Act. Ilay Campbell, J. Swinton. *Alt.* A. Wight. *Diss.* Barjarg, Stonefield, Elliock.

1768. *February* 24. KATHARINE TAILOR *against* WILLIAM WRIGHT.

PRISONER.

One in Prison for a fine, damages and expenses, *ex delicto*, not entitled to the benefit of the Act of Grace.

[*Faculty Collection, IV*, p. 129; Kaimes's *Select Decis.* p. 334; *Dict.* 11,813.]

MONBODDO. This case is well stated, and determined by Voet against the pursuer.

KENNET. Will's case cannot aid the pursuer; for part of Will's sentence was to ask pardon at the church door, which he could never do, so long as he remained in prison.

JUSTICE-CLERK. The case of *Malloch* is strong: *there* the king's pardon was found not to give the benefit of a *cessio* to those who were committed to prison for payment of damages arising from delicts.

GARDENSTON. The aliment is only by statute; and there is nothing in the statute which makes creditors liable to aliment persons in the condition of Katharine Tailor, imprisoned for damages the consequence of a delict.

COALSTON. Were it not for the train of decisions, I should have had doubts as to the interpretation of the statute.

PITFOUR. The question is, Whether this damage arose from a crime or from a fault, *levis* or *levissima*? If from a fault, Whether that *fault* is to be considered as a *crime quoad* its consequences?

On the 24th February 1768, The Lords found Katharine Tailor not entitled to the Act of Grace, adhering to the interlocutor of Lord Kennet.

Act. A. Murray. *Alt.* A. Rolland.

1768. *March* 1. MARY VEITCH *against* ALEXANDER PRINGLE.

SERVICE AND CONFIRMATION.

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.

[*Faculty Collection, IV.* p. 343; *Dictionary*, 14,401.]

MONBODDO. I consider the Commissary Court as a relict of popish tyranny. The clergy supposed that they had a right in testaments, and a jurisdiction concerning them: this right of jurisdiction was, by degrees, diminished. It was an excellent law which made confirmation not necessary. We have got into

the simplicity of the Roman law, where possession was all in all. In Lord Stair's time it was not so: for then confirmation was held to be *aditio hæreditatis in mobilibus*. Later decisions have varied this: and we have gone so far in this way that we cannot go back. It has been found, that a partial confirmation is sufficient, and that apprehending possession is sufficient. If I do a deed, acknowledging the succession, I acquire a title to the succession; but here the difficulty is to find that Alexander did any deed acknowledging his title to the succession of James. His continuing to be debtor was not sufficient: he could not acquire a right without incurring a passive title. His continuing debtor could not be a passive title.

COALSTON. There is no doubt as to the general rule of law, that neither heritage nor moveables could transmit *ipso jure*. This rule is strictly kept up in heritage. As to moveables, confirmation is highly proper, when there is an incumbered succession: but, when there is no incumbrance, confirmation is a great grievance. Since Lord Stair's time there have been great alterations in the law as to confirmation. The first blow given to it was the prohibiting charges to confirm. There have been various decisions upon the same plan. When I collect the whole decisions, they amount to this:—Wherever the person who is in the right of the defunct attains possession, *that* supersedes the necessity of confirmation, so as to exclude the remoter relations. This applies to the present case: the debtor was as much possessed of the sum as if he had levied it from a stranger.

PITFOUR. The first question here is, Whether the sum vested *sola superviventia*? 2. Whether, if it did not vest, it could be extinguished *confusione*? As to the *first*, I do not think that the law has ever been altered by any of the decisions mentioned. I still think that confirmation is *aditio hæreditatis in mobilibus* now, as much as in Lord Stair's time. The inconveniences of confirmation may be rectified, but confirmation itself ought not to be abolished. Confirmation is salutary: it prevents embezzlement, and provides caution. We have the evidence of Acts of Parliament, and of all lawyers, that confirmation is *aditio hæreditatis in mobilibus*. It is true, that the Committee of Estates, or Convention, at the Revolution, complained of confirmation as a grievance. When the Convention became a Parliament, it removed the grievance, but did not abolish confirmation. See particularly 14th Act of Parliament 1693 and 41st Act Parliament 1695. All our decisions go on the same plan. See *Sinclair* against *Sinclair*, 1726, Lord Kaimes; *Boyes* against *Dewar*, 1745, Falconer. If I were to go into the new system of law, my head would turn round. As to the decisions quoted on the contrary, *they* confirm the rule; *M'Whirter*. Agreeable to what is laid down in heritage, the heir, by that decision, apprehending possession, may possess; *Mrs Murray*. *There* a partial confirmation was found necessary,—nothing of that kind here: therefore that decision proves against Alexander Pringle. On the same day, it was found that a decerniture of executor dative was good for nothing without confirmation; *Carmichael*. If you hold that a man acquires *ignorans et dormiens*, you make a wide stretch indeed.

KENNET. Confirmation is part of our law not abolished: this is admitted on all sides. It is also true, that our law has received some alterations by the Act 1690, and the decisions since that time. The question here is, Whether was the debt extinguished *confusione*? I think that something was necessary

on the part of Alexander to be *done*; but nothing was done. The bond is still *in hæreditate jacente* of James. (N.B.—A mistake in expression, for there was no bond.) If there was indeed any intromission by Alexander, there might be a difference.

KAIMES. A right, having burdens, cannot be acquired to a man without his consent. Alexander would not perhaps have been liable universally, but he would have been liable to processes. *Confusio* is only a temporary suspension of a debt, not an extinction.

JUSTICE-CLERK. I do not think that there is any difference whether a man has effects in his hands *ex deposito* or *ex commodato*, or whether he directly apprehends them. A confirmation gives the aid of the law *ad colligenda bona*. If you need the aid of the law, you apply for confirmation. An estate is here settled on the eldest son, with the burden of L.1500 to the younger son. By the death of the eldest son, the estate becomes disburdened: this is my idea of the case. If Alexander had left a son, the case would have been the same 39 years hence as at present, and the subject might have been carried off by remote collaterals.

AUCHINLECK. Every thinking man endeavours, in his settlements, to obviate the necessity of confirmation. Wherever there is a special assignation, the supposed security of creditors, by means of confirmation, is at an end; and, formerly, confirmations were the favourites of the law, and the Lords of Session had a share of the profit. When there is possession, there is no occasion for confirmation; because a man ought not to be put to expense merely in order to give it to the commissary. In heritage, possession does not transmit the right; but in moveables it does. Suppose that a valuable moveable, not a sum, had been the subject in question, and Alexander kept it, is not that sufficient? Here L.1500 belonged to James,—he had no debt,—Alexander had the subject,—he saw the decisions of this Court,—he relied on them,—he did not confirm. It is said that there was no *animus* in Alexander; he laid hold of any little moveables that James had: this was *gerens se* as executor.

PRESIDENT. No doubt that confirmation had all the force supposed in this argument. The benignity of the law has softened confirmation, in the same way that the effect of passive titles has been softened. The Act 1690 did not mean to throw loose the goods of the defunct, but to make a way for the nearest in kin. If the word *alteration* displeases, I will say that decisions have introduced relaxations of the law. This is not a question as to a creditor of James; but it is a question as to Alexander having the *instrumentum* in his hands. Possessing for a number of years, it must be supposed that he was willing to keep it. The decisions show the genius of the law. There is no danger of a *damnosa hæreditas*; but, if there was, let Alexander look to that.

On the 1st March 1768, the Lords repelled the defences, and remitted to the Lord Ordinary, altering the interlocutor of Lord Justice-Clerk.

Act. H. Dundas, R. M'Queen. *Alt.* Campbell, A. Lockhart.

Diss. Justice-Clerk, Auchinleck, Barjarg, Coalston, Elliock, Hailes, President,—7.

Alemore absent. So that the Judges were equally divided, the President having no vote.

N.B. It appears, from the report in the Faculty Collection, that, on 7th March 1769, the Lords altered this interlocutor, and assoilyied the defender. *Vide Dictionary*, 14,401.