

No 9. 1735. December. GRAYS against CREDITORS of DRUM.

THAT confirmation being *aditio hæreditatis in mobilibus* vests the full right in the nearest of kin, not only *quoad* the subjects confirmed, but *quoad* the whole *universitas mobilium*; debated, but not determined. See APPENDIX.

Fol. Dic. v. 2. p. 3.

1737. June 24. MITCHEL against MITCHEL of Blairgorts.

No 10.

Where the nearest of kin themselves confirm, their claim is thereby established as well as where a stranger is made executor; and tho' they should die before executing the testament, yet an assignation granted by them will be effectual.

PATRICK MITCHEL being creditor, as well as next of kin to his brother, James Mitchel, did, upon James's decease, confirm himself executor-creditor; and, among other subjects, gave up, in inventry, a bond of two thousand merks due to the deceased; which bond he thereafter assigned to Mitchel of Blairgorts, but died without executing the testament.

James Mitchel, by the death of his father Patrick, came to be next of kin to James Mitchel, the original creditor in the said bond; and a creditor of his, apprehending that Patrick Mitchel's confirmation had become void by his death, seeing the money was neither levied by him nor his assignee, nor decree taken in their name, did, upon the act 41st, Parl. 1695, obtain himself confirmed executor-dative to James Mitchel, the said original creditor; upon which a question arose betwixt him and Patrick Mitchel's assignee, which of them had best right to the said bond. The executor-dative appealed to the authority of Lord Stair, B. 3. T. 8. § 61. In answer to which, the assignee contended, that a confirmation by an executor-creditor, or *qua* nearest of kin, doth so far vest and establish the subjects in the person of the executor, that there never can be place thereafter for a second confirmation of these subjects, as *in hæreditate jacente* of the first defunct.

Upon this point of law, it was yielded for the assignee, that executry is but an office, and *qua* such can never be a *causa transferendi domini*; that indeed, when an executor-dative obtains payment, the money becomes his property, being delivered as a *species* not as a *corpus*; and that when he discharges a debt, taking a new bond in his own name *tanquam quilibet*, the bond is his property, because the discharge makes him liable as if he had received payment in specie; but that, if the executor-dative die before execution, the trust, so far as not fulfilled, must die with him, which requires the nomination of a new trustee by a confirmation *ad non executam*; and this is the sum of what Lord Stair lays down in the passage above quoted. The assignee at the same time contended, that an executor-creditor or *qua* next of kin, is in a different condition. It is said by Lord Stair, B. 3. T. 8. § 51, with regard to the interest of the next of kin, that confirmation is *aditio hæreditatis in mobilibus*, whereby their title is