

SECT. VII.

FIDEI COMMISSA, whether they must be confirmed?

1745. February 12. THOMAS BOYES *against* JAMES DEWAR of Vogry.

JAMES DEWAR of Vogry granted bond to James Hog of Hagbrae, for £940 Sterling, under back-bond, That if he should lend £810 thereof to certain persons, their bonds should be accepted as payment for so much. Accordingly he lent the money to these persons, but upon bonds payable to himself; and Hagbrae being deceased, Thomas Boyes, writer in Edinburgh, was appointed by the Lords of Session factor on his effects, with a power to deliver up and discharge Vogry's bond. Vogry presented a bill, shewing that he was threatened to be charged on his bond, which he apprehended he was not safe to pay without confirmation; and therefore craving letters of suspension.

Answered for Mr Boyes, There was no need of confirming more than was due, and Vogry was only resting the surplus in his bond over the £810. With regard to the residue, he was to be considered as a trustee; and it did not require any confirmation to oblige him to denude of the bonds, which was all that could be asked of him.

The Lords passed the bill.

Lord Drummore, *Reporter.*

Fol. Dic. v. 4. p. 270. D. Falconer, v. 1. p. 73.

No. 52.

The subject of a trust must be confirmed by the representative of the *Fidei commissarius*, before he can oblige the trustee to denude.

SECT. VIII.

Confirmation necessary to establish a right to the Dead's Part in the nearest of Kin.—A Bond of Corroboration obtained by the nearest of Kin supersedes Confirmation.—Heir of a Marriage may without Service challenge Deeds contrary to the Contract of Marriage.

1745. January 23. CARMICHAEL *against* CARMICHAEL.

THE brother of a defunct having taken out an edict, in order to a confirmation, as executor *qua* nearest of kin, died after obtaining a decree-dative, but before the confirmation was expedite. A question arose between his children and the other

VOL. XXXIII.

78 Q

No. 53.

- No. 53. nephews and nieces of the first defunct; the former alleging, that though the office had never been vested in their father, yet that the decree-dative fully established the dead's part in him so as to transmit to his children, who therefore were entitled to the office of executors to the first defunct; and the other nearest in kin contending, that since there had been no confirmation, the decree-dative was of no effect; the Lords remitted to the commissary to confirm the nearest in kin, without regard to the decree-dative.

Fol. Dic. v. 4. p. 270. Rem. Dec. D. Falconer. Kilkerran.

* * This case is No. 12. p. 9267. *voce* NEAREST OF KIN.

- No. 54. 1751. February 20. SPENCE *against* WILSON.

As the nearest of kin obtaining possession of moveables needs not confirm, so a debtor voluntarily paying to the nearest in kin, will be effectually discharged by him, though the nearest in kin have not confirmed the debt; but it was questioned, if a bond of corroboration obtained by the nearest in kin superseded the necessity of confirmation. The Lords found, That it did; upon the answer made, That if the nearest in kin could take payment and discharge, he could certainly give up the 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.

Fol. Dic. v. 4. p. 271. D. Falconer, Kilkerran.

* * This case is No. 39. p. 14399.

* * A similar judgment was pronounced in the case Watson against Marshall, No. 66. p. 7009. *voce* INHIBITION.

- No. 55. 1759. December 8. SIR WILLIAM MONCRIEFF *against* CREDITORS OF SIR THOMAS MONCRIEFF.

THE heir of a marriage is entitled, without the aid of a service, to challenge deeds contrary to the settlements of the contract of marriage.

Fol. Dic. v. 4. p. 270. Fac. Coll.

* * This case is No. 31. p. 12871. *voce* PROVISION TO HEIRS and CHILDREN.

What understood to be a general assignation; see GENERAL ASSIGNATION.

See EXECUTOR.

See SUBSTITUTE and CONDITIONAL INSTITUTE.

See APPENDIX.