

No 9. 1735. December. GRAYS against CREDITORS of DRUM.

THAT confirmation being *aditio hæreditatis in mobilibus* vests the full right in the nearest of kin, not only *quoad* the subjects confirmed, but *quoad* the whole *universitas mobilium*; debated, but not determined. See APPENDIX.

Fol. Dic. v. 2. p. 3.

1737. June 24. MITCHEL against MITCHEL of Blairgorts.

No 10.

Where the nearest of kin themselves confirm, their claim is thereby established as well as where a stranger is made executor; and tho' they should die before executing the testament, yet an assignation granted by them will be effectual.

PATRICK MITCHEL being creditor, as well as next of kin to his brother, James Mitchel, did, upon James's decease, confirm himself executor-creditor; and, among other subjects, gave up, in inventry, a bond of two thousand merks due to the deceased; which bond he thereafter assigned to Mitchel of Blairgorts, but died without executing the testament.

James Mitchel, by the death of his father Patrick, came to be next of kin to James Mitchel, the original creditor in the said bond; and a creditor of his, apprehending that Patrick Mitchel's confirmation had become void by his death, seeing the money was neither levied by him nor his assignee, nor decree taken in their name, did, upon the act 41st, Parl. 1695, obtain himself confirmed executor-dative to James Mitchel, the said original creditor; upon which a question arose betwixt him and Patrick Mitchel's assignee, which of them had best right to the said bond. The executor-dative appealed to the authority of Lord Stair, B. 3. T. 8. § 61. In answer to which, the assignee *contended*, that a confirmation by an executor-creditor, or *qua* nearest of kin, doth so far vest and establish the subjects in the person of the executor, that there never can be place thereafter for a second confirmation of these subjects, as *in hæreditate jacente* of the first defunct.

Upon this point of law, it was yielded for the assignee, that executry is but an office, and *qua* such can never be a *causa transferendi domini*; that indeed, when an executor-dative obtains payment, the money becomes his property, being delivered as a *species* not as a *corpus*; and that when he discharges a debt, taking a new bond in his own name *tanquam quilibet*, the bond is his property, because the discharge makes him liable as if he had received payment in specie; but that, if the executor-dative die before execution, the trust, so far as not fulfilled, must die with him, which requires the nomination of a new trustee by a confirmation *ad non executam*; and this is the sum of what Lord Stair lays down in the passage above quoted. The assignee at the same time contended, that an executor-creditor or *qua* next of kin, is in a different condition. It is said by Lord Stair, B. 3. T. 8. § 51, with regard to the interest of the next of kin, that confirmation is *aditio hæreditatis in mobilibus*, whereby their title is

completed, whoever be confirmed. Now, where the next of kin himself is confirmed, though the confirmation constitutes him only executor or trustee, for the behoof of creditors and of others having interest, which can never be a title of property; yet it must be considered, that this trust is partly for behoof of the trustee himself. And therefore, taking his confirmation as a procuratory *in rem suam*, it must subsist until the uses and purposes for which it was granted be fulfilled; for this evident reason, that such a procuratory falls not by the death of the person to whom it is granted, especially when granted by the law which never dies. A confirmation, accordingly, of the next of kin, or of a creditor, cannot fall by their death, but may be taken up and executed by their representatives confirming to them; which must for ever exclude a new confirmation of the same subjects, as *in bonis primi defuncti*; for our law admits not the nomination of a second executor or trustee, while a prior confirmation is in force; and therefore, if the first confirmation subsist after the executor's death, to be executed by his representatives, there can be no place for a new confirmation of the same subjects, more than if the executor were still alive. It was contended, *2do*, *Esto* a confirmation *ad non executam* could have place in this case, it would carry nothing but the naked office and *ius exigendi* for the behoof of the deceased executors' representatives or assignees. *3tio*, This being so, the confirmation upon the act 1695, is null and inept; seeing, by the intendment of that statute, such a confirmation, calculated solely for the benefit of creditors, can never proceed where nothing can be carried by it but the naked office.

"Found, that Patrick Mitchel having consumed the 2000 merks and interest, as creditor to his brother James, to whom he was next of kin, the property thereof belonged to Patrick from the time of the confirmation; and that he might habily assign the same. Found the confirmation of James Mitchel, as executor-creditor *quoad non executam*, was inept and void; and therefore found Blairgorts the assignee preferable."

*Fol. Dic. v. 2. p. 3. Rem. Dec. v. 2. No 9. p. 21.*

\*\*\* Clerk Home's report of this case is No 88. p. 3900, *voce* EXECUTOR.

1738. July 21.

MARGARET, & C. CAMPBELLS *against* LADY INVERLIVER and her HUSBAND.

DOUGAL CAMPBELL of Shirvine had issue, Archibald Campbell, and the said Jean; when Jean was married, her father gave her a tocher, which she, with consent of her future spouse, accepted, in full satisfaction of all portion natural, bairns' part of gear, executry, legacy, or others whatsoever, which she could expect, or that might accresce to her by and through her father or mother's de-

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No 11.

A daughter who renounces her father's succession, cannot compete for the office of executor to him with the children of