

1755. *January 10.*

The EARL OF CRAWFURD, and HUGH CRAWFURD Writer in Edinburgh, *against* MARY URE, and DUNCAN GLASFURD, her Husband, for his Interest.

No 3.  
General dis-  
ponees, al-  
though not  
named ex-  
ecutors, are  
entitled to  
the office of  
executor,  
preferable  
to the de-  
funct's near-  
est of kin.

JAMES URE granted a general disposition of all the goods and effects he had, or should have, at this death, failing children of his own body, in favour of the Earl of Crawford and Hugh Crawford equally; but the disposition contained no nomination of executors.

James Ure died without leaving children; and, after his death, the disponees obtained themselves decerned executors-dative to him before the Commissaries of Edinburgh.

After extracting the decreet-dative, but before expeding the confirmation, Mary Ure, the sister of James, applied to the Commissaries by petition, praying, That she might be confirmed as nearest of kin, seeing the defunct had not named executors. The Commissaries reversed the decerniture in favour of the disponees, and preferred Mary Ure, as nearest of kin, to the office of executor.

The disponees complained, by a bill of advocation to the Court of Session; and *pleaded*, That as, by the disposition, the goods to be confirmed belonged to them, they ought to have the administration of these goods, and were entitled to the office of executor preferably to the nearest of kin, who had no interest in them.

*Answered* for Mary Ure; That by the instructions to the Commissaries, they are appointed to prefer the nearest of kin to the office of executor, when there is no executor nominated; and, agreeably to these instructions, the Court of Session found the nearest of kin preferable to a general disponee, in a competition for the office of executor *anno* 1707, Scot of Harden against Lady Harden, No 1. p. 3809. It avails not to say, that it is improper to prefer the nearest of kin to the office, when he behoved immediately thereafter to account to the general disponee for the whole effects; for the law has expressly made it a rule, That the nearest of kin is to be preferred to the office, when there is no executor nominated; and the nearest of kin is entitled to judge whether the office be profitable for him or no: And, in many cases, it may be profitable; for example if he have grounds for reducing the general disposition.

*Replied* for the general disponees; That the plain meaning of the instructions to the Commissaries is, to give the office of executor to the party who apparently has the preferable interest in the subject to be confirmed; and, as the general disponees have not only a preferable, but even an exclusive right, in a competition with the nearest of kin, justice requires that they should have the management of their own effects; for it would be absurd to give the nearest of kin the possession of goods really belonging to another, or to entitle him to sell them against the will of the disponees, and make him only accountable for the

apprised values, when perhaps they might yield more. By the instructions to the Commissaries, the nearest of kin are only to be preferred, when there is no nomination or testament made by the defunct; and, under the word *testament*, a general disposition may very properly be comprehended.

In the case of Scot of Harden, the nearest of kin was also the defunct's heir, and the moveables assigned were bygone rents; and therefore he had an evident interest to apply for the office of executor, that he might have it in his power to protect his tenants, and prevent his lands from being thrown waste by too rigorous diligence against the tenants: But, whatever the Court may have found whilst it was held to be law, That the dead's part did not vest in the nearest of kin without confirmation, and that the confirming of a part did not transmit the whole; these decisions can be no rule now, when the matter of confirmations, and of the transmission of moveables from the dead to the living, are established in a manner much more equitable than anciently obtained.

'THE LORDS remitted the cause to the Commissaries, with an instruction to prefer the disponees.'

Reporter, *Lord Justice Clerk.* Act. *Lockhart & J. Dalrymple.* Alt. *Ferguson, & And. Pringle.*  
*Fol. Dic. v. 3. p. 189. Fac. Col. No 125. p. 185.*

\* \* \* Lord Kames reports the same case :

JAMES URE of Shergarton, by deed bearing date 28th of October 1752, disposed to the Earl of Crawford. 'All and sundry lands, heritages, debts, sums of money, and other goods and effects belonging to him, or which should be long to him at his death, under the burden of his funeral charges, and of all his just and lawful debts; dispensing with the not delivery;' containing a power of revocation, and a proviso, 'That in case he should have issue of his own body, the deed should be void.' In a competition, after the disponent's death, about the office of executry, betwixt the disponent and Mary Ure, the sister and next in kin of the deceased, the Commissaries preferred the latter, as next in kin, to the office of executry. The cause being advocated to the Court of Session upon iniquity, it was *pleaded* for the next in kin, That the Commissaries could do no other than prefer her, according to the instructions given to them *anno* 1666, 'That if there be no nomination of testament made by the defunct, the Commissaries must confirm the nearest of kin: That if the nearest of kin desire not to be confirmed, they must confirm such of the creditors as apply for the office; failing these, the legatars; and if no person having interest desires the office, they must confirm the procurator-fiscal.' That the Commissaries had all along conformed themselves to these regulations; and, upon that ground, in a case precisely similar to the present, they preferred the nearest of kin to the relict of the deceased, who had a general disposition from

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him of his moveable estate ; Forbes, 27th January 1708, Lady Harden *contra* Scot, No 1. p. 3809.

‘ THE LORDS, notwithstanding, remitted the cause to the Commissaries, with this instruction, to prefer the disponee.’

And the reasons for this judgment are as follow : The next in kin is preferred to creditors and legatees in the office of executry, because the next in kin has generally the greatest interest. But as there are few general rules without an exception, here is an exception founded on the common principles of law. It is a principle, that no person is allowed to bring an action, or make a claim, whatever right he may have, unless he can show an interest. A contract betwixt two apprisers, that neither should alien under the pain of forfeiture, was not sustained to produce an action of forfeiture upon alienation ; because the pursuer could qualify no damage by the alienation, and, therefore, had no interest to raise the process, Durie, 11th February 1630, Carr *contra* Limpetlaw, No 4. p. 95. For the same reason, the next in kin who cannot figure to herself any advantage by the office, ought not to be admitted ; especially in competition with the disponee, who has a well-founded interest to be admitted to the management of effects, which, after payment of the debts, are wholly to be applied to his use ; *2do*, If the next in kin be preferred, the whole moveables must be converted into money ; which seems to be both unnecessary and unreasonable, when perhaps there is not a shilling of debt ; *3tio*, The case of Lady Harden *contra* Scot, instead of being an authority for the next in kin, affords an argument for the disponee. In that case, the next in kin was also heir to the land estate, who urged, that he had an interest *qua* heir to have the debts paid : And next, that the bulk of the executry consisted in arrears due by his tenants ; and that he had an interest to deal with them tenderly, which could only be in his power if he himself were made executor. These considerations favour the disponee, who had right to the real estate as well as personal.

*Sel. Dec. No 74. p. 98.*

1762. August 6. ALEXANDER EARL OF HOME *against* LADY JANE HOME.

No 4.

A bond of provision granted by a brother to a sister, and bearing to be in full satisfaction to her of all claim of executry, found in the hands of the brother's doer after his death, does not ex-

UPON the 7th of May 1757, William, late Earl of Home, granted a bond of provision to his sister Lady Jane, whereby, upon the narrative of his being inclined to make a reasonable settlement upon her in the event of her surviving him, he bound himself and his heirs, &c. to pay her an yearly annuity of L. 80 Sterling during her remaining unmarried ; and, in the event of her marriage, the sum of L. 1000 Sterling at the first term thereafter.

The bond contained the following clause : ‘ And it is hereby expressly provided and declared, That the above-written provisions, in favour of the said Lady Jean Home, shall be in full satisfaction to her of all claim of executry, or whatever else she can ask, claim, or demand by my decease, except what