

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."

Lord Ordinary, *Gardenston*.
Solicitor-General *Dundas*,

Act. *Blair, Mat. Ross*.
Mackintosh, Rolland.

Alt. Lord Advocate, *Campbell*.
Clerk, *Menzies*.

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

No. 21.

1784. November 26.

WILLIAM LENOX and Others, against ROBERT GRANT.

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. Robertson of Bedlay. She again, after his death, executed a similar conveyance *omnium bonorum*, in favour of Robert Grant; but did not expedite a confirmation as executrix of her husband. Grant however obtained himself confirmed executor *qua* disponent 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 *hereditatis aditio in mobilibus*; and Katharine Nasmith having died unconfirmed, the bond in question still remained *hereditate 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 disponent, 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*

No. 22.

Confirmation as executor or a general disponent, who had not been confirmed, nor in possession, not sufficient to give right of action respecting the subjects disponent.

No. 22.

exigendi. Such was the case of the debtor in the bond in question; and it is absurd to say that he had then the same title to object which he would have had prior to confirmation, or in the lifetime of Katharine Nasmith. Nor does it follow, because, if she had procured herself confirmed, it must have been *qua* executrix to her husband, that the present confirmation as executor to her is erroneous. Though undoubtedly she could not be her own executrix, and of necessity must have obtained confirmation in the character of that of her husband, is that any reason why her general disponee may not be her executor? Besides, this confirmation being a *res judicata* by the commissary's decree, must, notwithstanding the distinction that has been attempted, be held *pro veritate*, till set aside by a reduction.

A majority of the Court seemed to consider confirmation in the person of a general disponee, as essential for transferring to him the right of property, or *ius in re*; and that Katharine Nasmith having obtained none, was not vested with this right, which therefore could not be transmitted to her disponee by confirmation as her executor. Some of the judges, on the other hand, contended, that the confirmation, however erroneous, yet not being brought under reduction, should have full effect.

The Lords "sustained the objection to Robert Grant's adjudication."

Lord Ordinary, *Ankerville*. For objectors, *C. Hay*. Alt. *J. Grant*. Clerk, *Home*.
Fol. Dic. v. 4. p. 268. Fac. Coll. No. 180. p. 283.

1785. June 28.

CREDITORS OF PARK *against* PATRICK MAXWELL.

No. 23.

Service and confirmation necessary to render valid a decree of adjudication in favour of an executor.

ARTHUR PARK was indebted in a sum of money to Hugh Warden, whose general disponee, unconfirmed, obtained decret for the debt; and on that ground an adjudication was afterwards deduced. To this adjudication other creditors

Objected; Without previous confirmation the decree could not be valid; 26th November, 1784, *Lenox contra Grant*, p. 14381, *supra*; of consequence the diligence which followed upon it was likewise void.

Answered: If a debtor acknowledges the right of his creditor's successor, by granting to him a bond of corroboration, the necessity of confirmation will be superseded. The same consequence should seem to follow from his submitting to the passing of a decree against him at the instance of the heir, and so the point has been explicitly determined; March, 1686, *Children of Bangor contra Duke and Duchess of Hamilton*, No. 58. p. 13285.

The Lord Ordinary repelled the objection. But

The Court altered that judgment; and, in respect of the want of confirmation, found the adjudication ineffectual.

Lord Ordinary, *Kennet*. Act. *Rolland*. Alt. *Blair, Morthland*. Clerk, *Home*.
S. Fol. Dic. v. 4. p. 268. Fac. Coll. No. 218. p. 344.