No. 42.

under the sequestration. Answered for Shiells, That the nearest in kin, or a general disponee, may, without confirmation, acquire the property of particular subjects in consequence of possessing them; and if the bond had been paid, or renewed to the son, the creditors of the father could no longer have attached it as *in bonis* of their debtor. But this will not apply to the bond in dispute, which must still be viewed as the property of the defunct. The Lords preferred Shiells in virtue of his confirmation.

Fol. Dic. v. 4. *p.* 270. *Fac. Coll.*

*** This case is No. 20. p. 14377.

1784. *June* 29. JAMES MACDOWALL *against* WALTER MACDOWALL.

No. 43.
Possession of the defunct's moveables by the nearest of kin, vests him in the right of the subjects possessed only.

PATRICK MACDOWALL was creditor in a personal bond. Upon his death, James, his only child, succeeded to him, and had an intromission with his estate, real and personal, but intermeddled not with that debt.

James granted to one of his children a general disposition of his effects. This disponee having died, his son James Macdowall, in his right, laid claim to the bond; in which demand he, being the great-grandchild of Patrick, was opposed by Walter, a son of the elder James, and of course the grandson of Patrick, and his next of kin.

The issue of the competition depended on this point: Whether the elder James, who expede no confirmation, had, by a general possession of his father Patrick's other funds and effects, vested himself with a right to the debt in question, so as he could transmit it to his disponee; or whether the debt still remained *in bonis* of Patrick, descendible to his nearest in kin?

Pleaded for the heir of the disponee: In no period of our law has the right of succession *ab intestato* been denied to the kindred of deceased persons. The peculiarity of feudal property, in the origin of that establishment, having circumscribed the right which was in the ancestors only, contradicts not this observation. But, in heritage and moveables, the right of blood was equally the title of succession; though, with respect to the former, it was not allowed to operate before it had been certified and declared by certain prescribed solemnities; while, as to the latter, these were not required. The course of moveable succession, however, has in fact been interrupted by the following adventitious circumstances.

Of old, the clergy were deemed the only fit depositaries of all trusts. On this principle they executed the testaments of deceased persons; or they authorised or controuled the management of the executors nominated by testators; whence arose the practice of exhibiting inventories, and of the subsequent confirmation, with its quota of emolument. Of the moveable effects of those who died intestate, the bishops, by themselves, or by others of their appointment, assumed the sole dis-

posal, under the pretence that it had been conferred on them by the presumed will of the deceased. Thus, in effect, the clergy came to succeed to all moveable effects the proprietors of which died intestate; and in this source originated the idea that the right to the dead's part was inseparable from the office of executor. That clerical usurpation was, however, gradually diminished; and at length the course of succession returned to its proper channel. No. 43.

By act of Parliament of 1540, Cap. 120, the presumption was debarred in the case of persons dying under the age requisite for making testaments, and their next of kin were declared entitled to "their goods, without prejudice to the Ordinary's claim of quot." That statute, which passed near the æra of the Reformation in Scotland, could not fail to be liberally interpreted; and, in 1563, this article appears among the instructions given to the commissaries, "that if one die intestate, or his executor-nominate refuse to accept of the office, the commissaries must give the office to the nearest of kin, being willing to confirm. In this manner, the right of the next of kin was rescued from the hands of the churchmen or their commissaries; but as, for the reason already mentioned, it still continued to be excluded by the executors whom the deceased themselves had nominated, action to account was, by act of Parliament 1617, C. 14. given to the nearest in kin against them likewise; so that the latter became truly trustees or procurators for the former, who therefore acquired through them the same right as if they had acted for themselves.

Downward to the Revolution, however, the ancient influence prevailed; and without the clerical sanction, or confirmation, moveable succession was not understood fully to vest; the commissaries having it still in their power to charge the nearest of kin to confirm, or, if they failed to do so, to confirm their own Procurator-fiscal in their stead. But, by the statute of 1690, Cap. 26. which prohibited these proceedings of the commissary court, the next of kin were finally emancipated from the ecclesiastical authority; and thus no obstacle remained to their lawfully apprehending possession of the moveable estates of their ancestors, and, on the title of propinquity, obtaining the full property of them; Essays on Brit. Antiq. p. 191. That this is now the only requisite *modus acquirendi dominii* of an ancestor's personal effects, is apparent from the decisions of the Court, relative both to the *ipsa corpora* of moveables, and to *nomina debitorum*.

With respect to the first, which are capable of a proper possession, the rule was exemplified in the case of Shearers *contra* Wilson, No. 7. p. 9263. *voce* NEAREST OF KIN; in that of Macwhirter *contra* Miller, No. 38. p. 14395. *supra;* and in the cases of Baird *contra* Gray, No. 37. p. 14393. *supra*, of Brodie *contra* Stewart, No. 91. p. 2912. *voce* EXECUTOR; and of Pringles *contra* Veitch, No. 40. p. 14401. The right of *nomina debitorum*, again, is transmitted, either by the next of kin's receiving payment, to do which, and by consequence effectually to discharge the debtor, he is unquestionably entitled; or by the debtor's renewing the document of debt in his name, or even by granting to him a new obligation corroborative of

No. 43. the general one; Spence *contra* Alcorn's Creditors, No. 39. p. 14399. *supra*, Watson *contra* Marshall, No. 66. p. 7009. *voce* INHIBITION.

But though the right of the next of kin is now independent of confirmation, that solemnity nevertheless is not superseded. It is still as essential as ever to the office of executor, and not to be dispensed with by the next of kin himself, if he shall, through that medium, lay claim to the succession; a method, by which he may avoid an universal passive representation. Nor is a partial confirmation sufficient to every effect. By this, indeed, (for a decreet-dative of itself is not enough, Carmichael *contra* Carmichael, No. 12. p. 9267. *voce* NEAREST OF KIN), he will be instated in the office, which, being to him a procuratory *in rem suam*, will descend, among his other *jura quæsita*, to his representatives or assignees; Somerville, *contra* Creditors of Murray, No. 89. p. 3902. *voce* EXECUTOR. But a partial confirmation will not, beyond its extent, establish him in the property of the defunct's effects. It is the confirmation only of each article which transfers it from the *hæreditas jacens*, and places it under his administration, substituting to those concerned a *jus crediti* over him and his cautioners; and therefore, in the case of a partial confirmation by the next of kin, not completed by his representatives, on whom the office thereby devolved, it was found, that the rest of the succession might, as *in bonis* of the first defunct, be still attached by his creditors; Sloane Laurie *contra* Spalding Gordon, No. 94. p. 3918. *voce* EXECUTOR. Some of the later observations have been intended to obviate objections, by giving a complete view of the subject of this question; for it is on the right of James Macdowall the elder, the next of kin to Patrick, as such, and on his general intromission, that the plea of the present competitor is founded.

Answered: The premises, in the opposite argument, whether true or false, are not conclusive. It may, however, be asked, for what reason, if moveable succession be so independent of forms, cannot the next of kin of a deceased creditor compel, without full confirmation, his debtor to make payment? Fraser *contra* Gibb, No. 95. p. 3921. *voce* EXECUTOR. Or why does the act of Parliament of 1693, Cap. 15. require confirmation by the next of kin, in order to his obtaining registration of securities granted to the defunct, or insisting in a process instituted by him? Whence, likewise, on that supposition, proceeds the known distinction between the interest of the next of kin, which does not, and the children's legitim and relict's share, which do, *ipso jure*, transmit to their representatives.

The inconclusiveness of the argument appears, from comparing with the circumstances of this case its principle; which is, that *jus sanguinis*, as the title or *causa*, must be followed by the apprehending of possession as the *modus acquirendi dominii*, in order to establish the succession in the person of the next of kin, so as it may devolve to his successors; in the same manner as in heritage, the right of blood even declared by service is ineffectual, without infeftment, to vest the heir with the property, or to transmit it to his representatives. For, as the taking of sasine in one of several landed estates which belonged to his predecessor cannot place an heir in the property of the rest, so neither could possession of the whole

other funds or effects of Patrick Macdowall impart to James, his son, any right to the debt in question. No. 43.

Replied: They are not real inconsistencies which have been mentioned. Confirmation being the only method prescribed by law for certifying to the debtor of a deceased person who are the creditor's next of kin, or rather that he himself is in safety to pay to those who claim the debt in that character, it is abundantly natural, that if he chuses to resort to this security, the law should not deny it to him; and it is for the same reason that the statute of 1693, above quoted, does not oblige the parties interested to dispense with the production of confirmed testaments. The distinction stated between the legitim or the relict's share, and the dead's part, truly favours the right of the next of kin. The first mentioned interests proceed not at all from succession, being in their very nature separated and divided from the dead's part. As, therefore, the next of kin of the deceased have no connection with them, if they were not *ipso jure* transmissible to the heirs of those to whom they belonged, but who have not appropriated them, they would of necessity be rendered caduciary. In fact, however, possession could scarcely be wanting in those cases, on the part either of the widow or of the children; of the former, at least, in the strictest sense.

The Court were unanimously of opinion, that possession by the next of kin can have no effect in conferring an active title farther than with respect to the subjects actually possessed. Accordingly,

The Lords preferred Walter Macdowall to the fund *in medio*.

Reporter, *Lord Alva*. For the heir of the disponee, *Elphinstone*. Alt. *Currie*. Clerk, *Orme*.

S. *Fol. Dic. v.* 4. *p.*269. *Fac. Coll. No.* 164. *p.* 255.

1799. *March* 7.

DUNCAN STEWART *against* LIEUTENANT ALEXANDER GRÆME.

No. 44.

A. when abroad, transmitted a sum of money to Scotland, to be placed on heritable security. The persons to whom it was sent lent it on an heritable bond payable to themselves, for A.'s behoof. After A.'s death, they got payment of the

IN 1780, Lieutenant Stewart transmitted, from the East Indies, £1000 to William Stewart and John Taylor, with directions to lend it on heritable security, and to apply the interest of it yearly towards the support of some of his relations in Scotland. Lieutenant Stewart, at the same time, sent them a general power of attorney, the immediate object of which was to enable them to manage this fund, but it was conceived in terms sufficiently broad to extend to every other concern which he might have in Scotland.

Messrs. Stewart and Taylor lent out the money on an heritable bond, payable to themselves, "as trustees and attornies of Duncan Stewart, Esq. in the service of the Honourable the East India Company, to the survivor of them, and to the assignees of the survivor."

The interest of this bond was applied agreeably to Lieutenant Stewart's instructions. Both Messrs. Stewart and Taylor wrote him, mentioning what they had done; and some of his relations wrote him likewise. Lieutenant Stewart received