SECT. III.

Situation of a Factor, and of an Executor, relative to the Creditors of a Defunct.

No 20.
Where a factor was appointed by the Court, for the infant children of a debtor, to manage the estate belonging to their father, a creditor having pursued for payment of a debt, the Lords found, the proper method was, that the pursuer should obtain himself decerned executor-creditor to the defunct-debtor, and confirm the moveable effects in the factor's hands, as still *in hæreditate jacente* of the debtor.

1747. *November* 25. ELIAS CATHCART *against* WILLIAM HENDERSON.

A FACTOR appointed by the Court of Session for the infant children of Quintin Dick, to manage the funds which belonged to him, was convened in a process by one of Quintin's creditors to pay a debt due by Quintin contained in a bill. The defence was, That there was no passive title upon which he could be made liable; that the creditor had no other method but to take a decree of constitution against the infant children; and thereupon apply to the Court for a warrant against their factor. The LORD ORDINARY having assoilzied the factor, the matter came before the Court upon a petition and answers. The Judges were all clear, that there could be no necessity of taking a decree upon the passive titles in this case; and that such a decree could not pass, because no passive title could be specified against the children, who were not the intromitters. Elchies was clear, that the action was competent against the factor, as intromitter with the defunct's effects. *See* SERVICE & CONFIRMATION. Arniston thought it hard to give a creditor thus an opportunity of a start in diligence, where there can be no *pari passu* preference; and therefore, he declared his opinion, that the pursuer ought to obtain himself decerned executor creditor to his defunct debtor, and to confirm the moveable effects in the factor's hands, as still *in hæreditate jacente* of the debtor; to which opinion the plurality agreed. And so it was found, that the creditor must confirm.

Fol. Dic. v. 3. *p.* 165. *Rem. Dec. v.* 2. *No* 83. *p.* 155.

No 21.
In a competition among creditors of an executor, and a creditor of the person to whom the fund originally belonged; this last was preferred.

1779. *February* 12. JOHN TAIT *against* DAVID KAY.

DAVID BERVIE was debtor to Helen Simpson at the time of her death in a considerable sum.

Henry Simpson, her brother, having been confirmed executor, *qua* nearest of kin, David Kay, one of his creditors, charged him for payment, and arrested in the hands of Bervie, debtor of the deceased Helen Simpson. Others of Henry Simpson's creditors followed the same course, and David Bervie brought a multiplepoinding.

Henry Simpson dying soon after, Alison Kay, his relict, expeded a confirmation, as executrix nominate to him; and, among other subjects, confirmed the debt due by David Bervie.

Janet Bervie, a creditor of Helen Simpson, having assigned her claims to John Tait, he obtained decree for payment against Alison Kay, as executrix confirmed to her husband, who was executor confirmed to Helen Simpson. This decree was not obtained till the expiry of near two years and a half after the death of Helen, and the confirmation of Henry Simpson. No 21.

Tait produced his decree in the multiplepoinding, and *contended*, That, as the immediate creditor of the person, to whom the fund in question originally belonged, he was preferable on it to all the arresters, who were only the creditors of Henry Simpson, the next of kin. In support of this claim,

Pleaded for Tait: The proper funds of a defunct ought to be applied to the payment of the defunct's debts, before they can be touched by any creditor of his executors.—If the executor is the next of kin, a residuary right may remain to him in the defunct's effects, *deductis debitis*; but, until the debts are paid, he is no more than a trustee, and his creditors can have no right to payment out of effects which he only holds in trust.—Accordingly, it is laid down by our lawyers, that the creditors of the defunct are always to be preferred on the executry funds to those of the executor, though the latter should have used prior diligence; Stair, b. 3. t. 8. § 60. Ersk. b. 3. t. 9. § 42. And it is not said by these writers, that there is any limitation in point of time upon the creditors of the defunct in demanding their payment. They are considered as always preferable to those of the executor, as long as there are funds in his hands.

The act 1695, c. 24. does not invalidate this doctrine.—The object of this act was, to give a remedy to the creditors, both of the defunct and of the nearest of kin, where the nearest of kin did not confirm. All the provisions in the act are relative to the case of there being no confirmation. In the first part of it, the mode of attaching the defunct's subjects is pointed out; and it is added, 'With this provision always, that the creditors of the defunct doing diligence 'to affect the moveable estate within year and day of the debtor's decease, 'shall always be preferred to the diligence of the nearest of kin.'

It is therefore only in case the nearest of kin does not confirm, and the creditors follow out the course prescribed by the statute, that this provision applies, or that the limitation on the heirs of the defunct can take place.

When the next of kin confirms, he becomes trustee for all the creditors; and, on the established principles of law above mentioned, the creditors of the defunct must be paid out of the subjects before any residue, to which he may be entitled, can be affected by his creditors.

Answered for the Creditors of the nearest of kin: Antiently, in the law of Scotland, as well as in the early period of the Roman law, the heir was so much considered as *eadem persona cum defuncto*, that no distinction was made after the defunct's death betwixt the debts of the one and the other. The estate to which he succeeded was equally liable to be attached by the diligence of his own creditors as those of his ancestors, without any difference but what might arise

No 21. from the nature or priority of the diligence itself. This was remedied in the law of both countries, and a preference given to the creditors of the defunct; but, in justice likewise to the creditors of the heir, the law, wherever it gives the remedy, restricts it to a limited time.—In the Roman law, the creditors of the defunct were obliged to apply for the *beneficium separationis*, allowed by the *prætor* within five years; otherwise the general rule took place.

Previous to the act 1661, c. 24. it appears to have been our law, that, after titles were made up to the ancestor's *heritable* subjects by the heir, no preference was given to the creditors of the ancestor. By this statute, a preference is established in their favour, but, under the provision, that diligence is done against the estate of the defunct by them within three years after his death.—The terms of the statute imply, that both the preference itself, and the limitation attending it, hold equally in the case of an heir entered, and an heir in apparency.

In *moveable* succession, it was a doubtful question, prior to the act 1695, whether the creditors of the defunct had a preference? In one decision it was found, that they had; Laird of Kirkhead *contra* Irvine, No 2. p. 3124. —This seems, however, to have been still considered as a point not fixed; *vide* Sir John Nisbet's Doubts, *voce* EXECUTOR. But, by the act 1695, a permanent rule was established.

It appears from the narrative of this statute, that the purpose of the Legislature was to put the moveable succession on a footing with the heritable, so far as circumstances would permit. It sets forth, that the law is deficient, as to the affecting with legal diligence the moveable estate of a defunct, 'in such a man-'ner as a defunct's *heritage* may be affected.' A preference of the same kind, as in heritage, is given to the creditors of a defunct; but the less permanent nature of the subject suggested, that in moveables it should be of shorter endurance; and, accordingly, the statute confines it to a twelvemonth.

This limitation of the preference takes place whether the nearest of kin lies out without confirming, or expedes a confirmation. The doctrine, that executors confirmed are no more than trustees for the creditors, and have no right themselves in the effects, may apply to executors nominate or dative; but not to the nearest of kin confirmed. The nearest of kin is the heir in moveables, and the confirmation no more deprives him of that character, and renders him merely a trustee, than a service as heir reduces an heir in heritage to that state. He must indeed discharge the burdens affecting the moveable estate to the extent of the inventory, and he will not be benefited by the succession beyond the free residue. In both respects, the case of an heir with respect to heritage, is entirely similar.

But, whether the nearest of kin after confirmation be considered as a trustee, or as *hæres in mobilibus*, the statute 1695, both from the terms and intendment of it, reaches to the case of the next of kin confirmed, in like manner as the

statute 1661 reaches to the case of an heir served. The *heritable* and *moveable* succession must be put on the same footing, agreeably to the intendment of the statute. No 21.

THE COURT found, 'That Mr Tait is entitled to be preferred to the other competitors on the funds *in medio*, for his claims in right of Janet Bervie, as it is a debt due by Helen Simpson, to whom the funds belonged.'

Lord Ordinary, *Ankerville.* Act. *Armstrong.* Alt. *Rolland, Sinclair.*
Clerk, *Gibson.*

Fol. Dic. v. 3. *p.* 165. *Fac. Col. No* 69. *p.* 129.

See HEIR APPARENT.—SERVICE and CONFIRMATION.—EXECUTOR.—APPENDIX.