No. 20. tion alone. Either a partial confirmation, 24th January, 1745, Creditors of Mr. Hugh Murray, No. 89. p. 3202.; the possession of moveables, 3d February, 1744, Children of Baird *contra* Gray, No. 37. p. 14393.; the renewal of bonds, or other vouchers of debt due to the predecessor, 10th February, 1751, Spence *contra* The Creditors of Alcorn, No. 37. p. 14399.; the receiving payments or granting discharges; or, in a word, any act whereby the successors in the moveable estate, whether nearest in kin, or general disponees, signify a resolution to undertake a representation of the deceased, 10th March, 1769, Pringle *contra* Veitch, *infra*, *h. t.* is effectual to establish in them the whole executry-funds. By the general disposition, therefore, followed by possession of the lands for which the bond was granted, the sums in question were completely transferred to the general disponee, and fell of consequence under the sequestration of his effects.

Answered for the Executor-creditor: The nearest in kin, or a general disponee, may indeed, without confirmation, acquire the property of particular subjects, in consequence of attaining possession; and it may therefore be here admitted, that after payment, or a renewal of the bond in favour of the son, the creditors of the father could no longer attach it as *in bonis* of their debtor. This mode of transference, however, is not, like that by confirmation, universal in its nature; the act of possession being at the same time the foundation of the acquisition and the measure of its extent. The fund in dispute therefore must still be viewed as the property of the defunct; for the possession of the lands, which could not be attained in virtue of a disposition to the moveable estate, is altogether out of the question.

Mr. Richardson likewise endeavoured to found an argument on the terms of the sequestration, which related as well to the effects of Alexander Orr, the father, as to those of the son. But the Court were clearly of opinion, that a sequestration, in pursuance of the bankrupt statutes, was an inept diligence for attaching the estate of a person deceased. It was likewise observed, that in order to bring this debt under the sequestration, the factor, as in the right of Alexander Orr, junior, should have used a confirmation *qua* disponee, or should have obtained a corroborative obligation from the debtor.

The Lords "preferred Archibald Shiells, in virtue of his confirmation."

Lord Ordinary, *Kennet*. For Mr. Richardson, *Lord Advocate Campbell, Wight*.
For Archibald Shiells, *Baillie, Honyman*. Clerk, *Home*.

C. *Fol. Dic. v. 4. p. 268. Fac. Coll. No. 147. p. 229.*

1784. *July* 20.

JAMES BUCHANAN and JOHN AULD, *against* ADAM GRANT.

No. 21. Payments to the creditors of a person

A TRADING Company, of which Adam Grant was the managing partner, being indebted to William Galdie, deceased, in the sum of £1219 Sterling; George

Galdie, the nearest in kin, and general disponee, authorised Mr. Grant, out of that fund, to pay his predecessor's most pressing debts.

No. 21. deceased, in consequence of a general mandate from the nearest in kin, or general disponee unconfirmed, effectual in a question with the creditors of the defunct confirming.

Within two years after the death of William Galdie, Mr. Grant accordingly disbursed the sum of £1091. Being then sued by James Buchanan and John Auld, as executors-creditors of William Galdie, for a much larger sum than remained in his hands, the Lord Ordinary found, "That the sum of £1219 Sterling, acknowleged to be due to William Galdie at the time of his death, was *in hæreditate jacente* of him, and could not be diminished by the payments made by the defender in consequence of a general order from George Galdie, the nearest in kin, or general disponee to the defunct; seeing the said George Galdie had made up no legal title in his person, either by confirmation, or by obtaining decreet against the defender."

In support of this judgment, which was brought under the review of the Court,

The pursuers pleaded: The modern practice, in order to facilitate the transmission of moveable property by succession, has dispensed with confirmation, either where possession of the effects has been apprehended by those entitled to the executry, or where, with regard to *nomina debitorum*, which are incapable of actual possession, the successor, by obtaining payment, or a corroborative obligation in his own favour, has been substituted in the place of the deceased. But the security of creditors, the primary and essential object of confirmation, is still unimpaired. A payment by a debtor of a person deceased, though an effectual bar to every claim by the succeeding nearest in kin, will afford no defence against a creditor of the deceased confirming. Hence a debtor in no case can be compelled to pay without a confirmation of the whole debt; a regulation surely altogether unreasonable, if the discharge by the nearest in kin were a complete extinction of his obligation.

Nor, though payments to the nearest in kin were effectual, even against the creditors of the predecessor, would it follow that such as are made to the creditors of the deceased, by virtue of a general order from the nearest in kin, should be attended with the same consequence. In the former, the act of receiving payment, like the possession of *corpora mobilia*, may be considered as a complete transference of the property or right, while, by means of the universal representation thereby incurred, the creditors of the predecessor acquire an additional security. But a general direction to pay the predecessor's debts from the proceeds of his own estate, cannot be viewed as an appropriation on the part of the nearest in kin. And as it can as little be thought to indicate his intention to incur a passive title, the funds may in this manner be withdrawn from the other creditors of the deceased, without the possibility of redress. It is likewise material, that no decreets were here obtained, either by the nearest in kin, or by the creditors to whom the payments were made. If that authority is requisite to an executor confirmed, both for liquidating the debt, and as a notification to other creditors, a pro-executor, or the mandatary of the nearest in kin unconfirmed, cannot surely be in a better situation.

No. 21.

Answered for the defender: It is now a fixed point, that possession of moveables, or the receipt of sums due to the predecessor, is sufficient, without confirmation, completely to vest the right in the nearest in kin, or general disponee. No rule, however, could be more unjust, if limited to the interest of those entitled to the succession, while the effects thus transfered to them were still subject to the creditors of the deceased, as if no intromission had taken place. The inevitable consequence would be, that a debtor to an opulent estate might be compelled, at the distance of 40 years, to pay a second time to those who, during that interval, had trusted to the credit of the nearest in kin or their representatives.

That a debtor cannot be compelled to pay to an executor unconfirmed, proceeds on principles altogether different. The person supposed to be dead may be still alive; his moveable succession may devolve not to one only, but to a variety of persons in the same degree of propinquity; or those entitled to it may have been excluded by general dispositions, testaments, special assignations, or legacies. Even the character of general disponee, though more readily discernible than that of the legal successor, is yet subject to recal, or may be limited by posterior settlements. A debtor, therefore, is permitted to require confirmation, not for conferring a right, but for authenticating that already established. He is not, however, prevented from paying to the nearest in kin or general disponee unconfirmed; and a payment to a third party, in consequence of an order from them, must be equally effectual.

Nor was a decreet at all necessary against the defender. An executor, whose intention is not to incur an unlimited representation, is merely a trustee for those interested in the moveable estate, and ought not to pay without the warrant of a decreet. From neglecting that precaution, there cannot be a doubt that George Galdie has become liable to the pursuers, as if the sums paid by his order to the other creditors were still *in medio*, Ursula and Jean Smith *contra* James Marshall, No. 60. p. 2322. But the payments, in every other respect, are unquestionably valid. Nor have the pursuers the smallest ground of complaint, since it was in their power, in terms of the act of sederunt 1662, and the statute 1695, to prevent every intromission which they conceived to be prejudicial to their security.

The Lords did not distinguish payments by order of a nearest in kin or general disponee unconfirmed, from those made directly to himself; both being deemed equally effectual to transmit the right in succession, and to operate a complete extinction of the debt. It was farther observed, that the general order inferred a passive title, to the extent at least of the sums the pursuers might have drawn if the payments had not been made: Also, that the pursuers might still challenge the payments made to the other creditors, so far as an undue or partial preference was intended.

The Lords found, "That in respect Adam Grant, the defender, paid the money in question to the different creditors of the deceased William Galdie, by order of George Galdie, the nearest in kin and general disponee of the said William

Galdie, he cannot now be found liable to pay the money over again to the pursuers as executors-creditors to the said William Galdie; and remit the process to the Lord Ordinary to hear the pursuers on their particular objections to those payments."

No. 21.

Lord Ordinary, *Gardenston.* Act. *Blair, Mat. Ross.* Alt. Lord Advocate, *Campbell.*
Solicitor-General *Dundas, Mackintosh, Rolland.* Clerk, *Menzies.*

Fol. Dic. v. 4. p. 268. Fac. Coll. No. 170. p. 265.

1784. *November* 26.

WILLIAM LENOX and Others, *against* ROBERT GRANT.

No. 22.
Confirmation as executor or a general disponee, who had not been confirmed, nor in possession, not sufficient to give right of action respecting the subjects disponed.

DAVID MARSHALL granted to Katharine Nasmith his wife, a general disposition, *mortis causa*, of his effects, among which was a bond due to him by Mr. Roberton of Bedlay. She again, after his death, executed a similar conveyance *omnium bonorum*, in favour of Robert Grant; but did not expede a confirmation as executrix of her husband. Grant however obtained himself confirmed executor *qua* disponee to her; and having given up in inventory the above-mentioned bond, deduced, on that title, an adjudication against the estate of Bedlay. Afterwards, in the ranking of the creditors on this estate, Mr. Lenox and others objected to the validity of that adjudication, and

Pleaded: Confirmation is *hæreditatis aditio in mobilibus;* and Katharine Nasmith having died unconfirmed, the bond in question still remained *hæreditate jacente* of Marshall; so that a title to it could not be established by a confirmation as executor of the former, *in bonis* of whom it was not. It would be inconsistent to suppose that it could; though indeed the confirmation of a person not entitled to the office of executor, will, as it is the sentence of a competent Court, stand good till legally reduced, no such contradiction being there implied. It must at least be admitted, that Katharine Nasmith had not the *jus exigendi.* How then could this be transferred by confirmation as her executor?

Answered: It is clear, that if Katharine Smith, unconfirmed as she was, had died intestate, her own heirs, and not those of her husband, would have succeeded to the right of this bond, which therefore could be no longer *in bonis* of the latter; a fact that alone shows the opposite argument to prove nothing, as proceeding on a *petitio principii.* The same circumstance likewise evinces, that the effect of confirmation, in such cases, is not to vest the right of property. Its only purpose then must be to give the *jus exigendi;* and of course it is an institution solely designed for the safety of the debtor. A subject may, notwithstanding a general disposition, have been specially assigned; so that if the debtor in the subject were to pay or deliver it to the general disponee, he might be obliged to render a second payment or delivery to the special legatee. Against this hazard he ought to be protected; and accordingly the caution found in confirmation affords him the security required; after which he can have no interest nor title to dispute as before the *jus*