

attached, as in *bonis defuncti*, by the creditors of the deceased, and the creditors of the executor, in whom they never were vested, would have no title to challenge their diligence.

No 94.

The decisions founded on do not apply. They go no further than to show, that the office of executor, established in the person of the nearest of kin, transmits to his executors. These heirs may be entitled to intromit, but, without a special confirmation, are not vested in the right to any subject. There is no ground for supposing that the act 1690 meant to alter the law in this matter. It establishes only, that the Commissary-court cannot oblige a person to confirm for their emolument, if he does not otherwise choose it.

The statute 1695, c. 41. is in favour of the pursuer's plea; for it proceeds on the hypothesis, that, at common law, creditors of the nearest of kin had no access to any subjects which their debtor did not choose specially to confirm. It directs by what methods the creditors shall be enabled to attach such effects for the future; but, when these methods are not used, as in this case, the subject remains in *bonis defuncti*, attachable by the diligence of the defunct's creditors.

Though the executor cannot oblige the debtor to pay, if the debt is not specially confirmed, yet payment made to a person vested in the office of executor, is always sufficient to liberate the debtor. The determination of the Court, therefore, in this case, cannot affect his safety.

The cause was determined on a hearing in presence, and memorials.

THE COURT found, 'That the annualrents in question are to be held as *in bonis* of Mr Walter Laurie, affectable by his debt.'

Lord Ordinary, Hailes.  
Clerk, Tait.

Act. Crisbie.

Alt. A. Miller.

*Fol. Dic. v. 3. p. 191. Fac. Col. No 87. p. 169.*

1784. February 10. DANIEL FRASER against JAMES GIBB.

FRASER, as next of kin, and executor of a creditor of Gibb, and as having expedite confirmation with respect to some other of the defunct's effects, and in a portion likewise of Gibb's debt itself, sued him for payment, and obtained decret against him. Gibb presented a bill of suspension; but it having been refused by the Lord Ordinary on the bills, he, in a reclaiming petition,

*Pleaded,* To give an active title to a creditor's executor, confirmation respecting the particular debt claimed has ever been found to be necessary; although, by being partially confirmed, the executor may render the office itself transmissible to legal or to conventional successors; as was determined in the case of the Creditors of Murray, 4th December 1744, No 89. p. 3902.

*Answered,* 'The confirmation by an executor, *qua* next of kin, of any one subject belonging to the deceased, as it proves his right of blood, and conse-

No 95.

Debtors are not bound to make payment to executors or nearest of kin, unless confirmation has been obtained as to their full debts.

No 95.

quently his title to the legal succession of his moveable estate ; so, by our latest decisions, it has been adjudged to carry the whole executry out of the testament of the deceased, and to make even the part which was not confirmed, to transmit to the executors of the person confirming on his death.' Erskine, b. 3. tit. 9. § 30.

*Observed* on the Bench ; The effect of partial confirmation, precisely like that of a general disposition of moveables, is to give *jus ad rem* ; but in order to confer *jus in re* as to any particular subject, the executor must be confirmed in such subject itself.

THE LORDS therefore remitted the cause to the Lord Ordinary, with an instruction to pass the bill.

Lord Ordinary, *Swinton*. Act. *G. Fergusson*. Alt. *M. Ross*. Clerk, *Home*.

N. B. The Lord Ordinary having, on the above ground, *suspended the letters*, found expenses due by the charger ; with respect to which he reclaimed to the Court ;—but his petition was refused, without answers.

*S.* *Fol. Dic. v. 3. p. 191. Fac. Col. No 144. p. 225.*

1802. May 26. ALISON *against* SCOLLAY'S CREDITORS.

No 96.

A partial confirmation does not vest the right of the whole executry.

IT was objected to the interest produced by the Reverend Charles Alison, in the ranking of the creditors of the Reverend John Scollay, That the debt was due to his father James Alison, and although he had (November 1799) obtained a decree of constitution for payment of the sums due, and had led an adjudication upon it, (11th June 1800) which was produced in the process of ranking and sale ; these were ineffectual, as they were obtained without any title ; for although he had expeded a confirmation as executor to his father, no part of the debt now in question was confirmed.

THE COURT were unanimous (19th January 1802) in adhering to the Lord Ordinary's judgment sustaining the objections, and finding the adjudication void, as a partial confirmation gives only the right of pursuing, in the same way as a decree darive would have done ; but the pursuer must confirm to the individual debt before extract.

Lord Ordinary, *Bannatyne*. For Alison, *Fletcher*. Agent, *Tho. Gordon*, W. S.  
For the Creditors, *Macnochie*. Agent, *A. Youngson*, W. S. Clerk, *Menzies*.

*F.**Fac. Col. No 43. p. 88.*