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,

No. 40. vests the dead's part in the nearest of kin, 4th December, 1744, Executors Creditors of Murray Kynnynmound *contra* Somervil, No. 89. p. 3902. *voce* EXECUTOR. And the whole current of decisions tends to support the defence now pleaded.

There is no solid difference in the transmission of moveables properly so called, and debts. The only question, therefore, that remains is, Whether Alexander Pringle actually attained possession of his brother's provision. But as to this there can be little difficulty: he was not only in possession of the document of debt, but, being the debtor in the obligation, he had the money itself in his hands. Had any other person been debtor in the sum, and had payment been made to Alexander, or the security innovated, the right would have been fully vested in him. And the law can never require such a piece of mummery, as a simulate payment, and a nominal discharge granted by the nearest in kin to himself.

Answered: The whole series of our statutes proceeds upon the idea of the necessity of confirmation, which is supposed even in those which were purposely framed for the advantage of the nearest in kin, as 1540, c. 120. 1617, c. 14. 1690, c. 26. and more particulary in those which relate to the subject of quots of testaments, as 1641, c. 61. 1661, c. 28. 1669, c. 19. 1701, c. 14. Had it been intended to dispense with confirmations altogether, the legislature would not have been at the trouble of regulating them by so many anxious enactments. Indeed, in a double view, they are of more consequence at present, than in any former period of our law; the inventories made up, and the caution found in confirmations, is the best security which remains, now that the penalties of vicious intromission are in a great measure abolished. And accordingly, so satisfied was the Court of the necessity of confirmation, that the obtaining a decree dative was found insufficient to vest the effects, where the person who had taken out the edict happened to die before actual confirmation; 24th January, 1745, Carmichaels *contra* Carmichael, No. 12. p. 9267. *voce* NEAREST OF KIN.

In all the cases referred to by the defender, there was some overt act declaratory of the intention of the nearest in kin to take up the succession; as, apprehending the possession of moveables, exacting payment, or taking a bond of corroboration. In the present case, there was no act of that kind done by Alexander Pringle; and it is contrary to every idea of law, to suppose that he could have become heir *in mobilibus* to his brother, without taking any step to indicate that such was his intention. This will appear the more obvious, if it be considered, that whatever has the effect of vesting the moveables, cannot but have the corresponding effect of inferring an universal passive title; so that, however great the debts of the defunct may be, the nearest of kin might be subjected to them without his knowledge, nay, contrary to his intention.

"The Lords repelled the defences, and decerned."

Afterwards, the defender insisted for a proof, that Alexander Pringle had intromitted with the whole moveables of his brother, and thereby incurred an universal representation; and a proof having been allowed, it appeared from the

evidence, that he actually intromitted with a horse and riding-furniture, which had belonged to James, with his books, linens, and other clothes, being the whole effects he was master of, and that he had paid any debts which he owed. No. 40.

"The Lords, having advised the testimonies of the witnesses adduced, in consequence of the former interlocutor, whereby it appears, that Alexander Pringle had an universal intromission with his brother's effects, sustain the defence, and assoilzie the defender."

Act. *Macqueen, Solicitor-Dundas.* Alt. *Lockhart.* Clerk, *Pringle.*

Fol. Dic. v. 4. *p.* 269. *Fac. Coll. No.* 92. *p.* 343.

1776. *December* 27. LESLIES *against* ABERCROMBIE.

No. 41.

ABERCROMBY, after his wife's death, being pursued by her nearest of kin for her share of the goods in communion, and particularly for the half of the sum in a bond of provision granted by the wife's father, but which he, together with his wife, had renounced for a new security taken payable to himself and his heirs, of which the term of payment was not yet come, the defender pleaded, That his wife having left a son, who survived her a few days, the right transmitted *ipso jure* to the child; and although he died before confirmation, the father's possession as administrator for his child, was equivalent to a confirmation, and therefore the father's right to the sum in this bond, as nearest of kin to his son, must exclude the right of the pursuers, as nearest of kin to the mother. Answered, Possession supersedes the necessity of confirmation only where there is an actual apprehension of the *ipsa corpora* of moveables; but there can be no possession of the sum in a bond, of which the term of payment had not arrived. The Lords repelled the defence. See APPENDIX.

Fol. Dic. v. 4. *p.* 270.

1784. *February* 19. RICHARDSON *against* SHIELLS.

No. 42.

ALEXANDER ORR had become bound to dispone certain lands, but died before fulfilling that obligation, though after a bond had been granted to him for the price. His eldest son, who was his universal disponee, possessed the lands for some time. He then obtained a sequestration, in terms of the act 1772, of the effects belonging to himself and to his father. Shiells, a creditor of the father, expede a confirmation as executor-creditor, and gave up in inventory the bond above mentioned, for which a competition ensued between him and the factor under the sequestration; the latter pleading, That by the general disposition, followed by possession of the lands for which the bond was granted, the sums in question were completely transferred to the general disponee, and fell, of course,