1737. *July* 27. MURRAY KINNINMOUND *against* MRS ELIZABETH ROCHEAD.

No 2.

THOUGH the nearest of kin is preferred to the office of executor to a general disponee, yet, where the general disposition contained a clause, secluding the nearest of kin from being executors, the general disponee was found to have the office; for such was constructed to be the intention of the excluding clause.

Fol. Dic. v. 3. *p.* 189. *Kilkerran*, (EXECUTOR.) *No* 1. *p.* 171.

*** Clerk Home reports the same case:

THE deceased Sir James Rochead, by a deathbed-deed, disponed all his heritable and moveable estate to certain trustees, whereof the said Mr Hugh Murray was one, for the use and behoof of the persons therein named; and, by it, he excluded his nearest of kin from being executors to him, and from all pretence of managing his means and estate, or meddling therewith any manner of way.

Upon this title, Mr Murray, the only accepting trustee, in order to complete his right to the moveable subjects, moved an edict before the Commissaries of Edinburgh; in which he was opposed by Mrs Rochead, one of the defunct's nearest of kin.

For Mr Murray, it was *contended*; That, as the will of the deceased is the sovereign rule in the disposal and management of his effects, it was plain, in this case, the appointment of trustees is upon the matter the same as a nomination of executors, they being nothing else but trustees for the behoof of all parties concerned. The business of executors, in executing a testament, is to call for the debts and effects, and to apply the same in payment of debts, &c. all which powers are, by this deed, committed to the trustees, so that there is nothing belonging to the office of executry which is not granted to them; wherefore there is here a virtual nomination; and words are not to be regarded, when the thing itself is plain; but the matter does not rest upon this footing allenarly, there is likewise a prohibition, or exheredation of all the nearest of kin. It is true, a simple exheredation would not avail; because a right, that is not made over to another, must still descend, as the law directs, notwithstanding the strongest exclusion to the contrary; but, at the same time, the prohibition here serves to explain the will of the defunct, and makes the whole that the law could have intended for such nearest of kin, to center upon the persons indirectly named; and consequently the trustees, to whom the subjects are conveyed, must be understood likewise to be called to the office of executry, when the nearest of kin are, with the same breath, excluded. *See* the case betwixt William Oliphant's relict and his nearest of kin, *voce* SERVICE and CONFIRMATION, referred to in the decision, 27th January 1708, Scot of Harden, No 1. p. 3809.

No 2.

It was *argued* for Mrs Rochead; That, by the genius of our law, exclusion or exheredation of the nearest heir, whether in heritables or moveables, avails nothing, unless there be an express institution or nomination of another heir; and that the nearest of kin has a right to the office, even where the executry is exhausted by debts, legacies, or a general disposition; a doctrine which ought with greater reason to take place here, as Mrs Rochead has intented a reduction of the general disposition. 2*do*, The uniform practice of the Commissaries is, to prefer the nearest of kin to general disponees; a procedure founded on the express terms of their instructions anno 1666, which contain *inter alia*, this instruction: 'If there be no nomination or testament made by the defunct, or, 'if the testament-testamentar shall not be desired to be confirmed, ye shall 'confirm the nearest of kin desiring to be confirmed; and, if the nearest of 'kin shall not desire to be confirmed, ye shall confirm such of the creditors as 'desire to be confirmed as creditors, they instructing their debts.'

Now, so it is, a general disponee cannot otherwise be confirmed than as executor-creditor, having no pretension either to be executor-nominate or nearest of kin; for these two things, the office and the benefit are perfectly distinct, each of them requiring proper and apt words to convey the same; and therefore, if a stranger be executor-nominate, unless he be also named universal legatar, he gets nothing but a naked office, with such benefit as the law has superadded thereto; and, *vice versa*, if a stranger get an universal disposition to the moveables, he has thereby no title to the office of executor, otherwise than by a fiction as *quasi* creditor, in case there be neither an executor-nominate nor nearest of kin competing with him; agreeable to which principles, it was determined, in the foresaid decision, Scot of Harden. Nor does the clause, secluding the nearest of kin, vary the argument; as our law knows no such thing as a virtual nomination or institution of heirs, whether in heritage or moveables.

Answered for Mr Murray; The instructions to the Commissaries do not touch the point, because, where there is a general disponee, especially with an exclusion of the nearest of kin from the office, there is a virtual nomination in the case, and, consequently, he is preferable to the nearest of kin, according to the above instructions. Besides it is plain, from the last words thereof, that the creditors mentioned therein, who are postponed to the nearest of kin, are only creditors in particular sums, and not a general disponee, who has a right to all the effects of the defunct.

THE LORDS remitted to the Commissaries, with this instruction, That they prefer the trustee to the office of executry, but prejudice to the nearest of kin to propone objections, &c.

C. Home, No 74. p. 125.