

# APPENDIX.

## PART I.

### SERVICE AND CONFIRMATION.

1768. *March 1.* PRINGLES *against* MARY VEITCH.

JAMES PRINGLE having £5000 Sterling in land and money, died *anno* 1757, leaving a wife and two sons, Alexander and James, both minors. In October 1757, a little before his death, he executed two deeds in favour of Alexander his eldest son. By the one, he settled his land-estate upon Alexander, his heirs and assignees; whom failing, upon James, his heirs and assignees, &c. By the other, he made over his moveable estate to Alexander, and burdened him with 27,000 merks to James as his portion.

James died *anno* 1764 under age. Alexander was confirmed executor to his father, but died in the 1765, without making up titles either to the land-estate or to his brother's provision of 27,000 merks. While he was languishing under a deep decay, he made over to his mother Mary Veitch, by a general disposition, his whole estate heritable and moveable.

Alexander and Margaret Pringles, being confirmed executors, *qua* next in kin to James, demanded payment of the said sum of 27,000 merks from Mary Veitch. Her defence was, that the same was extinguished by confusion in the person of her son Alexander, who, by surviving his brother James, became both debtor and creditor. The Lord Ordinary pronounced the following interlocutor: "Finds the provision of 27,000 merks, which was due by Alexander Pringle to his younger brother James, did, upon the death of James, devolve upon himself, and was extinguished in his person." It was thought that the only use of confirmation being to entitle the next in kin to carry on a process for payment against the debtors of the deceased, it cannot be necessary where the debt is due by the next in kin himself.

Upon a reclaiming petition, confirmation was found necessary upon the following principle, that with regard to moveables as well as land, *aditio hereditatis* is necessary, importing the heir's resolution to take up the succession and to

No. 1.

In what cases confirmation of moveables is necessary.

No. 1. pay the debts, otherwise an heir without his knowledge or consent may be subjected to his predecessor's debts, the active title being inseparable from the passive. This made a confirmation necessary to manifest Alexander's will to accept of the succession and to pay the debts. It was agreed, at the same time, that with respect to such moveables as can be possessed *via facti*, a horse for example, or an ox, a confirmation is unnecessary, because the laying hold of such a moveable shows the *animus* of the next in kin to take up the succession.

What misled the Ordinary and some others, was, that James died in minority without having contracted any debt; and they did not distinguish this case from a pure donation free of burden, which a man may acquire without his knowledge or consent. And they did not advert, that what is law in this case, must be law also where the succession is hazardous.

Another objection lies against the interlocutor of the Ordinary. That if the debt in question was extinguished merely by the survivance of Alexander the debtor, the creditors of James could have no access to confirm the subject for their payment, which no person pretended to maintain.

To obviate the first objection, a proof undertaken was successful, *viz.* That Alexander had intromitted with the moveables of his brother James, namely, his body-clothes, his watch, his horse, &c. which showed his willingness to subject himself to the debt of his brother; and upon that medium it was found that in this case *mortuus sasis virum*, without necessity of a confirmation, 7th March 1769.

*Sel. Dec. No. 262. p. 335.*

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1806. March 7. CUTHBERTSON *against* BARR and Another.

No. 2.  
General service, a sufficient title to the heir of a creditor, to discharge a real burden created in the person of the debtor

THOMAS CUTHBERTSON sold the lands of Borland to John Barr, writer in Kilmarnock, for the sum of £2500. Barr was allowed to retain £1900 of the price for a year, and accordingly this sum was declared, in the disposition granted by Cuthbertson, to be a real burden on the lands. At the same time, Barr, along with John Gemmill of Templehouse as his cautioner, granted a personal bond for the sum to Cuthbertson.

Before any part of this money was paid, Cuthbertson died, leaving a settlement, by which his eldest son Robert, a minor, succeeded to the whole of his heritable property. He made up his title by a general service, as heir to his father.

Robert Cuthbertson, and his tutors, raised an action against Barr and his cautioner, for payment of the sum contained in the bond, when the defenders objected,

1st, The title of the pursuer is defective. A general service conveys only personal rights; under which description, the right reserved in the disposition,