1778. *February* 11. Mary Nasmith *against* Commissaries of Edinburgh.

No 93.
Found in conformity with Brodies against Stephen, No 90. p. 3911.

The whole effects of a defunct being inventoried and appretiated by the Commissaries, a partial confirmation, to a small amount, was demanded by the executrix, Nasmith, which the Commissaries refused to grant.

The Lord Ordinary refused a bill of advocation against this judgment; but, upon advising a reclaiming petition and answers, the Court were of opinion, that the Commissaries are obliged to grant confirmation upon any part of the defunct's effects that shall be offered them for that purpose. This judgment was given upon the same grounds as in the case Agnes and Jean Brodies *contra* the Commissary-depute of Murray, 10th August 1753, No 90. p. 3911. The only difference betwixt the two cases was, that, in the former, a partial inventory of the effects had only been made, to the extent of which the confirmation was demanded. This was not considered by the Court as forming any distinction of consequence betwixt that case and the present.

The Court 'remitted the bill of advocation to the Commissaries, with instructions to allow the confirmation to proceed, as craved by the petition.' *See* Nearest of Kin.

For Commissaries, *Solicitor General.* Alt. *C. Hay.* Clerk, *Tait.*

Fol. Dic. v. 3. *p.* 191. *Fac. Col. No* 13. *p.* 26.

1779. *July* 27.

Walter Sloan-Laurie, *against* Alexander Spalding-Gordon.

No 94.
Tho' a partial confirmation, *qua* nearest of kin, is found to transmit the whole, yet subjects not specially confirmed, and not intromitted with, remain still *in bonis* of the defunct, and must be taken up accordingly, and are affectable by his debts.

In 1741, Walter Laurie granted a legacy, in favour of Walter Sloan, in the form of a bond, for L. 60, payable one year after his death. Laurie died soon after; and, in 1745, James Laurie, his nephew, and only next of kin, had a general intromission with his moveable effects, and obtained himself confirmed in a part of them.

Walter Laurie, some time before his death, had conveyed over to Robert Gordon a moveable bond for L. 500, which Gordon owed him, 'reserving the annualrents during his own life.' The interest, therefore, remaining due to Laurie on the bond, when he died, came to be part of the moveable effects *in bonis* of the defunct.

In 1775, Sloan, who had got no payment of his legacy, confirmed executor-creditor to Walter Laurie in this subject, and brought an action against Alexander Spalding-Gordon, the representative of Robert, for payment of these interests.

The defender, in bar of this action, *contended*, that the whole of the defunct's moveable effects, and of consequence, these interests were vested in James

Laurie by means of his partial confirmation; and, that he had claims against Laurie sufficient to compensate the interests. In support of this objection, No 94.

Pleaded for the defender; The nearest of kin is the heir *in mobilibus*. His right to succeed to the moveable effects was known in the antient common law of Scotland, though the usurpation of the clergy had greatly encroached on it. The act 1540, c. 120. gave the first check to these usurpations. In this act, the nearest of kin is supposed to be, *ipso jure*, vested with a proper right of succession, separate from any authority given by the ecclesiastical court.

The statute sets forth the iniquity done by executors-dative, in withdrawing the effects of children dying under age 'fra the kin and freinds that suld have 'the samen be the law;' and enacts, that, for the future, the nearest of kin 'suld have their gudes.' From this time the right of the nearest of kin to the defunct's moveables came to be acknowledged in courts of law, and held to be expressly independent of the office of executor, or any title derived from the ecclesiastical court; Stair, b. 3. t. 8. § 11. A partial confirmation by the nearest of kin, and possession of any part of the subjects, as they implied that he had entered on the succession, were held to vest in him the right of the whole effects. Accordingly it was early found, and is now a fixed point, that these are sufficient upon his death to transmit the whole moveables to his heirs at law; Bells against Wilkie, February 12. 1662, *voce* NEAREST OF KIN; Forsyth against Paton, No 6. p. 2941.

By act 1690, c. 26. the succession in moveables was freed from what remained of those restraints which the clergy had laid on it; all the modes by which the Commissary court had attempted to oblige the nearest of kin to confirm, were entirely prohibited, and the act has been considered as allowing the succession in moveables to be taken up by the possession alone without confirmation; Br. antiq. p. 180.; Bankt. b. 3. t. 8. § 118, 119. On this ground, the decisions proceeded, M'Whirter against Miller, November 14. 1744, Falc. *voce* SERVICE AND CONFIRMATION; Ogilvie against King's Advocate, February 13. 1760. No 92. p. 3916. But, in the present case, there was both an intromission with the effects, and a partial confirmation, which has always been held a legal method of taking up the succession, and vesting the whole subjects in the nearest of kin.

The preference given to the creditors of the defunct doing diligence on the subject within year and day, over those of the nearest of kin, does not aid the pursuer's plea. It is merely an exception from the common law, introduced by a special provision in the act 1695; and, therefore, where no such diligence is done within the year and day, and there has been a partial confirmation by the nearest of kin, the creditor of the defunct has no preference on the moveable subjects that belonged to him. If he can attach them at all, it is only on the footing of their being the property of the nearest of kin, who succeeds to the defunct in this part of his subject.

No 94. It has now become an established practice for the debtors of the defunct to pay his nearest of kin, and to take discharges from him without scruple, though in the knowledge that their debts have not been confirmed. They have been considered as perfectly safe in doing so; and such discharges are held to be valid and effectual; Bankt. b. 3. t. 8. § 120. But, if it shall be found that nothing is vested but what is specially confirmed, no debtor will rely on such a discharge. Confirmation of the debt will always be required before it is paid. Thus, the succession to moveables will be loaded with an additional expense.

Answered for the pursuer; At an early period, the clergy assumed a superintendence of the execution of all last wills, chiefly on pretence, that the execution of a trust was a matter of conscience, and all testaments implied a trust. The person appointed by a testament to administrate, was obliged to apply to the ecclesiastical court, for leave to enter on the management, to make up an inventory of the subjects in that court, and find caution to administer properly.

In succession *ab intestato*, the clergy interfered on the same ground. The deceased having failed to name a trustee, this defect was supplied by the bishop of the diocese, in consequence of his general controul over trusts.

In distributing the effects, the defunct's creditors were first to be paid by the executor-dative. A portion of the effects was then set apart to answer the legal rights of relict and children; and the clergy considered the remainder of the succession as *bona caduca* in their own hands, to be applied as they thought fit. The object of the act 1540 was merely to rectify this latter abuse. It applied only to a particular case; but, as the power of the clergy soon after declined, the statute received a liberal interpretation. The dead's part, no longer considered as a caduciary right in the hands of the church, was transferred to the nearest of kin, who came to be entitled to the office of executor in all cases.

But, although the clergy were thus restrained from seizing on the dead's part, the nearest of kin, in order to establish his right in any particular subject, must still apply to the proper court, and obtain himself specially confirmed in that subject. A partial confirmation is only sufficient to vest the office of executor in the nearest of kin, and to make it transmit, on his death, to his executors. By such confirmation, he obtains and takes possession of the office; and being a general trustee for all concerned, may intromit with the defunct's other subjects, in order to account more completely to the creditors.

The nearest of kin, though in possession of the office of executor, is not, on that account, effectually vested in the defunct's subjects. He has no *jus exigendi*. It is is an established point, that the defunct's debtor may always refuse to pay, until the debt itself is confirmed. Even when the nearest of kin gets a license to pursue, he is only entitled to obtain a decree, and the debt must be confirmed before extract; so that he never can have execution against the effects themselves without a confirmation. None of the defunct's effects, therefore, vest, *pleno jure*, in his nearest of kin, until they are specially confirmed. Though he had even obtained possesion of the effects, they might be

attached, as in *bonis defuncti*, by the creditors of the deceased, and the creditors of the executor, in whom they never were vested, would have no title to challenge their diligence. No 94.

The decisions founded on do not apply. They go no further than to show, that the office of executor, established in the person of the nearest of kin, transmits to his executors. These heirs may be entitled to intromit, but, without a special confirmation, are not vested in the right to any subject. There is no ground for supposing that the act 1690 meant to alter the law in this matter. It establishes only, that the Commissary-court cannot oblige a person to confirm for their emolument, if he does not otherwise choose it.

The statute 1695, c. 41. is in favour of the pursuer's plea; for it proceeds on the hypothesis, that, at common law, creditors of the nearest of kin had no access to any subjects which their debtor did not choose specially to confirm. It directs by what methods the creditors shall be enabled to attach such effects for the future; but, when these methods are not used, as in this case, the subject remains *in bonis defuncti*, attachable by the diligence of the defunct's creditors.

Though the executor cannot oblige the debtor to pay, if the debt is not specially confirmed, yet payment made to a person vested in the office of executor, is always sufficient to liberate the debtor. The determination of the Court, therefore, in this case, cannot affect his safety.

The cause was determined on a hearing in presence, and memorials.

THE COURT found, 'That the annualrents in question are to be held as *in bonis* of Mr Walter Laurie, affectable by his debt.'

Lord Ordinary, *Hailes.* Act. *Crosbie.* Alt. *A. Miller.*
Clerk, *Tait.*

Fol. Dic. v. 3. *p.* 191. *Fac. Col. No* 87. *p.* 169.

1784. *February* 10. DANIEL FRASER *against* JAMES GIBB.

No 95.
Debtors are not bound to make payment to executors or nearest of kin, unless confirmation has been obtained as to their full debts.

FRASER, as next of kin, and executor of a creditor of Gibb, and as having expede confirmation with respect to some other of the defunct's effects, and in a portion likewise of Gibb's debt itself, sued him for payment, and obtained decreet against him. Gibb presented a bill of suspension; but it having been refused by the Lord Ordinary on the bills, he, in a reclaiming petition,

Pleaded, To give an active title to a creditor's executor, confirmation respecting the particular debt claimed has ever been found to be necessary; although, by being partially confirmed, the executor may render the office itself transmissible to legal or to conventional successors; as was determined in the case of the Creditors of Murray, 4th December 1744, No 89. p. 3902.

Answered, 'The confirmation by an executor, *qua* next of kin, of any one 'subject belonging to the deceased, as it proves his right of blood, and conse-