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 executry; and
 a Commissary
 is not entitled
 to refuse to
 give out a
 confirmation,
 because the
 whole move-
 ables are not
 given up in
 the inventory.

longed to her. The Commissary-depute refused to give out the confirmation, because the inventory did not contain all the moveables of the defunct; and insisted that the executors should give up inventory upon oath, bearing that the inventories contained the whole moveables which belonged to the defunct, and had come to their knowledge.

Agnes and Jean Brodies gave in a summary complaint to the Court of Session, complaining of the above refusal; and *argued*, that as by the act 26th. Parliament 1690, it is provided, that the nearest of kin shall have liberty to confirm or not to confirm the testaments of persons deceased as they think proper; and shall not be compelled to confirm by the Commissaries or their Fiscals; so when the nearest of kin chooses to confirm, he may confirm part by giving up in inventory as much as he pleases, and cannot be compelled by the Commissary to give up more. And such partial confirmations have been found by late decisions of their Lordships sufficient to vest the right of the whole moveables in the person of the nearest of kin.

To this complaint the Commissary-depute *answered*, That by the instructions to the Commissaries, no testament is to be confirmed till the executor make oath that the inventory contains all the moveables of the defunct which have come to the executor's knowledge; and the stile of the confirmation is, that the inventory is faithfully given up by the executor. And although, since the said act of Parliament, a Commissary cannot compel persons to confirm a defunct's testament, yet if they do confirm, they ought to give up inventories faithfully, and upon oath, especially where creditors are interested, and insist for an oath; and in the present case, the respondent is himself a creditor to the defunct.

Before the complaint and answers were advised, the Commissary-depute had given out the confirmation; and therefore the complainers insisted only for the expenses of the complaint.

'THE LORDS found, that the respondent did wrong in refusing to give out the confirmation mentioned in the complaint; and found him liable to the complainers in the expenses of the complaint.' See NEAREST OF KIN.

Act. Lockhart.

Alt. Tho. Hay.

Clerk, Pringle.

Fol. Dic. v. 3. p. 191. Fac. Col. No 88. p. 133.

No 91.
 Possession of
 the move-
 ables by the
 nearest of kin,
 vests the
 right without
 confirmation.

1757. December 21.

ELISABETH BRODIE, Relict of WILLIAM STUART Merchant in Edinburgh,
against ARCHIBALD STUART Merchant in Edinburgh.

MARGARET CHARTERIS, relict of the deceased Daniel Stuart writer in Edinburgh, kept a shop in Edinburgh, and dealt to a considerable extent. She

died intestate upon the 13th of April 1748, leaving issue four children, William Stuart, the pursuer's husband, who was then abroad in the East Indies; Archibald, the defender; and Alexander and Margaret Stuarts. A few days after her death, particular inventories of the whole effects and debts belonging to her, amounting to upwards of L. 1500 Sterling, were made up by Archibald Stuart the defender, her second son; who took upon him the management and disposal of these funds, for the behoof of all concerned.

In September 1748, Archibald moved an edict for being decerned executor *quâ* nearest in kin to his mother; and was accordingly decerned; but before any confirmation could be got expedite, and the active title thereby established in his person, the pursuer Elisabeth Brodie, as factrix to her husband William Stuart, the eldest son, who was then supposed to be alive, did, upon the 5th of January 1749, prefer a petition, in name of the said William Stuart, to the Commissaries of Edinburgh, insisting, That the said William Stuart might be conjoined with Archibald, the second son, in the confirmation; which was accordingly ordered by interlocutor 25th January 1749. On the 8th of March thereafter, Archibald, with a view to save expenses, expedite a confirmation for the sum of L. 22 Sterling only, being a small debt due to the defunct.

After William Stuart was thus conjoined in the office, Archibald entered into a transaction with Elisabeth Brodie; the result of which was, that Archibald, upon the 23d of February 1749, granted a declaration or obligation to the pursuer, as factrix for her husband; which contains a recital of the facts before set forth; and then proceeds in these terms: 'And I being now satisfied of my brother's right, which I never intended to disappoint, but only, by not confirming the whole subjects which belonged to the said Margaret Charteris, to save charges as much as possible, for the interest of all concerned; and I having this day signed exact duplicates of the inventories above mentioned, which I have herewith delivered to the said Elisabeth Brodie his spouse; I acknowledge and declare, That I have taken the said effects, and grounds of debt, into my custody; and that I am to seek in and recover the said debts for the joint behoof of the said William, and of Alexander and Margaret Stuarts, my brothers and sister; for all of whom I hereby declare, that I hold the said office of executry in trust, as well as for myself; and I oblige me to account for, and to pay to them, and their heirs, &c. their full share of the said executry, in so far as shall be due to each of them, after deducting the debts, and charges of management, in the same way and manner as if all of them had been conjoined in the said office, and had confirmed every particular contained in said inventories.'

Soon after this obligation was granted, accounts were received of William Stuart's death upon the 9th December 1748, in the East Indies; and as it thereby appeared, that William was dead some time before the foresaid application, for his behoof, made to the Commissaries by the pursuer for his being conjoined in the office; and consequently before the above declaration or obligation was

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granted; upon supposition of his being then alive; the question occurred, What right or benefit accrued to the pursuer, who had been left William's sole executrix, from the said obligation?

The pursuer having confirmed herself executrix to William, brought an action against Archibald to recover her husband's fourth share of the effects of Margaret Charteris. Archibald raised a multiple-poinding, calling all parties concerned; and the cause being heard before the Lord Justice-Clerk Ordinary, his Lordship, on the 27th February 1755, pronounced the following interlocutor: ' Finds the defender Archibald Stuart must account to the pursuer Elisabeth Brodie, in the right of William Stuart her husband, for the fourth part of the shop goods, lying money, household-furniture, and other moveables, which were in the possession of the defender's mother at the time of her death, and were intromitted with by the defender; and makes avisandum to the Lords with the other points in debate.'

By this interlocutor, a distinction was made betwixt the *bona mobilia* which had been in the possession of Margaret Charteris at the time of her death, and afterwards intromitted with by the defender; and the *nomina debitorum*, or the debts constituted by writ, and standing in the account books of the defunct; which last amounted to upwards of L. 1100 Sterling. The interlocutor was founded upon the authority of the later decisions of the Court, particularly in Macwhirter against Miller, *voce SERVICE AND CONFIRMATION*. It was here held, as in former late cases, that the right to moveables was established in the nearest of kin for the time, by possession, without actual confirmation; and that the defender's obligation, though of date posterior to William's death, ought so far to operate in favour of him, and of his executors, as to entitle the pursuer to William's share of the *bona mobilia*, notwithstanding that William was dead at the time of said obligation, in respect he was alive at the time when Archibald intromitted with these. The Lord Ordinary's interlocutor, upon this point, was acquiesced in by the parties, and became final.

The other point in this cause, reported to the Court, was, Whether the pursuer had also right to a share of the debts due to the defunct?

Pleaded for the defender, *imo*, It is held by all our lawyers, that confirmation is necessary to vest a right in the nearest of kin to the debts due to a defunct, as being the proper *aditio hæreditatis in mobilibus*, and the only method known in the law of transmitting such subjects from the dead to the living. The being decerned executor is but an incomplete step towards the making up the title; it is the actual confirmation only which completes it, and serves to transmit the right. This method the law has devised, not only for the benefit of all concerned in the executry itself, to prevent concealments; but more particularly as to the *nomina debitorum*, in order to secure the debtors, who have an interest to see that proper titles be established, whereby they may pay safely. And as no debtor can be compelled to pay, but upon actual confirmation, this

shows clearly, that our law, as to this point, remains firmly established. *2do*, With regard to the obligation granted to the defender, it can have no effect, as it proceeds upon an error *in substantialibus*, viz. upon an erroneous supposition, that William was then alive, and thereby capable of establishing a title to his share of the moveable effects by confirmation; or, which would be tantamount, of acquiring right by the defender's obligation; but as William was dead before that time, and even before the pursuer, as his factrix, made the afore-said application to the Commissaries for his being conjoined in the office, the obligation was rendered abortive; and as William was then incapable of acquiring any right, matters remained upon the same footing as if no such obligation had been granted.

Answered for the pursuer; To the *first*; Whatever may have taken place in our ancient law, it is now an established point, founded on reasonable considerations and just principles, That confirmation is not necessary; but that the *jus sanguinis* vests the full right of moveables in the nearest of kin, and transmits the same to their representatives; 17th December 1729, Shearer *contra* Wilson, *voce* NEAREST OF KIN; 14th November 1744, Macwhirter *contra* Miller, *voce* SERVICE AND CONFIRMATION. And therefore, as William Stuart, the pursuer's husband, was alive when the above steps were taken by the defender, the whole moveables which had belonged to their deceased mother, having ceased to be *in bonis* of her, became the property of her children. And notwithstanding William died before the execution of the foresaid obligation, and although there was a defect in the incompleated title of the nearest of kin; yet the defender having moved an edict, and being decerned executor on the said 28th September, upon which confirmation was expedite 8th March thereafter, the same was sufficient to supply any defect of title, and did accresce to William, and the other nearest of kin. To the *second*; The inductive cause set forth in the defender's obligation, is, 'That he was satisfied with his brother's right, which he never intended to disappoint;' and therefore, 'he obliges himself to account for and pay to his brothers and sister, their heirs, executors, or assignees,' their full share of the said executry, in the same way and manner as if they had been all conjoined with him in the said office,' &c. As therefore the defender held this office of executry in trust, for the behoof of all concerned, and who had acquired a right thereto upon the death of their mother, his after confirmation must, in terms of his obligation, accresce to the pursuer in right of William, who was alive at the time the defender was decerned executor by the Commissaries; nor can he now be allowed to counteract his own express obligation, which was founded on motives of justice and the principles of law.

'THE LORDS found, That by the obligation, dated 23d February 1749, the defender Archibald Stuart was accountable to the pursuer Elisabeth Brodie, as in the right of the deceased William Stuart, the defender's eldest brother, and likewise to Alexander and Margaret Stuarts, the defender's brother and sister,

No 91. for their proportion of the debts due to Margaret Charteris their mother.' See No 77. p. 541.

Reporter, *Justice-Clerk.* Act. *Da. Dalrymple.* Alt. *Lockhart.* Clerk, *Home.*
Fac. Col. No 74. p. 124.

1760. February 13. SUSANNA OGILVY *against* His MAJESTY'S ADVOCATE.

No 92.
 A decreedative in favour of a nearest of kin, without confirmation, not a sufficient title to convey.

JOHN FARQUHARSON was proprietor of the lands of Monaltry and Craigmyle. He sold the lands of Craigmyle; and, at his death, the greatest part of the price remained in the hands of the purchaser,

John Farquharson died without issue-male, leaving a daughter, Anne Farquharson.

The lands of Monaltry, being a male fee, by the death of John Farquharson devolved upon his brother Francis; who being convicted of high treason, the lands were surveyed as forfeited, in terms of the vesting act.

Anne Farquharson was decerned executrix to her father by the Commissary of Aberdeen; but died before the confirmation was expedite, having made a deed in favour of Susanna Ogilvy.

After the death of Anne Farquharson, the price of Craigmyle was also surveyed, as falling under the forfeiture of Francis Farquharson.

A claim was entered for Susanna Ogilvy, as having right to the price of Craigmyle, in virtue of Anne Farquharson's deed in her favour.

Objected for his Majesty's Advocate, That the subject in question was never vested in Anne Farquharson; and therefore could not be carried by her deed to the claimant. The only right in the person of Anne Farquharson was the decerniture in her favour, which, without confirmation, did vest nothing.

An *ipso jure* transmission of property from the dead to the living, is unknown in the law of Scotland. Certain titles are necessary to vest in the heir the subjects which belonged to his predecessor, whether these subjects be heritable or moveable. The title necessary, in moveable subjects, is confirmation. A simple decerniture vests no right; it only declares, that the person decerned has a title to be confirmed, in the same way as a special service points out the person who is entitled to take up the lands belonging to the defunct; but it is the infestment that vests the lands in the person of the heir. If he dies without infestment, the special service falls to the ground.

This doctrine is laid down by all the writers on our law, and supported by the decisions. There is a late one directly in point, 23d January 1745, Carmichael against Carmichael, *voce* NEAREST OF KIN.

Answered for the claimant, The price of Craigmyle was a moveable subject, *in bonis* of John Farquharson at the time of his death. At his death the right devolved upon his daughter Anne Farquharson, without the necessity of any