other funds or effects of Patrick Macdowall impart to James, his son, any right to the debt in question. No. 43.

Replied: They are not real inconsistencies which have been mentioned. Confirmation being the only method prescribed by law for certifying to the debtor of a deceased person who are the creditor's next of kin, or rather that he himself is in safety to pay to those who claim the debt in that character, it is abundantly natural, that if he chuses to resort to this security, the law should not deny it to him; and it is for the same reason that the statute of 1693, above quoted, does not oblige the parties interested to dispense with the production of confirmed testaments. The distinction stated between the legitim or the relict's share, and the dead's part, truly favours the right of the next of kin. The first mentioned interests proceed not at all from succession, being in their very nature separated and divided from the dead's part. As, therefore, the next of kin of the deceased have no connection with them, if they were not *ipso jure* transmissible to the heirs of those to whom they belonged, but who have not appropriated them, they would of necessity be rendered caduciary. In fact, however, possession could scarcely be wanting in those cases, on the part either of the widow or of the children; of the former, at least, in the strictest sense.

The Court were unanimously of opinion, that possession by the next of kin can have no effect in conferring an active title farther than with respect to the subjects actually possessed. Accordingly,

The Lords preferred Walter Macdowall to the fund *in medio*.

Reporter, *Lord Alva*. For the heir of the disponee, *Elphinstone*. Alt. *Currie*. Clerk, *Orme*.

S. *Fol. Dic. v.* 4. *p.*269. *Fac. Coll. No.* 164. *p.* 255.

1799. *March* 7.

DUNCAN STEWART *against* LIEUTENANT ALEXANDER GRÆME.

No. 44.

A. when abroad, transmitted a sum of money to Scotland, to be placed on heritable security. The persons to whom it was sent lent it on an heritable bond payable to themselves, for A.'s behoof. After A.'s death, they got payment of the

IN 1780, Lieutenant Stewart transmitted, from the East Indies, £1000 to William Stewart and John Taylor, with directions to lend it on heritable security, and to apply the interest of it yearly towards the support of some of his relations in Scotland. Lieutenant Stewart, at the same time, sent them a general power of attorney, the immediate object of which was to enable them to manage this fund, but it was conceived in terms sufficiently broad to extend to every other concern which he might have in Scotland.

Messrs. Stewart and Taylor lent out the money on an heritable bond, payable to themselves, "as trustees and attornies of Duncan Stewart, Esq. in the service of the Honourable the East India Company, to the survivor of them, and to the assignees of the survivor."

The interest of this bond was applied agreeably to Lieutenant Stewart's instructions. Both Messrs. Stewart and Taylor wrote him, mentioning what they had done; and some of his relations wrote him likewise. Lieutenant Stewart received

No. 44. money, and discharged the bond; and, in a multiplepoinding afterwards brought by them, the sum was found to belong to A.'s sister, as his heir-at-law. But she having died without expeding a service to him, it was decided, that the sum was not carried by her testament, but, as remaining *in hæreditate jacente* of A. devolved on his next heir-at-law.

the letters from his relations, but those from his trustees seem to have been miscarried; for, in a letter to them in February, 1783, he says: "I had the satisfaction to learn, that the cash has been received, and the interest applied agreeable to my desire; but I have not had the pleasure to hear from either of you."

Lieutenant Stewart died in December 1783; and there was found in his repositories a holograph memorandum of a will, which contained these words: "To direct £1000 I sent to Europe to be applied in the manner already directed."

In December, 1787, the £1000 were paid by the debtor in the heritable bond to Messrs. Stewart and Taylor, from whom he received a discharge.

Some doubts having arisen with regard to the succession to this sum, two multiplepoindings were brought, in 1788, for having the matter ascertained. One of these actions was brought in the name of the executor appointed by Lieutenant Stewart in the above memorandum; the other, in the name of Messrs. Stewart and Taylor.

In these actions, the £1000 were sought, 1*st*, By the legatees of Lieutenant Stewart claiming under the will; 2*dly*, By his mother, as his executor by the law of England; and, 3*dly*, By Mrs. Bowman, his sister, who, in Scotland, was his heir-at-law.

The Court, on 20th May, 1791, "preferred Mrs. Bowman to the fee of the said £1000, upon the death of the liferenters; and remitted to the Lord Ordinary to proceed accordingly." And, in concequence of this judgment, a small partial payment was made to her, by Messrs. Taylor and Stewart, out of the £1000, to defray the expense of the litigation.

In August, 1791, Mrs. Bowman executed a will, appointing Lieutenant John Alexander Græme to be her residuary legatee.

Mrs. Bowman died without having taken any further step to complete her right to the £1000.

Lieutenant Græme, in 1795, sisted himself in the multiplepoinding, and claimed the fund *in medio*, in virtue of Mrs. Bowman's will. He was opposed by Duncan Stewart, of Jamaica, who, on Mrs. Bowman's death, became the heir-at-law of Lieutenant Duncan Stewart; and having obtained a service in that character, he contended, that the £1000 must be considered as an heritable subject, which, in consequence of Mrs. Bowman's not having made up a title to it as the heir of her brother, remained *in hæreditate jacente* of him, and consequently belonged to the claimant.

In defence, Lieutenant Græme

Pleaded: 1*st*, The real right to the £1000 was in Messrs. Taylor and Stewart, as Lieutenant Stewart's trustees. His right consisted merely in the faculty of directing the application of the trust-fund. And when he desired that it should be lent on heritable security, and the interest divided among certain relations during their lives, there was an implied appointment, that the fee should, at their deaths, belong to his heir-at-law. Mrs. Bowman, therefore, took the subject

merely as a person in whose favour the uses of the trust were declared; and it is a settled point, that, in such case, the right vests without a service, though the trust-fund be heritable; Willocks against Auchterlony, affirmed in House of Lords, No. 100. p. 5539. *voce* HERITABLE AND MOVEABLE. No. 44.

2dly, Even supposing that Mrs. Bowman had not taken the subject as heir designative, but as fully representing her brother, it does not follow, that such a right could not vest in her without a service. In many subjects, a service is not necessary for that purpose; such as leases, and the rents of an estate from the death of the predecessor to the death of the heir-apparent. The strong effects given by the act 1695, Cap. 24. to three years possession, also show how much the law is disposed to extend the rights which an heir may have *jure sanguinis*. An heir without service may likewise confirm a death-bed deed; and all redeemable rights may, in certain cases, vest in him without service; Robertson against Davidson, No. 11. p. 3044. *voce* CONFUSIO. When an heir-apparent, too, brings a judicial sale of his ancestor's estate, he has right to the reversion without any service; Hamilton, No. 43. p. 5297. And it is surely reasonable, that where there is a trust, with a power to convert the trust-estate into money, the heir of the truster should have power to vest the trust-fund in himself, so as to transmit it to his representatives, at least with as much ease and safety as if no trust had been created by his ancestor, and consequently without a service, which would involve him in an universal representation.

3dly, Messrs. Stewart and Taylor had power to extinguish and discharge the heritable security; and they actually did so before Mrs. Bowman's death; consequently the sum to which she had right rested simply on their personal security. And, accordingly, in virtue of the *jus crediti* which she had against them as her brother's trustees, she obtained not only a preference in the multiplepoinding, but also possession of the subject, by getting a partial payment. Now, possession without any formal title is sufficient to vest a right to all subjects, which, though devolving by heritable succession, are of that nature, *quod percipi et consumi possunt*; because such subjects cannot be reduced under the power, or vested in the person of the heir so completely as by their actual enjoyment; Blackburn, No. 29. p. 14384. Douglas, No. 78. p. 9736. Roberton against Dalmahoy, No. 30. p. 5402. Creditors of Dunjop against Alison, (APPENDIX to HEIR APPARENT.)

Answered: 1*st*, Lieutenant Stewart had no intention of creating a trust. On the contrary, he sent Messrs. Taylor and Stewart a power of attorney to enable them to discharge the interest; which clearly implied, that he meant that the bond should be taken payable to himself, and Messrs. Taylor and Stewart disobeyed their instructions, by taking it in their own names. But supposing that, in doing so, they had not exceeded their powers, it would not avail Lieutenant Græme; because, as Mrs. Bowman was not substituted *nominatim* to her brother in the bond, its contents could not vest in her as his heir-at-law without a service; Stair, B. 3. T. 5. § 6. & 25.; Erskine, B. 3. T. 8. § 59. An heritable bond,

No. 44. although payable to trustees for behoof of the truster, is just as much heritable, and liable to the same rules, both with regard to the right of succession, and the title to be made up to it by the heir, as if it had been made payable to the truster himself; Durie against Coutts, No. 140. p. 5595. Kyde against Davidson, No. 142. p. 5597.

2dly, None of the instances mentioned by Lieutenant Græme, in which heritable subjects vested in the heir without service, bear any resemblance to the present. The act 1695 was introduced not from favour to heirs, but to creditors. And it is only in virtue of a special clause in that statute, that an heir-apparent is allowed to bring his ancestor's estate to judicial sale. When he takes the reversion, therefore, the decree of this Court comes in place of the title which he must otherwise have made up in his person. And as it required the force of a statute to alter the common law in this respect, it operates against the defender's argument.

3dly, The £1000 were heritably secured at Lieutenant Stewart's death; and it is the situation in which the sum then stood, not any subsequent change made on it by the trustees, which must govern the right of succession to it; Ross against The Trustees of Ross, No. 102. p. 5545. Lady Christian Graham against the Earl of Hopetoun, No. 143. p. 5599. Neither did Mrs. Bowman ever obtain a decree against Messrs. Taylor and Stewart for payment of the £1000. The interlocutor of the Court, of the 20th May, 1791, was merely a finding in her favour. She ought, in virtue of the remit to the Lord Ordinary, which that interlocutor contained, to have got a decree for payment pronounced by him against the raisers of the multiplepoinding. As this, however, was not done, Messrs. Stewart and Taylor had no authority to make her a partial payment; and, in fact, what Lieutenant Græme calls a partial payment was merely a sum taken out of the funds *in medio* to pay the expense of the law-suit; consequently, Mrs. Bowman never derived any benefit from the money, nor can she justly be said to have ever possessed any part of it.

The Lord Ordinary "preferred John Alexander Græme, upon the claim and interest produced, to the fee of the foresaid sum of £1000 Sterling, in the hands of John Taylor, writer to the signet, subject always to the liferents affecting it; and decerned in the preference."

The Court thought the case attended with much difficulty, and pronounced opposite judgments.

Several judges were of the same opinion with the Lord Ordinary. A service (it was observed) may be used for two distinct purposes,—either to ascertain who the heir is, or to vest a right in that heir. In this case, it was necessary only for the first of these purposes; and, that being the case, the want of it may be supplied by other evidence. When a trust of an heritable estate is created for the payment of debts, the heir of the truster is entitled, without a service, to any reversion of the price which may be in the hands of the trustees. In like manner, in this case, as the heritable bond was converted into money before Mrs. Bow-

man's death, the trustees might have paid it to her without a service; and the multiplepoinding which they raised, together with the interlocutor of the Court, preferring her to the fund, ought to be held as equivalent to payment. No. 44.

A majority of the Court, however, came at last to be of opinion, that Mrs. Bowman not being a *nominatim* substitute in the bond, nor having actually got possession of its contents, the fund *in medio* fell to be considered as still *in hæreditate jacente* of her brother.

The Court at first adhered to the interlocutor of the Lord Ordinary; but afterwards, on advising a reclaiming petition for Duncan Stewart, with answers, "they altered the interlocutor reclaimed against, preferred the petitioner to the fund *in medio*, and remitted to the Lord Ordinary to proceed accordingly."

And, on advising a reclaiming petition for Lieutenant Græme, with answers, the Court "adhered."

Lord Ordinary, *Craig*. For Stewart, *H. Erskine, J. W. Murray*.
For Græme, *Solicitor-General Blair, Cha. Hay, M. Ross*. Clerk, *Home*.

R. D. *Fac. Coll. No.* 118. *p.* 266.

SECT. VI.

Intromitters with the Defunct's effects may be pursued directly without Confirmation.

1623. *February* 5. SCHAW *against* AUCHINLECK.

No. 45.
Found, that a relict intromitting with some things omitted in the defunct's testament, might be pursued directly for the same by the creditors, without either first insisting against the executors confirmed, or take a dative *ad omissa*.

IN an action Schaw *against* Auchinleck, the Lords sustained the action against the relict of the defunct, who was convened as intromissatrix with certain particular goods of the defunct, to make the goods intromitted with by her forthcoming to one of the defunct's creditors, notwithstanding that the relict alleged, that there were executors confirmed, who ought to be convened for the defunct's debts, and to which executors she ought only to be accountable for her intromission: But the pursuer replied, that she might be pursued for that particular libelled wherewith she intromitted, seeing it was not contained in the defunct's confirmed testament: She duplied, that she could not be convened therefore by this manner of pursuit, but any having right thereto, as omitted out of the testament, and obtaining a dative thereof, might pursue therefore, to whom she should be answerable as accords. This allegeance was repelled, and the action sustained against the relict for her intromission, seeing the testament wherein the bairns are confirmed executors, was given up by herself, and that her omission to give up the particular goods of the