

No 91. for their proportion of the debts due to Margaret Charteris their mother.' See No 77. p. 541.

Reporter, *Justice-Clerk.* Act. *Da. Dalrymple.* Alt. *Lockhart.* Clerk, *Home.*
Fac. Col. No 74. p. 124.

1760. February 13. SUSANNA OGILVY *against* His MAJESTY'S ADVOCATE.

No 92.
 A decreedative in favour of a nearest of kin, without confirmation, not a sufficient title to convey.

JOHN FARQUHARSON was proprietor of the lands of Monaltry and Craigmyle. He sold the lands of Craigmyle; and, at his death, the greatest part of the price remained in the hands of the purchaser,

John Farquharson died without issue-male, leaving a daughter, Anne Farquharson.

The lands of Monaltry, being a male fee, by the death of John Farquharson devolved upon his brother Francis; who being convicted of high treason, the lands were surveyed as forfeited, in terms of the vesting act.

Anne Farquharson was decerned executrix to her father by the Commissary of Aberdeen; but died before the confirmation was expedite, having made a deed in favour of Susanna Ogilvy.

After the death of Anne Farquharson, the price of Craigmyle was also surveyed, as falling under the forfeiture of Francis Farquharson.

A claim was entered for Susanna Ogilvy, as having right to the price of Craigmyle, in virtue of Anne Farquharson's deed in her favour.

Objected for his Majesty's Advocate, That the subject in question was never vested in Anne Farquharson; and therefore could not be carried by her deed to the claimant. The only right in the person of Anne Farquharson was the decerniture in her favour, which, without confirmation, did vest nothing.

An *ipso jure* transmission of property from the dead to the living, is unknown in the law of Scotland. Certain titles are necessary to vest in the heir the subjects which belonged to his predecessor, whether these subjects be heritable or moveable. The title necessary, in moveable subjects, is confirmation. A simple decerniture vests no right; it only declares, that the person decerned has a title to be confirmed, in the same way as a special service points out the person who is entitled to take up the lands belonging to the defunct; but it is the infestment that vests the lands in the person of the heir. If he dies without infestment, the special service falls to the ground.

This doctrine is laid down by all the writers on our law, and supported by the decisions. There is a late one directly in point, 23d January 1745, Carmichael against Carmichael, *voce* NEAREST OF KIN.

Answered for the claimant, The price of Craigmyle was a moveable subject, *in bonis* of John Farquharson at the time of his death. At his death the right devolved upon his daughter Anne Farquharson, without the necessity of any

title. The office of executor may indeed require a title; but the right of the nearest of kin to the subjects of the executry requires none. It is established *jure sanguinis*, and needs no form of law to complete it.

This is agreeable to the principles of the Roman law, by which the *aditio hæreditatis*, which corresponds to our making up of titles, was not required of *sui hæredes*, who succeeded by right of blood, *et hæreditatem ipso jure acquirebant*, § 3. *Inst. De hæred. quæ ab intest.* And as the right vested in them without titles, so they transmitted the same to their heirs: *Hæreditatem etiam non aditam ad hæredes transmittébant*, l. 3. *C. De jure delib.*

The claimant's plea is supported by the decision in the case of Macwhirter, 14th November 1744, *voce SERVICE AND CONFIRMATION*, where it was found, That a nearest of kin, who attains possession of the moveables of a defunct, does transmit the same to his own nearest of kin, though he should die without making up any title. This proves, that his right is complete without a title, since it enables him not only to take possession of the subjects, but to transmit them; for, surely, unless he had a previous right, intromission with the subjects could not vest any in him, nor transmit any to his executors; as in the case of heirship-moveables which belong to the heir of line, upon his making up a title by service; but if he should die without being served, although he had got possession of the heirship-moveables, he would not transmit them to his heir, but they would go to the next heir of the first defunct.

Supposing a title was necessary, the decret-dative in favour of Anne Farquharson would be sufficient. When a nearest of kin has declared an intention to take up the predecessor's moveable succession, and has proceeded so far as to be decerned executor, his right is so established by the decerniture, that he may transmit or convey that succession. A partial confirmation of a nearest in kin is sufficient to transmit the whole executry to his nearest of kin or creditors; but where the confirmation is only partial, the subjects not confirmed are in the same case as if there had been no confirmation; it can therefore only be in virtue of the decret-dative that such subjects, not confirmed, are transmitted.

The claimant's case is highly favourable, that this succession should not be swept away by the forfeiture of a collateral, who had no right to it at the time he committed the treason.

THE LORDS found, That the claimant had no right to the executry of John Farquharson, in respect her cedent Anne Farquharson had neither made up titles by confirmation to the said John Farquharson, nor attained possession of his moveables before her death.

Reporter, Colston.

For the Claimant, Nairne.

Alt. M^{rs} Queen.

Clerk, Gibson.

Fol. Dic. v. 3. p. 190. Fac. Col. No 213. p. 386.