Gil. 8 & 811 M. Linzie stat. lib. 3 Gil. 9 & 16. Yea, a Testament was found to have been executed by the executors obtaining a Decree against the Debtors of the Deceased without Recovering payment, altho' the executor was neither Heir of kin, nor Creditor or Legatory, but a mere stranger to the Deceased 17 Novemb. 1666 Downie contra Goring. The Reason why a Testament is held to be executed when Decree is Recovered against Debtors by the Executor tho' he die before payment is because the right of the Debt being fully established in his person by Decree, it cannot be Impaired to