No 87. *ditas est adita* by confirmation in the name of himself, or any other executor, though a stranger; and his interest as nearest of kin, trasmits after the confirmation, as the right of legitim transmits before, or without any confirmation, albeit as to the point of execution there must be a new confirmation of *non executa*, when sentences are not recovered against debtors; and it may be debated, that as to the interest of nearest of kin, or legitim, there needs no confirmation *quoad non executa*, where the goods or debt were once confirmed, and the executor died before sentence, (though the custom of the Commissary court appoints confirmation of *non executa* in all cases) seeing the interest of nearest of kin is transmitted by confirmation; and an executor may receive the sums confirmed without sentence, if the debtor please, who will be effectually secured by the executor's discharge. 2*do*, It is *jus tertii* to the debtor to require the pursuer to confirm before sentence, seeing that defence is only competent to another executor or creditor of the defunct; and the Lords' sentence will secure the debtor.

'The Lords repelled both the defender's allegeances in respect of the answers.'

Fol. Dic. v. 1. *p.* 278. *Harcarse*, (Executry.) *No* 471. *p.* 128.

1737. *June* 23. James Mitchel *against* Mitchel of Blairgorts.

No 88.
Though an executor-creditor, or nearest of kin, die before executing the testament, there is no place for an executor *ad non executa*.

Mitchel of Alderston being debtor to James Mitchel taylor in Edinburgh, by bond, the same, after the creditor's decease, was confirmed by Patrick Mitchel his brother, upon the title of executor-creditor. Patrick the executor died, without renewing the bond in his own name; after whose death, his son James confirmed it, as *in bonis* of his deceased father, and then conveyed the bond to Mitchel of Blairgorts.

Another James Mitchel being creditor by decreet to the said James Mitchel, the son of Patrick, obtained himself decerned executor-dative to James Mitchel, the original creditor, upon this ground, that, by Patrick's dying without executing the testament, the bond returned to be *in bonis* of the original creditor; to whom James Mitchel his debtor came to be nearest of kin, upon his father Patrick's decease; and, on this title, he insisted in a process, on the act 1695, against Blairgorts; concluding, it ought to be found, that he had the only right to the bond.

For Blairgorts it was *pleaded;* That the bond in question was fully essablished in the person of Patrick, without the necessity of any execution; and that, by his decease, it transmitted to his son, without falling back *in bonis* of the first defunct, so as to give access to a confirmation *ad non executa;* in support whereof it was observed, that, though executry is but an office, and, as such, gives no right of property, unless the executor execute the testament, either by getting payment, or renewing the bond, or taking decreet; yet where

an executor-creditor, or nearest of kin, is confirmed, a right of property is transmitted by confirmation alone; as is laid down by Lord Stair, Tit. EXECUTRY, § 51. who says, 'That, with regard to the nearest of kin's interest, confirmation 'is *aditio hæreditatis in mobilibus*.' Therefore, whoever is confirmed executor, the nearest of kin existing at the time, obtain thereby the right to be established in them; so as without further to transmit to their representatives; and, similar to the confirmation of the nearest of kin, is that of an executor-creditor, which is understood to be a legal diligence establishing the subject in the person of the creditor: nay, if an executor-nominate should assign to the nearest of kin any share of the moveables, in lieu of their claim, this *de praxi* is understood to be an execution of the testament *pro tanto*, in so much that the assignation does not fall by the executor's death; confirmations, therefore, by those who have an interest in the moveables, are very different from the case of those who have no right in them, except the bare office; the last is a trust which is personal, and must die with the trustee; the other sort are of the nature of procuratories *in rem suam*, which, being given by the law, cannot die. No 88.

Answered for the pursuer; Confirmation alone does not fully convey the particulars in the inventory of the testament confirmed, so as to take them out of the *hæreditas jacens* of the defunct, and vest them in the executor, somewhat more being requisite, viz. That the testament should be executed; wherefore, if the executor die before that happen, the title cannot otherwise be made up, than by a confirmation *ad non executa* to the first defunct. Nor is there any difference, in this respect, between an executor who has but the naked office, and an executor-creditor, or nearest of kin; because, if confirmation alone does not operate a transmission to the one, neither ought it to have that effect in favours of the other; as it is not conceivable how the different interests of executors should vary the nature of the conveyance, or that the same form of title should operate different effects, so as to serve for a full transmission to one, and not to another. Neither does the distinction now pleaded for meet with any support from our lawyers; for Lord Stair, Tit. EXECUTRY, § 61, lays it down, in general, That, if all the executors be dead, and any part of the testament unexecuted, then there is place for executors *ad non executa*, which he cannot be supposed to mean only of executors-nominate. *See* Dirleton, *verb. Executor*, and Sir James Stewart; both of whom plainly suppose confirmation *ad non executa* necessary in the case of an executor-creditor's dying without executing the testament. It may be true, That where there is confirmation, the nearest of kin transmits his right, *i. e.* the claim with which the executry might have been burdened; but it is denied, that confirmation alone transmits any title to the specific subjects of the first defunct's executry, so as to give the nearest of kin a direct right to the executry. And what proves this distinction to be well founded, is, That if, the moment an executor-nominate was confirmed, the nearest of kin acquired a direct right to the defunct's executry, it would follow, that he might demand payment, intent actions against debtors, or assign the debt to

No 88. third parties, none of which things he can do; of course, he cannot transmit to another what was not in himself.

As to the instance of an executor-nominate's assigning to the nearest of kin, which is understood to be an execution of the testament, it was *answered*, That, if such an executor assign, it will entitle the assignee to sue the debtor; and, if he obtain decreet before the executor die, the assignation may be good; but, if he die before decreet, it is believed, the assignation would fall with the cedent's right, because, till the testament is executed, the executor is not fully in the title.

THE LORDS found, That Patrick Mitchel having confirmed the 2000 merks and interest in dispute, as creditor to his brother James Mitchel taylor, to whom he was nearest in kin, the property thereof belonged to Patrick, from the time of the confirmation, and was *in bonis* of Patrick, at his death; and that James Mitchel, the son and executor of Patrick, having confirmed the same, might habilely assign the same to Blairgorts; and found the confirmation of James, as executor-creditor *quoad non executa*, was inept and void; and therefore found Blairgorts, the assignee, preferable. *See* EXECUTOR-CREDITOR.

Fol. Dic. v. 1. *p.* 278. *C. Home, No* 60. *p.* 104.

*** This case is reported by Lord Kames, Rem. Dec. vol. 2. No 9. p. 21., *voce* NEAREST OF KIN.

1744. *December* 4.

MRS ISABEL SOMMERVILL *against* CREDITORS of MR HUGH MURRAY.

No 89.
A partial confirmation by executors *qua* nearest of kin, establishes a right to the whole dead's part.

HUGH SOMMERVILL having died intestate, his estate real and personal descended to his two daughters, who, in September 1739, were confirmed executors *qua* nearest of kin, upon giving up a full inventory of all the moveable debts and effects that at that time were known to belong to their father.

In March 1741, an account due to the said Hugh Sommervill by the Marquis of Annandale was discovered, amounting to above L. 3000 Scots. Hugh Murray, husband to one of the daughters Isabella, died in December 1741; and the foresaid balance was eiked to the testament in June 1743. This produced a dispute betwixt Isabella and her deceased husband's creditors. She claimed this balance in conjunction with her sister, as being a subject not vested in her person till after her husband's death, and therefore not conveyed to her husband *jure mariti*. His creditors, on the other hand, claimed her half of this balance, upon the following medium, That confirmation by a next of kin, being *aditio hæreditatis in mobilibus*, is an universal title to all the personal estate, however defective the inventory may be; and therefore, that as by the said confirmation, the full right of the dead's part was vested in Isabella before her husband's