

a title to debts. This being fixt it remained to know what confirmation was, and that Hope mentioned the making up and swearing the inventory as a requisite of confirmation; that in the act of sederunt 1679, anent executors creditors, the term, "confirmed," was applied to debts, and there was no such thing as a general confirmation.

Observed on the Bench; That the right of the nearest of kin had always obtained, as appeared from the *Regiam Majestatem*; and the laws cited to infer the contrary, related only to the office, which the Bishops disposed of; that our Lawyers, speaking of confirmations, never stated the case of a partial one, but enquired betwixt confirmation, and the execution of the testament, which gave the right to transmit; and therefore talked of confirmation transmitting indiscriminately, because they were talking of a total confirmation.

On the the other hand, that the question was only concerning the dead's part; that the relict's and bairn's part vested without confirmation; that their several rights were not a share of the particular subjects, but of an *universitas*, viz. the defunct's free gear; that, consequently, this question did not impinge on the necessity of confirmation before any could regularly intromit; nor take away the vitious passive title, as neither relict nor children, who undoubtedly transmitted, could intromit at their own hand; that, supposing a partial confirmation, and, after the death of the nearest kin, an eik, and debts to pay, off whom ought they to come? That the whole must also be laid together, to determine the relict and children's shares; and, if the transmission was not universal, the thing would be inexplicable.

THE LORDS, 4th December 1744, found, That the confirmation of Mr. Somerville's two daughters as executors *qua* nearest of kin to him, did so far establish their right to the whole dead's part of the executry, as to make the same transmit to their assignees, whether voluntary or legal, though some particulars of the said executry were not specially contained in the inventory of the confirmed testament.—And this day (23d January, 1745) they adhered. See NEAREST OF KIN.

Act. Lockhart & Home. Alt. W. Grant, Ferguson, & Geddes Clerk, Kilpatrick.

D. Falconer, v. 1. p. 52.

* * * See 23d January 1745, Carmichaels against the nearest of kin of Carmichael, *voce* NEAREST OF KIN.

1753. August 10.

AGNES and JEAN BRODIES *against* JAMES STEPHEN Commissary-depute of Moray.

AGNES and Jean Brodies obtained themselves decerned joint executors dative *qua* nearest of kin to their deceased sister Margaret Brodie, and gave up in the inventory nothing but a small part of the household-furniture which had be-

No 89.

No 90.

The nearest of kin may confirm either a part or the whole of the

No 90.
 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