dence to presume in this case, that there had been a division made, or a transaction between the father and son; and refused to find the presumption elidable by the defender's oath, unless the pursuer would allege there had been neither division nor transaction. No. 38.

Kilkerran, (SERV. and CON.) *No.* 3. *p.* 509.

*** See C. Home's report of this case in the APPENDIX.

1751. *February* 20.

JAMES SPENCE *against* WILLIAM WILSON and Others, the Creditors of Alcorn.

No. 39.
The nearest of kin obtaining payment of a debt due to a defunct, has right to it, being confirmed.

JOHN BARCLAY, smith in Musselburgh, was creditor to Mr. Henry Alcorn by bond; and Jean Cruickshanks disponed to James Spence, writer in Edinburgh, her husband, all bonds that should be found to pertain to her, as executor nearest of kin to be confirmed to the said John Barclay, her grandfather then deceased. James Spence obtained her decerned executor, and insisted before the magistrates of Edinburgh against James Alcorn, heir to the debtor, for payment, and inhibited him; whereupon he granted his bond corroborating the debt. The magistrates decerned, and James Spence adjudged on the constitution, without mentioning in his decreet the corroboration; but there was not any confirmation expede.

Other creditors, posterior to the inhibition, adjuged; and, in the competition, the Lord Ordinary, 10th January, 1750, "Found, that the decreet of constitution at the instance of Jean Cruickshanks, and James Spence her husband, and the decreet of adjudication following thereon, were void and null, for want of a sufficient title in the person of Jean Cruickshanks, to the sums therein mentioned; and therefore preferred the said William Wilson and the other adjudging creditors, as they should be ranked."

Pleaded in a reclaiming bill, as the executor decerned was entitled to pursue for recovery of the debt, so she had right to raise any diligence competent upon a dependency; and if the decreet pronounced is valid, the diligence will be effectual to her: That she was not confirmed was an exception competent to the defender; but if he did not make it, the decreet was not null, which decerning the debtor to pay to her, fully vested her with the right.

2dly, An executor obtaining possession of the defunct's effects, need not confirm, as was found 14th November, 1743, Mary M'Whirter *contra* Edward Millar, No. 38. p. 14395. Payment would therefore have been good; consequently she might have discharged the debt, and taken a new bond, and the bond taken is not the worse that the old debt was kept up. Thus the executor's right was completed by possession, and the decreet rightly given.

Answered, The decreet of constitution was null for want of confirmation, if the pursuer's title was not otherwise complete, for the decerniture to pay could not vest the right: The possession of moveable subjects has been held to vest a right, but this has not been extended to debts.

No. 39. The Lords found the pursuer had sufficient right to the debt, notwithstanding that there was no confirmation expede, and sustained the diligence.

4th June, 1751, A bill, as without the days of reclaiming, was refused.

Act. *Brown.* Alt. *Macdowal.* *Gibson*, Clerk.

Fol. Dic. v. 4. *p.* 269. *D. Falc. v.* 2. *No.* 201. *p.* 248.

*** This case is also reported by Kilkerran:

IT was found in the case of Mary M'Whirter, No. 38. p. 14395. that a nearest in kin attaining possession of moveables, the right thereto *eo ipso* transmits without confirmation; but what should be the case of a nearest in kin's obtaining payment of a debt, without confirmation, was left entire till the point should occur, which it did in this case, which was as follows:

Jean Cruickshanks, in her contract of marriage with James Spence, assigned him to two bonds that were due to John Barclay, her deceased grandfather, by Mr. Henry Alcorn, in the year 1684 and 1685. In order to make up a title thereto, Spence executed an edict for confirming her and himself for his interest therein; and accordingly she was decerned executrix-dative, *qua* nearest in kin to her grandfather.

A process upon the passive titles was brought before the bailies of Edinburgh against James Alcorn, the grandchild and heir of the debtor, and thereupon inhibition followed against the said James, who, being conscious of the justice of the debts, granted bond of corroboration thereof to the pursuer. Notwithstanding this, the pursuer proceeded in his process; and the bailies, upon advising the whole, found the libel proved, and decerned. Upon which decree, the pursuer obtained adjudication of certain lands and tenements against the said James Alcorn; and, upon the title of this adjudication and inhibition, pursued a reduction against several persons, pretending right to the subjects adjudged, some as purchasers, and others as adjudgers from the said James Alcorn.

And it being alleged for the defenders, that both inhibition and adjudication were null, as proceeding upon a decree of constitution which was null, in respect that Jean Cruickshanks had not completed her title by confirmation before extracting the decree; and that this defect could not now be supplied after the death of Jean Cruickshanks, the Ordinary found the decree of constitution null, and preferred the defenders.

But the case being brought before the Court by a petition, the Lords, upon advising petition and answers, "sustained the pursuer's title."

It was in the reasoning supposed, that as the nearest in kin obtaining possession of moveables needed not confirm, so a debtor voluntarily paying to the nearest in kin will be effectually discharged by him, though the nearest in kin have not confirmed the debt; and all the doubt was, if a bond of corroboration would supersede confirmation. But it was found that it did, upon the answer made, that if the nearest in kin could take payment and discharge, he could no doubt give up the

old bond and take a new one from the debtor; and if so, there could be no reason why a corroboration should not have the same effect to establish the debt in his person, which, in respect of circumstances, it might be reasonable for him to take, rather than give up the old bond. No. 39.

Kilkerran, No. 9. *p.* 514.

*** See No. 91. p. 3912. *voce* EXECUTOR.

1769. *March* 7. PRINGLES *against* VEITCH.

No. 40.
An elder brother intromitting with the effects of the younger on his death, found to have vested in himself a provision with which he was burdened.

JAMES PRINGLE of Bridge-heugh disponed his whole effects, heritable and moveable, to his eldest son Alexander, with the burden of 27,000 merks provided to James his second son, who survived the father, but died without issue, minor, and intestate.

Alexander Pringle did not make up titles to his brother, and died unmarried, after executing an universal disposition in favour of Mary Veitch, his mother.

Upon his death, an action was brought by Alexander and Margaret Pringles, first cousins to old Bridge-heugh, who, by the death of the eldest son, had become nearest in kin to the youngest, concluding for payment of his provision, upon the ground that it was *in hæreditate jacente* of James, and was properly taken up by their confirmation as executors *qua* nearest in kin to him.

Pleaded in defence: Creditors do not suffer, though the nearest in kin should neglect to confirm. The creditors of the defunct are entitled to confirm executors creditors. The privilege is extended, by the act 1695, Cap. 41. to the creditors of the nearest in kin. And, from the statutes upon this subject, it would appear to have been the intention of the Legislature to leave it in the option of the nearest in kin, whether to confirm or not. Thus, the statute 1690, Cap. 26. in particular, prohibits all charges to confirm, except at the instance of the relict, bairns, nearest of kin, or creditors; from which it may be inferred, that they only are, in the eye of law, considered as interested in the executry; so that confirmation cannot be necessary merely to exclude the claim of an after nearest in kin, who, at the time, had no manner of interest.

Indeed, this idea was early received in the law; for, in a case observed by Haddington, in 1610, Blackburn *contra* Rig, No. 29. p. 14384. action was refused to a supervening nearest in kin, against a tutor, who had intromitted with the heirship moveables for the behoof of his pupil, the nearest in kin for the time, who died without being confirmed. After decisions have proceeded upon the same principles, as July, 1743, Macwhirter *contra* Miller, No. 38. p. 14395; 3d February, 1744, Bairds *contra* Gray, No. 37. p. 14393. 21st December, 1757, Brodie *contra* Stewart, No. 91. p. 3912. *voce* EXECUTOR. In all these cases, it was found, that possession vested the effects in the nearest of kin, without the necessity of confirmation. It has also been found, that confirmation upon a partial inventory,