The Lord's found the father's possession to be the child's possession, and preferred the father to the wife's nearest of kin. No. 37.

C. Home, No. 259. p. 416.

1744. *November* 14.

MARY M'WHIRTER *against* ROBERT MILLER.

No. 38.
The right of a defunct's moveables vests in the person who might have confirmed them, by his obtaining possession.

ROBERT MILLER, tenant in Kilbride, married Elizabeth M'Whirter, and the marriage having dissolved by her decease, leaving issue one son of the age of 19, who lived in the family with his father till he died, aged 25, Mary M'Whirter, sister of Elizabeth, pursued Robert Miller for her sister's third of moveables, the same having never been confirmed by the son, and consequently now belonging to her as nearest of kin. The Lords, July 1743, "Found, that the children of a marriage, attaining possession of their mother's third of moveables in communion, need not confirm these moveables, in order to bar those, who, on the death of these children, should become nearest of kin to the said defunct wife, from claiming the said moveables; and found sufficient evidence to presume in this case, that the defender's son did attain possession of his mother's share of moveables."

A reclaiming petition was given in against both points of this interlocutor, on which the Lords, 2d November, 1743, "Adhered to the first part thereof, and ordered the bill to be seen and answered as to the rest." The petition proceeded by considering the law as it stood before the act 1690, and then what alterations were made by that act. It argued, That by the genius of the law, a title made up was necessary in all cases to transmit subjects from the dead to the living; a service in heritables, and confirmation in moveables: No distinction had ever been known in practice, or noticed by any author, betwixt the *ipsa corpora* of moveables in the defunct's possession, and the rest of the executry; and had there been any such distinction, it could not have been overlooked by all those who have wrote on the subject. A doubt had been suggested by the defender, Whether a service was necessary to vest the heirship moveables in the person of the heir; but there was no foundation for that doubt; as it was admitted in general that the rule was otherwise, it was incumbent on him to prove his exception. But the contrary appeared from our authors: there were certain privileges competent to apparent heirs, which Stair enumerating, B. 3. T. 5. from § 1. to § 4. inclusive, did not mention this; and, in the subsequent paragraphs, describing the rights of the heir entered, § 5. he took notice of heirship moveables. And B. 3. T. 4. § 23. he said, That heirs who do not orderly enter, became successors *passive*, but not *active*; and Craig was cited to the same purpose, L. 2. D. 17. § 3. And if an heir was not so active, how could it be imagined, that by a vitious intromission he could appropriate to himself any part of his predecessor's estate. Agreeable to this, was a decision of the Lords, 27th June, 1629, Robertson *against* Dalmahoy, No. 30. p. 5402. The widow of a defunct who had intromitted with

No. 38. heirship moveables, was, on the death of her children whom she had alimented, pursued by the succeeding heir. She pleaded she had expended them in the aliment: The Lords " sustained the exception, albeit the bairns were never served heirs, and so had no right themselves to claim the heirship." It had been found, that the *hereditas jacens* was subject to the aliment of the apparent heir, 20th December, 1662, Lady Tarsappy *against* Tarsappy, No. 9. p. 5206. so that there was nothing in the cited case peculiar with regard to heirship moveables; and the decision expressly bearing, that the apparent heir had no right to claim them, was in point.

It being fixed, that all intromission with a defunct's effects without a title was contrary to law; it could not be thought the law would so far add its sanction, as to give the property, although the intromitter was willing to subject himself to the debts.

A man, by possessing his predecessor's estate, did not vest it in his person; but there was a method prescribed by law for making up his title; and it was more evidently so in the case of moveables, which were committed to the bishop's care for the security of creditors, and especially of legatars, to whom the insisting on the passive title of vitious intromission was not competent. Before the act 1690, when charges to confirm were competent, and confirmations upon oath, there was surely no keeping any thing out of the inventory, on pretence of having attained the natural possession; and no distinction betwixt the *corpora mobilium*, and any other part of the executry. Dirleton proposed this question, If a testament was not executed by confirmation, as to goods, whereof the executor was presently in possession? And Stewart answered in so many words, That it was: and the precise present question was decided 17th February, 1663, Forsyth *against* Paton, No. 6. p. 2941. It remained next to consider, if any alterations had been made by the act 1690. That law proceeded on a recital of the great vexations occasioned to the lieges by the commissaries and their clerks, &c. that was the grievance intended to be remedied; and the statutory words only prohibited all charges to confirm, without any distinction betwixt the *corpora mobilium*, and any other part of the executry. This was all that was done by the statute; and, as formerly, no man could be charged to enter to his predecessor's estate, and yet he could not regularly take it without service; so now, neither could he acquire the moveables without confirmation, although he could not be charged to confirm.

The rest of the petition, which only was ordered to be answered, being in fact, to wit, Whether the father had made any division of goods with his son, on account of his mother's right? And the interlocutor not having determined this point, Whether the father's possession of the goods without any division, would not have been a sufficient possession by the son, who was under age, his father being his administrator in law? It was not thought necessary to insert any more of the petition or answers, except that it was pleaded for the respondent, that he having intromitted with the third which belonged to his son, and being his administrator in law, was liable to him therefore; and this was a right immediately arising to himself without any confirmation.

No. 38.

The Lords found, that it was to be presumed, that the father, as administrator to his son, had the custody of the mother's third of moveables for the son's behoof, and that he did make a division, or bargained with the son for his interest in the moveables.

Act. *Lockhart.* Alt. *Macdowal.* Clerk, *Hall.*

Fol. Dic. v. 4. *p.* 269. *D. Falc. v.* 1. *p.* 6.

*** This case is also reported by Kilkerran:

ELIZABETH M'WHIRTER predeceased her husband Robert Miller, in the year 1725, leaving an only child of the marriage, a son, then 19 years of age, who lived in family with his father till the year 1731, when he died, after having, by his testament, nominated his father his executor and universal legatary, but without having made up a title to his mother's third by confirmation.

In a process brought before the sheriff of Ayr, at the instance of Mary M'Whirter, as nearest in kin to the wife, against the husband, to account for the said third of moveables, as what the son could not dispose of, having made up no title; it was alleged for the defender, that he had made a division with his son after his majority, at least that he had transacted with him in presence of friends, and given him so much of the stock, in satisfaction of the transacted sum. The sheriff allowed a proof, which came out to no more than this, that the son and father had lived in family together, that the son had managed the stock and crop, as the sons in other families use to do, and was in use to buy and sell beasts; and one witness deponed, That at one time he had bought one cow from the son and two from the father, but none of them knew any thing of any division or transaction. On advising whereof, the sheriff, in respect of the testament and proof, "assoilzied the defender."

But the case coming before the Lords, the following points occurred; viz. Whether confirmation was at all necessary to the transmission of moveables, whereof the nearest in kin had attained the possession, or if possession itself was not sufficient to transmit the right without confirmation; and if it was, 2*do*, Whether the father's possession of the mother's third, as being administrator in law to his son, did not, from the moment of the mother's death, become the son's possession of his mother's third; which, as they had occurred to the Court, and merited attention, and as the subject was of small value, and the parties in low circumstances, the case was, upon the recommendation of the Lords, debated in presence by two of each side of the most experienced lawyers at the bar.

And, upon the debate, it was upon the first point found, "That the children of a marriage attaining possession of their mother's third of moveables in communion, need not confirm these moveables in order to bar those, who, upon the death of the children, shall become nearest in kin to the defunct's wife, from claiming the said moveables."

No. 38. This interlocutor, though expressed as to apply to the case in hand, was intended to establish the general point, that wherever a nearest in kin attains possession of moveables, the right thereto, *eo ipso*, transmits without confirmation; and on this the Court was unanimous.

It must be owned, that our lawyers say strong things, touching the necessity of confirmation, as that it is the *aditio hæreditatis in mobilibus*, and that the testament is executed as to goods in the possession of the nearest in kin by the confirmation; and that the presumption of property of moveables from possession is taken off by a proof, that such moveables belonged to a person now deceased, and never were confirmed; which may seem not consistent with the doctrine established by this judgment, which yet was thought to be the truer doctrine of the law, and to have authority even from the most ancient practice. Thus, 2d February, 1610, Blackburn *contra* Rigg, No. 29. p. 14384. observed by Haddington, it was found, that though the apparent heir could not pursue for heirship moveables, if out of his hands, yet where he was in possession, he might dispose thereof. The example of the common law was also mentioned, by which possession did *eo ipso* transmit the right.

But what chiefly seemed to move the Court, was the consideration of expediency; and indeed a contrary doctrine would have been attended with great inconveniencies.

Where a man dies, leaving, for example, only one son and no debt, or leaving more children, but forisfamiliated, whereby the son is heir and executor, it has never been thought necessary for the son to confirm moveables, whereof he had attained the possession; and if now it should have been found, that such moveables did not transmit without confirmation, it would have laid a foundation for numberless actions against every one who may have acquired right from such nearest in kin, which never have been dreamed of.

As to the *second* point, it was observed, that there was a material difference in the present argument, between the case of a pupil and that of a minor. The father is no doubt tutor to his infant son, and obliged to act as such; and particularly with respect to the mother's third, the father has been found liable to him for the annual-rent thereof remaining in his hands, February 4th, 1665, Beg *contra* Beg, *voce* TUTOR AND PUPIL. And as the only possession a pupil is capable of, is by the act of the tutor, it was admitted, that while the children are within pupillarity, the father's possession will be deemed the son's possesson of the moveables falling under the mother's third: But that the case of a minor was quite different; for the act of a curator is not the act of the minor, who acts for himself, though with the concourse of his curator, and therefore without some act of the minor, the father's possession could not be deemed the minor's possession.

Upon this point, however, the Lords gave no judgment, but took up the matter upon the circumstances of the case, especially the length of time the son had survived the mother; and the distance of time at which this action was brought, whereby the father's mean of proof may have perished; and found sufficient evi-

dence to presume in this case, that there had been a division made, or a transaction between the father and son; and refused to find the presumption elidable by the defender's oath, unless the pursuer would allege there had been neither division nor transaction. No. 38.

Kilkerran, (SERV. and CON.) *No.* 3. *p.* 509.

*** See C. Home's report of this case in the APPENDIX.

1751. *February* 20.

JAMES SPENCE *against* WILLIAM WILSON and Others, the Creditors of Alcorn.

No. 39.
The nearest of kin obtaining payment of a debt due to a defunct, has right to it, being confirmed.

JOHN BARCLAY, smith in Musselburgh, was creditor to Mr. Henry Alcorn by bond; and Jean Cruickshanks disponed to James Spence, writer in Edinburgh, her husband, all bonds that should be found to pertain to her, as executor nearest of kin to be confirmed to the said John Barclay, her grandfather then deceased. James Spence obtained her decerned executor, and insisted before the magistrates of Edinburgh against James Alcorn, heir to the debtor, for payment, and inhibited him; whereupon he granted his bond corroborating the debt. The magistrates decerned, and James Spence adjudged on the constitution, without mentioning in his decreet the corroboration; but there was not any confirmation expede.

Other creditors, posterior to the inhibition, adjuged; and, in the competition, the Lord Ordinary, 10th January, 1750, "Found, that the decreet of constitution at the instance of Jean Cruickshanks, and James Spence her husband, and the decreet of adjudication following thereon, were void and null, for want of a sufficient title in the person of Jean Cruickshanks, to the sums therein mentioned; and therefore preferred the said William Wilson and the other adjudging creditors, as they should be ranked."

Pleaded in a reclaiming bill, as the executor decerned was entitled to pursue for recovery of the debt, so she had right to raise any diligence competent upon a dependency; and if the decreet pronounced is valid, the diligence will be effectual to her: That she was not confirmed was an exception competent to the defender; but if he did not make it, the decreet was not null, which decerning the debtor to pay to her, fully vested her with the right.

2dly, An executor obtaining possession of the defunct's effects, need not confirm, as was found 14th November, 1743, Mary M'Whirter *contra* Edward Millar, No. 38. p. 14395. Payment would therefore have been good; consequently she might have discharged the debt, and taken a new bond, and the bond taken is not the worse that the old debt was kept up. Thus the executor's right was completed by possession, and the decreet rightly given.

Answered, The decreet of constitution was null for want of confirmation, if the pursuer's title was not otherwise complete, for the decerniture to pay could not vest the right: The possession of moveable subjects has been held to vest a right, but this has not been extended to debts.