

No. 4. That, even in these cases, the feudal right, or the *jus crediti*, vested without service by precept of *clere constat* from the superior, or acknowledgement of the debt from the debtor, if they were willing to grant such precept or acknowledgment.

But that, in no case, was service necessary, or proper, where there was no superior and no debtor, where the right was real and allodial, on which the heir had only to take possession without the consent of any person. That possession of such property was full investiture in it. That besides heirship moveables, leases afforded an example of this; for these when granted to heirs, passed without service by possession, because a lease was not a *jus crediti*, and there was no investiture of them required from the landlord. That moveables destined to heirs must pass in the same way, since, though thus destined, they were still allodial property; and if the heir took possession of them, there was nothing more left for him to do. He might use a service if he pleased, but he had no need of it. That it would be an odd incongruity if an heir succeeding to a lease, and to farm stock settled to go along with it, might take the lease without service, but required a service to the farm stock.

Lord Ordinary, *Armadales*. Act. *Mat. Reas.* Alt. *John Reid*.
A. Kincaid Tate, and *Will. Keyden*, W. S. Agents. S. Clerk.

M.

Fac. Coll. No. 44. p. 160.

1808. June 23.

MAJOR JAMES MOODIE of Milsetter, *against* ROBERT RUSSEL and Others.

No. 5.

An heir of entail having succeeded as next of kin to a creditor upon the entailed estate, the debts do not vest in him without confirmation.

IN the year 1760, Mr. William Budge, writer to the Signet, succeeded to the estate of Toftington in the county of Caithness, under an entail executed in 1751, by his cousin James Budge the former proprietor. By the deed of entail, William was left at liberty to burden the estate with such debts as he chose to contract.

In 1763, William Budge died, leaving two daughters, Janet and Grizel Budge, and a widow, Mrs. Catharine Sinclair.

Janet, the eldest daughter, succeeded to the entailed estate, which she possessed on her apparenacy, and died. Grizel the second daughter then made up titles to the estate, which she possessed till the year 1798, when she died; and the estate devolved on the next heir of entail, with whom she was altogether unconnected.

Mrs. Catharine Sinclair acquired an assignation to certain personal debts which had been contracted by William Budge, and were effectual against the entailed estate. She died in the year 1789. Upon the death of Mrs. Catharine Sinclair, Grizel Budge, then her only nearest in kin, intromitted with her

effects, took possession *via facti* of any moveables belonging to her, paid her funeral expenses, for she had no debts, and was decerned her executor *qua* nearest in kin.

Upon the death of Grizel, a competition ensued before the Commissaries of Edinburgh, between Major James Moodie the nearest in kin of Mrs. Catharine Sinclair, on the one hand, and Robert Russell and others, the nearest in kin of Miss Grizel Budge, on the other hand, with respect to the debts to which Mrs. Catharine Sinclair had acquired right. Moodie maintained that these debts were still *in bonis* of Mrs. Catharine Sinclair, never having been taken up by confirmation; and Russell maintained, 1st, That these had vested in Grizel Budge without confirmation; and, 2^{dly}, That they had been acquired by Mrs. Catharine Sinclair in trust for her daughters; but no proof having been offered or adduced on this last point, the parties pleaded, and the Court decided, on the supposition that these debts were acquired with the proper money of Mrs. Catharine Sinclair, and formed a part of her moveable estate.

The Commissaries pronounced the following interlocutor: ‘ Find, that on her (Catharine Sinclair’s) death, in the year 1789, the said debts were descendible, and did descend to Grizel Budge her only surviving child, who was accordingly, in the year 1790, decerned executrix-dative *qua* nearest in kin to her mother; and on that title, without confirming, had an universal intromission with the whole moveable effects and writings, and estate of Catharine Sinclair, paid all debts owing by her, and was in particular possessed of the whole bonds, and the other vouchers of the debts in dispute, which she retained under her own power till her death in the year 1798; therefore, as Grizel, by her succession, became both the creditor entitled to receive, and the debtor bound to make payment of the debts, as she could not pay to herself by that fictitious as well as nugatory act, to vest either the money itself, or the right to it, in her own person, more completely than they were by her simple existence in the situation described by both creditor and debtor, to herself, as she was legally authorised to pay even to a stranger without confirmation: Find that those debts, and the right to them, were fully and substantially established in her person; and on her death did not devolve to the mover Henrietta Sinclair, nearest in kin to Catharine Sinclair, but that they descend to, and are confirmable only by, the petitioner Jean Calder, nearest in kin, decerned in that character executrix-dative of Grizel Budge, and already confirmed to her in part; ordain them to be struck out of the inventory of the testament of Catharine Sinclair, and allow them to be eiked to the inventory of the testament of Grizel Budge, to whom they did rightfully belong.’

Major Moodie presented a bill of advocation. The Lord Ordinary reported the case on informations. On that report the Court ‘ repelled the reasons of advocation, and remitted the cause to the commissaries *simpliciter*.’

No. 5. Major Moodie reclaimed, and his petition was answered.
Argument for advocator.

In moveables confirmation as an *aditio hereditatis* is as necessary as service or infeftment in heritable rights, (Ersk. B. 3. Tit. 9. § 30.) Since the penalties of vitious intromission have been abolished, and since succession has become a source of revenue to the state, it is necessary to adhere to this general rule, that a faithful distribution of the effects of the deceased, and an accurate account of their amount may be secured.

To this general rule there are just four exceptions wherein effects transmit without confirmation, 1690, C. 26; in the case of special assignations, and special legacies; 2dly, In the case of the *legitim* and *jus relictæ*; 3dly, The confirmation of one subject transmits the whole succession; 4thly, In the case of such moveables as are capable of being possessed *via facti*, wherein the possession of the *ipsa corpora* is sufficient to vest them. But the case of Miss Grizel Budge is not within any of these exceptions.

That a decree-dative in favour of the nearest of kin, without confirmation, is not a sufficient title to convey, has already been decided, (13th February 1760, Susannah Ogilvie, No. 92. p. 3916.) and from this it necessarily follows, that the *jus sanguinis*, accompanied with the intention to represent, is not sufficient without an *aditio hereditatis*. If this had not been the law, a *decreet dative*, being unequivocal evidence of intention, ought to have been as effectual as a confirmation.

So likewise it is determined, that while possession *via facti* of the *ipsa corpora* of such moveables as admit of it, vests those which are actually apprehended, yet no *general title* to the other moveable subjects is thereby created. (Dict. voce SERVICE and CONFIRMATION, Sect. 5.)

By analogy from the case of simple moveables, payment by a debtor to the unconfirmed nearest in kin of the creditor may be safely and effectually made, and what is so paid transmits. So likewise a debtor, by granting a bond of corroboration to the nearest in kin, whom he thus substitutes in place of his deceased creditor, renders confirmation unnecessary.

But in all these cases possession and apprehension (or what is held in law as equivalent) of one moveable, creates no right to demand possession of another. It gives a right to retain, not to acquire; it constitutes a defensive, not an active title.

It is admitted by both parties that the debt was not actually paid; and there is no plea of implied payment, or extinction *confusione*, by the coincidence of debit and credit in the person of Grizel Budge. For it is the interest of both parties to admit and hold, that the entailed estate was and still remains the proper debtor in these bonds. The executors of Grizel are not defending themselves for a claim against her estate, but contending that a *jus agendi*, an active title transmitted to them, while she, in whose person they pleaded, neither acquired it by assignation, nor took that legal step by which alone it could

otherwise have been obtained. The very acknowledgment that the debt is still to be recovered from a third party (the entailed estate) and that the struggle is for an active title, shews that Grizel was not placed, in relation to these debts, in any of the predicaments already pointed out as exceptions to the general rule.

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If the defenders were desirous to compel payment of the bonds, there is no form by which the preparatory step of registration could be accomplished. By act 1693, C. 15. that writs may be registered after the death of the creditor, it is necessary that, in the case of heritable rights, a service and retour, and in the case of moveables, a confirmed testament, containing the bond or other writ, or a special assignation, be produced. The only person, therefore, entitled to obtain the bonds in question registered, is the pursuer, the nearest in kin of Catharine Sinclair.

The only case bearing the slightest similarity to the present, is that in which 'An elder brother, intromitting with the effects of the younger on his death, was found to have vested in himself a provision with which he was burdened,' (7th March 1769, Pringle against Veitch, No. 40. p. 14401.) but that case differs from the present in a very essential point. 1st, The elder brother was the only and proper debtor in the bond of which payment was implied and extinction presumed *confusione* by the coincidence of debt and credit in his person, whereas in this case the heir of entail is the proper debtor; and nothing is more distant from the intention of either party than to presume payment or extinction *confusione*. 2dly, The person in that case standing in the right of the eldest son, pleaded on a defensive title, that in law payment was held to have been made, and a repetition could not be demanded; whereas, in this case, the defender is contending for an active title, and for a right to pursue a third party.

Argument for defender.—The question is not what legal solemnities are required to constitute a title to pursue, but what acts are sufficient to vest a right in the next of kin of a defunct to the effect of transmission.

The form and necessity of confirmation derived its origin from the usurpation of the church. During the rigour of ecclesiastical tyranny, the moveables of a person dying intestate were seized and disposed of by an executor appointed by the church. This abuse was gradually corrected; the consistorial court succeeded the ecclesiastical power; and the small tax that is yet paid to that court, is the legalized remains of what was originally an intolerable grievance. The progress of the law is marked by various acts of Parliament, (Stair, Lib. 3. Tit. 8. § 51.) the last of which (1690, C. 26.) directs that there shall be no confirmation but at the instance of the nearest in kin, their tutors and curators, or of a creditor.

The *jus sanguinis*, therefore, vests the rights to the moveables to the effect of transmission: Accordingly it has been found, that a child's survivancy transmitted its right to its nearest in kin (19th July 1623, Sibbald against Procura-

No. 5. tor-Fiscal of St. Andrews', No. 12. p. 8176;) so likewise (18th January 1614, Hope *de Execut.** Whether confirmation be in all cases necessary to vest an active title, it is unnecessary to inquire; but that it is not necessary to vest to the effect of transmission, is clear from the undisputable fact, that *partial* confirmation creates in the next of kin a right to all the other unconfirmed moveables to the effect of transmission. The doctrine of partial confirmation establishes that the *jus sanguinis*, united with the intention to represent the defunct, is all that the law requires.

Likewise the possession of the *ipsa corpora* of the moveables, whether by the nearest in kin himself, or by another for his behoof, supersedes the necessity of confirmation (3d February 1744, Brand against Gray, No. 37. p. 14393.)

In the case of *nomina debitorum*, if a debtor to the defunct pay the debt to his nearest in kin, confirmation is unnecessary. (28th July 1784, Buchannan and Auld against Grant, No. 21. p. 14378.)

So likewise if a debtor without paying renews the security by bond of corroboration, (20th February 1751, Creditors of Alcorn, No. 39. p. 14399.)

From these decisions it follows, *1st*, That confirmation is not a sole and indispensable title to a moveable estate; *2dly*, That confirmation, as applied to a particular subject or debt, is not necessary to enable that debt to transmit.

But by a more recent decision (Pringle against Veitch, 7th March 1769, No. 40. p. 14401.) it has been found, that the subject of a person deceased may be taken out of his effects, without confirmation partial or total, by the mere concurrence of the debtor and creditor in the same person.

The present case is precisely similar, because, *1st*, Grizel Budge was the sole nearest in kin to her mother, and therefore had the *jus sanguinis*.—*2d*, She clearly shewed her intention of representing her mother, not only by an universal intromission, but by being decerned executrix *qua* nearest in kin.—*3d*, She was representative of her father and uncle, as well as heiress of entail; and in both these characters was liable for the debt. The character of debtor and creditor coincided in her person; and the fund of payment was in her possession as much as could have happened in the analogous case wherein a debtor pays up a debt or grants a bond of corroboration. If she had actually paid the debts, and granted herself a discharge, the debts might not have been extinguished *confusione*, but *ex concessis* they would have vested. But the law cannot require such an idle ceremony as a simulate payment and nominal discharge by the nearest in kin to himself.

* The words of Hope follow:—"In an action betwixt Elizabeth Lawson, daughter to Margaret Brown, Lady Humbie, and Dame Elizabeth Bannatyne, Lady Humbie and Ormiston, the Lords found that the husband of the said daughter might discharge the legacies left to her in her mother's testament after her decease, *quia legatum transit hæredes mero jure, et hæres dominus omnium bonorum.*"

And, on advising a second reclaiming petition and answers,

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The Court were of opinion, that there was a difference between this case and that of Pringle against Veitch. In that case, the coincidence of debt and credit was equal and unlimited, and the principle of extinction *confusione* had full operation. In this, the proper debtor was the entailed estate, and there was no room for extinction *confusione*.

A general opinion likewise prevailed, that to dispense with the necessity of confirmation, in any farther degree than was sanctioned in that case, would be unsafe and unexpedient.

The Lords adhered (23d June 1808.)

Lord Ordinary, *Bannatyne*.

Act. Jo. Clerk & Dav. *Douglas*.

Alt. *Advocatum*.

H. Moncrieff, W. S. and *Ja. Horne*, W. S. Agents.

P. Clerk.

J. W.

Fac. Coll. No. 69. p. 220.

1808. June 23.

ROBERT BLACKADDER and Others, against JOHN BLACKADDER and Others.

No. 6.

MARGARET BLACKADDER, wife of John Heriot, died on the 28th July 1786, pre-deceasing her husband, and leaving no issue, settlement, or marriage-contract.

Confirmation necessary to establish a right to the dead's part in the nearest in kin. Parole proof of the date of lodging bond of caution and inventory with the commissary clerk incompetent.

Alexander and James Blackadder, her brothers-german, were her nearest in kin; and had right to one half of the goods in communion.

James died before any measures were taken respecting her succession. Alexander, then her sole and nearest in kin, having raised an edict before the commissary of Lauder, was, on the 20th March 1804, decerned her executor dative.

On the 12th March 1806, Alexander died *in cursu diligentia* before the confirmation was expedite. On the 3d April, an extract of the confirmed testament was given out by the clerk, bearing date the 1st day of April.

A competition then arose between Robert Blackadder the brother consanguinean and disponee of Alexander, on the one hand, and John Blackadder and others, children of the deceased James, brother of Margaret Blackadder, on the other. Robert offered to prove by parole evidence, that an inventory had been made out, and bond of caution executed; all which had been transmitted to the commissary clerk on the 18th February 1806, a period of three weeks before the death of Alexander.

But John referred to two cases of precisely similar circumstances in which this point had been already determined, 24h January 1745, Carmichael against Carmichael, No. 12. p. 9267; and 13th February 1760, Ogilvie against his Majesty's Advocate, No. 92. p. 3916.