1784. *July* 16. JAMES BUCHANAN and JOHN AULD *against* ADAM GRANT.

SERVICE AND CONFIRMATION.

Payments to the creditors of a person deceased, in consequence of a general mandate from the nearest in kin, or general disponee unconfirmed, effectual in a question with the creditors of the defunct confirming.

[*Fac. Coll. IX.* 265; *Dict.* 14,378.]

MONBODDO. Let us consider, 1*st*, What would have been the case by the civil law. In it there were two ways of making up titles by succession: 1. *Aditio hæreditatis; 2. Gestio pro hærede.* The second, as well as the first, was an active as well as a passive title, although not so with us. Mr George Goldie incurred the passive title of *gestio pro hærede*: this also gave him an active title to transmit. I should carry this still farther, were there not in our law a *confirmation,* which is a good institution, not known in the civil law. The debtor is secure against the next nearest in kin, but not against creditors confirming: were it not so, the office of commissary would be useless. But, from what I have heard from Mr Solicitor Dundas, I doubt that that is not the case *here.* Goldie granted a factory to uplift the executry funds, and to pay them to the creditors of the defunct. Grant and Goldie are one and the same person. Grant is the hand of Goldie; and that being the case, I cannot consider Grant as a debtor of the executry: the pursuers ought to have gone against the debtors.

PRESIDENT. Grant was debtor to the executry.

BRAXFIELD. It is natural for creditors to complain of the law when they do not get payment; but generally the fault lies in the creditors themselves. When a man dies, creditors may confirm directly, and prevent dilapidations: in this case, had the creditors offered to confirm, Goldie, as nearest in kin, would have been preferred, but it would have been upon caution. The creditors, however, did not confirm till after the bankruptcy of Goldie. If the nearest in kin intromits without a title, he means to pay every one, and he is obliged to pay every one. Goldie had no view of doing any thing but what was right; he thought that the succession was lucrative, and he acted accordingly. The creditors, from the same reason, took no measures for their own security; they thought that there would be no shortcoming.

It is said that the questions, formerly decided, were between one nearest in kin and another, and not with creditors. Should that distinction be adopted, it would open a door for numberless litigations. That part of our law which finds payment good to the nearest in kin, even without his confirmation, must not be touched. It was so found forty years ago: there are not many decisions on that point, because the nation was satisfied, and acquiesced in that principle as part of our law. In heritage the law requires a written progress; not so in moveables: in them the very act of delivery presumes property. Here a near-

est in kin is in right to call for the goods of the defunct: the debtor is sensible of this, and pays: there is no great stretch in finding this sufficient to vest.

Still confirmation is not needless; for it is not sufficient to say, I pay to the nearest in kin;—it must be to the person who has the right. There is always risk in a settlement. A man is not *bound* to pay without confirmation, but he *may* pay. As to the application, Grant was *in titulo* to pay to Goldie. I am still to learn what difference there is between payment to a man or to his order. The order is indefinite, and the consequence is, that, if Grant had paid to those who were not creditors, or paid too much, it was at his risk. Here the debts are admitted to be just. If Goldie had paid without decree, he would still have been answerable to the creditors. But that is a business in which Grant is not concerned.

JUSTICE-CLERK. Of the same opinion. I should be sorry to see this Court give a decision contrary to a train of decisions for forty years back. I hold it as a principle in the law and practice of Scotland, that the nearest in kin, or the general disponee, may go to the debtors of the defunct, and obtain payment, and that payment will be good to discharge the debtors. Were we to depart from the principles of the decisions already given, much confusion would ensue.

PRESIDENT. I am much for adhering to strict principles in matters of succession, and especially in heritable rights. I do not inquire what was the ancient practice as to confirmation: we must go according to modern practice. Goldie, instead of recovering payment of his debts, ordered them to be paid over to his creditors. The transaction was perfectly fair, and, to all appearance, the creditors run no risk.

HENDERLAND. There are cases in which creditors may be cut out; but the judgment of the Court must go upon what generally happens.

ESKGROVE. There is no occasion for *debtors* to take decreet: *creditors* receive payment on decreet in order to be a document to the payer. There is no difference between payment by Goldie and by his mandatory: *qui facit per alium, facit per se.*

MONBODDO. Had I seen a series of decisions, I should have submitted; but I see no such thing: in all the questions hitherto determined the party was the next in kin. As to the opinion of lawyers, *that* is not uniform. I differ from Lord Braxfield.

On the 16th July 1784, "The Lords, on the general point, found Grant not liable;" altering the interlocutor of Lord Gardenston.

Act. Ilay Campbell. *Alt.* M. Ross.

Hearing in presence.

Diss. Monboddo.