1776. *November* 27.

JAMES and GEORGE LESLYS *against* GEORGE ABERCROMBY.

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A minister's bond to the widow's fund, and his arrears of taxes, not deducted from the goods in communion, in an accounting with his wife's nearest of kin.

JOHN LESLY of Drumdola, obliged himself, by a bond of provision, to make payment to his younger children of certain provisions therein mentioned, and particularly to his daughter Jean the sum of £300 Sterling, the one half at the first term after his death, and the other half at the next term after the death of his wife Elizabeth Chalmers. Soon after Mr. Lesly's death, his daughter Jean intermarried with George Abercromby, minister of the Gospel at Aberdeen, and shortly after this event the above-mentioned bond was discharged, and assigned by Abercromby and Spouse to Morison of Bognie, who had purchased the lands of Drumdola. In consideration of this discharge and assignment, Bognie paid to Mr. Abercromby L.250, with interest then due, and at the same time granted his bond for the other L.250, payable to Abercromby, his heirs, executors, or assignees, at the first term after the death of Elizabeth Chalmers, his wife's mother.

See No. 20. p. 5783.

No contract of marriage, or any settlement either before or after the marriage, took place betwixt Abercromby and his spouse. She died about two years after her marriage, without making any will, but only a verbal destination of her clothes, and two legacies which she recommended to her husband's care. At her death she left a son about fourteen months old, who survived his mother only 15 days. An action was shortly afterward brought by her brothers James and George Leslys, as her nearest in kin, for their share of the effects in communion. The defender was at first assoilzied from that part of the libel which concluded for payment to pursuers of a share of the L.250 Sterling, contained in Morison of Bognie's bond. This interlocutor, however, the Lord Ordinary (Covington) afterward altered, and found that the sum in this bond must be added to the condescendence of the goods in communion.

Against the interlocutor, finding that this sum, and several other articles, made part of the goods in communion, the defender reclaimed to the whole Court, and endeavoured to support his cause by the following arguments.

It was urged, in the first place, as a general point of law, that the defender's son having survived his mother, and the whole effects of the mother being in the possession of the father as administrator in law, they vested in the son *ipso jure* without confirmation, and therefore now belonged to the defender as his nearest in kin, to the exclusion of the pursuers as nearest in kin to the mother.

Possession of moveables, according to a long received principle of law, transmits the right to them without necessity of service as to heirship moveables, or of confirmation as to others, 2d February 1610, Blackburn against Rigg, No. 29. p. 14384; M'Whirter against Millar, 14th Nov. 1744, No. 38. p. 14395. Baird against Greig, February 3d, 1747, No. 37. p. 14393; Brodie against Stewart, 21st December 1757, No 91. p. 3912.

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From this last decision, it appears that possession attained even by another person for behoof of the nearest in kin transmits the right from the deed without comfirmation, and also that the effect of this extends not only to *corpora mobilium*, which are capable of possession in the strictest and most direct sense of the word, but also to *nomina debitorum*, of whatever sort these may be.

This last proposition seems indeed to follow of course, from the general principle, that any one subject of executry being habily vested in the nearest of kin, the title to the whole transmits of course. This is a point *toti juris*, it having been repeatedly decided that confirmation of any particular subject, however trifling, vests the right to the whole executry; and there seems to be no difference between confirmation, and any other method of vesting the title. The general right of the nearest in kin is indefeasible; it cannot vest in part or remain *in bonis defuncti* in part; and hence if the *corpora mobilium* transmit from the deceased to his nearest in kin by mere possession, the whole right must go along with them, so as to exclude more remote successors from taking it up afterward. Debtors, it is true, may insist on particular debts being confirmed before they pay them; but this they may do in case of a single debt having been confirmed, before which, the single confirmation is nevertheless available to vest the whole right of executry in the nearest of kin.

Such is the general principle, which, if well founded, is decisive of the whole question. But supposing it to be otherwise, still the defender would be entitled to relief against other points determined by the Lord Ordinary.

1*st*, Morison's bond is clearly vested in the defender; and being so vested, the only question is, whether it is to be considered as moveable in such a sense as to fall *sub communione*, or whether it be heritable *ad hunc effectum*. Where a sum of money is made payable at an uncertain day, and which may be at a great distance, such a sum is not to be held as simply moveable even before the term of payment; 15th January 1628, Falconer against Beatie, No. 34. p. 5465. Prior to the statute 1661, bonds bearing annual-rent were heritable even in a question betwixt heir and executor; and as no alteration was made upon the former law, by the foresaid statute, as to questions betwixt husband and wife, the bond now in question must be held to be heritable in such a case as the present. The discharge of the former bond by the wife, and the taking up of this bond in place of it in the name of the husband, was a transference of the property from her to the husband. Though this might have been revocable as a *donatio inter virum et uxorem* during the subsistence of the marriage, yet as she executed no revocation, the conveyance became absolute by her death.

2*d*, The Lord Ordinary had found by his interlocutor, that a bond by the defender of £30 to the collector of the widow's fund can be no deduction from the goods in communion. In opposition to this it was contended, that this debt affects the funds in communion, as it is payable not only upon the death of the incumbent, but upon his translation, deprivation, or resignation,

No. 3. and as payment of it is thus not necessarily suspended till the dissolution of the marriage, but may in many cases happen to be made during the existence of it.

3*d*, The Ordinary had also found, that no deduction is to be made from the goods in communion on account of the window tax falling due during the subsistence of the marriage. Against this the defender argued, that though the clergy of the Church of Scotland have obtained a temporary relief from this tax, the collector being not made chargeable with the arrears due by them, while the ministers themselves are not at the same time discharged, yet the burden thus still hangs over their head, and though no demand is made against them, they are not altogether secure against such a demand. In such a situation the sum exigible as window tax during the subsistence of a marriage falls to be considered as a debt affecting the goods in communion, being contracted during the subsistence of the marriage, and never having yet been discharged. Nor can the uncertainty whether these debts shall ever be demanded be of any avail against this argument; for it would be improper to make the defender pay over the amount of this sum to the pursuer, and run the risque at the same time of an eventual demand for a like sum at the instance of the public.

Pleaded for the pursuers, in answer to the general point, in so far as respects the *corpora mobilium* which were in the defender's possession at the dissolution of the marriage: That question has already been given in favour of the defender by an interlocutor of the Lord Ordinary. The present question, therefore, respects only the *nomina debitorum* due to the defender at the dissolution of the marriage, and in that view none of the decisions quoted by him are applicable.

It is true, that where the nearest in kin apprehends the possession of the *ipsa corpora* of the moveables belonging to the defunct, the necessity of confirmation of these particular subjects is superseded. In the same manner, where the debtors of a defunct make either an actual payment to the nearest in kin, or come under an explicit obligation to pay, confirmation is unnecessary as to such debts. But the defender's plea carries this matter much farther, and tends indeed to abolish confirmations altogether. An *ipso jure* transmission of property is unknown in our law, and either the apprehension of the possession of the subject itself is absolutely necessary, or a title must be made up by confirmation. Upon these principles it was determined, that a decree dative in favour of a nearest in kin vested no right whatever without confirmation; January 23, 1745, Carmichael against Carmichaels, No. 53. p. 14417; 13th February 1760, Susanna Ogilvie against His Majesty's Advocate, No. 92. p. 3916. And in no case whatever has it been found that the right was transmitted *nuda existentia*. Upon the supposition even that the defender had been the nearest in kin to his own wife, and had died, he has yet had no such possession as would be sufficient to transmit the right to his representatives. Were the defender now to die, confirmation would be absolutely necessary to

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vest the right of the debts in question in his nearest of kin, unless they should have obtained payment, or bonds of corroboration, or other securities for the debts due to them. And if so, it is impossible that the wife's right and interest in these *nomina* can be held as vested in the person of her infant son, so as to transmit the right thereof to the defender as the son's nearest in kin.

A confirmation of a nearest in kin, however partial, must have the effect to vest the whole right, as the character of *hæres in mobilibus* is thereby completely established in the person so confirmed. But apprehending the possession of any part of the *corpora mobilium*, or receiving payment of any particular debt, can have no such effect. Such apprehension of possession may establish a passive title, but can never vest an active one. In the same manner a precept of *clare constat* with infeftment goes no farther than the particular subject in which the heir is vested by the act of the superior.

1*st*, As to the first point maintained concerning Bognie's bond, and laying aside the general question, it is understood as an established point, that a bond, though containing a stipulation of interest, is a subject simply moveable before the term of payment of either principal or interest; nor can it vary the nature of such rights, that the term of payment is either an uncertain day or a day at a distant period. It has also been finally adjudged betwixt the parties, that the bond of provision which was payable in the precise terms with Bognie's bond belonged to the defender *jure mariti* as a sum simply moveable; and the bond therefore must thus at any rate be held as composing part of the goods in communion. As to the argument that there was here a donation from the wife to the husband, which became absolute by her death,—the husband's getting possession of the wife's funds in the common course of administration, does by no means vest these funds in himself; and though a wife should convey her whole effects to the husband in the most express terms, yet that would not hinder her or her representatives from claiming a share of such of her funds as were simply moveable at the dissolution of the marriage.

2*d*, As to the bond to the collector of the widow's fund, it is a bond bearing interest, and upon which sundry years interest had been paid before the dissolution of the marriage. It is therefore an heritable debt, and in so far as concerns the principal sum, cannot burden the wife's interest in the goods in communion; nor is it of any consequence whether the bond might have become payable prior to the dissolusion of the marriage; for the real question is, what was the nature of the debt when the marriage was dissolved.

3*d*, As to the window tax, these arrears are in their nature a debt simply moveable; at any rate the pursuers are willing to find undoubted security to relieve the defender of a proportional part of these arrears, if ever he shall be called upon to pay them.

The Court pronounced a judgment, adhering to the whole interlocutor of the Lord Ordinary.

Lord Ordinary, *Covington*. Act. *M'Queen*. Alt. *Crosbie*.

J. W.