

## EXECUTOR.

## SECT. I.

Who entitled to the Office.

1707. December 24. Dame JEAN NISBET against ROBERT SCOT of Harden.

**R**OBERT SCOT, now of Harden, as only brother, and nearest of kin, to the deceased Sir William Scot of Harden, takes out an edict to confirm himself executor to him before the Commissary of Lauder. Dame Jean Nisbet, Sir William's relict, compares, and competes on a disposition and mutual contract, passed betwixt her husband and her in *anno* 1688, disposing the whole moveable estate he shall happen to have at the time of his decease, and craves to be preferred to the office, seeing Robert, her brother-in-law, could have nothing but an empty name, the benefit of the whole executry being conveyed to her by the said disposition; in which competition, the edicts being advocated to the Lords, it came to be debated which of them should be preferred to the office of executry. And it was *alleged* for the brother, That he, as nearest of kin, was founded *jure communi*, and the printed instructions given to the Commissaries in 1666. *First*, His right of blood, and *jus in re*, was undeniable; for, as he is *hæres in mobilibus*, so his confirming executor is his *aditio hæreditatis mobilium*, and nothing can bar or seclude him but a nomination of an executor in a testament, which is not pretended that Sir William did; and so there being no room here for succession *ex testamento*, it goes to him who can succeed *lege*, and naturally it falls to the brother; and this is consonant to the Commissaries instructions, and their method of ranking, viz. the executor-nominator, or testamentar *primo loco*; and failing of that, or they refusing to accept, then the nearest of kin; and in the third place the creditors; but a general disposition gives no right to the office, whatever it may do as to the goods. And the 26th act of Parl. 1690, gives a privilege of confirming to relicts, bairns, nearest of kin, and special assignees, but takes no notice of general assignations, who

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A lady having a general disposition to all her husband's moveables, in a competition for the office of executry between her and her husband's nearest of kin, the latter was preferred.

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only come under the rank and notion of creditors, and after the nearest of kin. It was *contended* for the Lady, That she having an ample disposition to the whole moveable estate, it was stronger than a naked nomination of an executor in a testament, who had but a share for executing the defunct's will, whereas she was universal legatrix; and law has always rejected and repudiated superfluities; for, how incongruous were it, to give Harden the office and mere administration, who could have no possible benefit by it, but behoved to restore it *incontinenter* to the Lady, by reason of her clear right, *et frustra petis quod mox es restitutus*; and to divide the office from the goods is most inconsequential; and though a general assignation, by the act 1690, gives no right to intronit till a confirmation, yet if they seek it, no Commissary can deny it; and it were ridiculous and inconvenient, that a bare titular-executor have the office, and another the whole profit and *commodum*; for what could be expected but that he would either embezzle the effects, or lie by till most of them perish? And though she be not designed executor, yet by the clear conjectured will of the defunct she is more, which must be the cardinal and chief standard to regulate all successions; for she is nominate and appointed to succeed her husband in his whole moveable estate, with power to her to sell and dispose upon them at her pleasure, and she may have a special and particular affection for some species of moveables, which her brother-in-law might put away if confirmed. And there was no need of naming her executrix, for it is more than implied in her general universal right, and may be conveyed in equipollent terms, as the learned Swinburn, in his Treatise of Testaments, Part 4. § 4. shews, that the consistorial courts do not so much regard the words as the meaning of parties. So that if the defunct say, I commit all my goods to the disposal of my wife, or, I make her Lady of them, or legatary to all my goods and chattels, they are as good in the construction and eye of the law, as if he had *per expressum* named her his executor, Justinian having repudiated *scrupulosas verborum figuras*; and so among the Romans, if one made another *dominus suorum bonorum*, it was a good *institutio heredis*, though he did not express the word *heir*. And by our own municipal law, where a disposition was made of heritage in a testamentary style, it was sustained *ex voluntate defuncti præsumpta*, 31st Jan. and 14th Nov. 1667, Henderson, both recorded by Stair and Dirleton, *voce* PRESUMPTION, and *voce* TESTAMENT, and both of them observe, that on the 2d July 1667, Sinclair *contra* Cooper, *voce* VIRTUAL, a simple assignation to mails and duties in all time coming, was sustained, as importing an obligation on the heir to dispoise the lands heritably and irredeemably in favours of the assignee; then *multo magis* must her absolute disposition give her right to the office of executry. And what a sham piece of pedantry were it to prefer the brother, which in the event could be nothing but an empty, useless, and expensive interruption in the management and administration of the defunct's moveable succession, and where he could get nothing but his pains for his expenses and reward. *Replied*, That his radical right of blood could not be overturned, no more than the principles

of law by such pretences ; for here was a most exorbitant donation *inter virum et uxorem*, the subject of the executry now controverted, being worth no less than five or six thousand pounds sterling, which though not revoked, yet was tacitly, by contracting much debt on his tailzied estate, posterior to this extravagant disposition ; and which debts she would cast over upon the heir and heritage to be paid out of that estate ; whereas, by law, the moveable estate is liable, in the first place, to pay the debts, and relieve the heir *pro tanto*, except where the debts are heritably secured ; and therefore craves the office, that he may see the moveable effects applied to disburden his estate, and pay the debts contracted by his brother Sir William. And it were absurd to let her carry away such a vast and opulent executry, and leave all the debt upon the heir ; neither are there material objections against this disposition wanting, that it was a destination to take effect after his decease, failing children of the marriage, and so is only *donatio mortis causa*, and so liable to revocation, and *de facto* revoked by the posterior debts he contracted, which were not small. Likeas, there were posterior contracts betwixt them, by which this was deserted, innovated and passed from, and was designed only to give her a right to what came by Dirleton her father ; and, though he had made a disposition of moveables to the present William Nisbet, now of Dirleton, yet she, as nearest of kin, was preferable to the office of executry. *Duplied*, Her disposition can never be quarrelled as a donation, for it was most onerous, being mutual ; for, as he disposed to her his moveable estate, so she conveyed to him all that might fall to her by the decease of Lord Dirleton, her father, which made a considerable accession to Harden's estate. *Triplid*, That would have fallen and accresced to him *jure mariti*, so he had just nothing at all by that mutual contract. *Vide* a competition between the nearest *agnati*, and a relict having a disposition for the office of executry, Oliphant *contra* Dobie, *voce* SERVICE and CONFIRMATION, only, it had this speciality, that the disposition expressly secluded the nearest of kin *nominatim* from any benefit of the executry, except a legacy, which was an exheredation on the matter. But here Sir William had inserted no such thing in his disposition to his Lady. When this debate was going to be advised, it was moved by some of the Lords, first to try a settlement betwixt so near friends, which put a stop to the decision at this time.

1708. *January 27*.—THE LORDS decide the cause mentioned *supra*, 24th December 1707, depending betwixt Harden and the Lady, about the confirmation of Sir William Scot's testament, and preferred his brother, as being the nearest of kin ; for they thought her disposition from her husband to the moveables, besides the other objections made against it, was at most but an universal legacy, which never excludes the executor from confirming.

*Fol. Dic. v. 1. p. 272. Fountainhall, v. 2. p. 407. & 423.*

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\* \* Dalrymple reports the same case :

By contract betwixt the deceast Sir William Scot of Harden and the said dame Jean Nisbet in the year 1688, the said Sir William, failing heirs of the marriage, assigns, transfers, and disposes in favours of his Lady all and sundry moveables, debts, and bonds, household-plenishing, utensils, domiciles, silver and gold coined and uncoined, and hail other moveable and executry whatsoever that shall happen to pertain to Sir William the time of his decease, to be disposed by her, her heirs, executors, or assignees, at their pleasure ; and his Lady in the like terms, transfers, assigns, and disposes to him in case he survive ; and the contract bears, that both parties, by a solemn oath in presence of Almighty God, oblige themselves never to quarrel the said mutual rights, and that the party surviving was to have the undoubted right to the whole moveables failing children, and the one-half in case there were children, obliging them to warrant the said disposition from their respective facts and deeds, but no ways to prejudge creditors whose moveable debts were contracted preceding that date ; and that all debts contracted, or to be contracted, or debursements upon the account of any action intended or to be intended at the instance of Sir William or his Lady, against the heirs of tailzie and relict of the deceast Sir John Nisbet of Dirleton, should be paid out of the first and readiest of the moveables.

The Lady being survivor, moves an edict to confirm her husband's testament ; which being advocated to the Lords, it was *alleged* for the Lady, that she ought to be preferred to the office of executry, because the mutual contract did import a nomination of an executor, in as far as there was thereby assigned and disposed to the survivor all moveables and executry, to be disposed of by the said survivor, or their heirs, executors, at their pleasure ; which most certainly implies a direct right to the subject : And there is another clause that provides, that the survivor shall have the only and undoubted right to the whole moveables ; which cannot be explicated, nor the design of the contractors made effectual, unless the survivor be admitted to the office ; neither can the nearest of kin have any prejudice, because the lady is willing to find undoubted security to the creditors, and all parties having interest, and cheerfully to discharge all debts and burdens to which her right can in law be subjected.

It was *answered* for Harden ; That he as nearest of kin, has the only undoubted right to the office, and hath a most peculiar interest and benefit to claim it, because he is heir as well as nearest of kin, and thereby, whoever be the executor, he is obnoxious to the debts ; and it is much his interest to have the subject of the executry, which is liable for his relief, in his own hand. It is not the proper place to debate how far this disposition of the whole executry *per universitatem*, will also be subject to the whole moveable debts *per universi-*

*tatem*; in which case the Lady can have no benefit by the office, the debts being above the value of the executry. But it is most certain, that, by the express quality of the contract, the same is burdened with considerable debts, to which in law the heir is subject, and therefore it is his advantage to have the office. *2do*, If the Lady were admitted to the office, it would not only be in her power to pull down all the household-plenishing and moveables that are proper for the heir; but likewise ruin his estate, by distressing the tenants for rents, which are very great, and would make the land waste, if rigorously managed by a stranger to the family. *3tio*, All these considerations are indeed of no weight, if the defunct had fully and clearly explained his mind, that the office of executry should belong to the survivor; but seeing that was not done, but the plain project of the contract is with relation to the benefit and advantage of the executry, without any consideration of the office, the common course of law ought to take place, and the nearest of kin admitted. It is also agreeable to the instructions given to the Commissioners preferring the nearest of kin to all creditors; and a general disposition is no other than the ground of a credit; and whatever in point of favour might be alleged against a nearest of kin who were not heir, and thereby could neither have benefit by confirming, nor be exposed to any danger by suffering the relict to be preferred, yet every thing favours the heir *qua* he is nearest of kin. Neither does the clause empowering the survivor to dispose of the moveables import any thing, because that is mere style, and has no respect to any *pretium affectionis* of the *ipsa corpora* disposed, but merely respects the projected benefit and advantage of the executry, and resolves into an universal legacy; and it is no extraordinary thing, that one person should be nominated executor for administration, and another universal legatar to have the whole benefit; and though it does not happen in this case, yet the defunct having only had regard to the benefit and advantage that was to arise to the survivor, and having expressed nothing as to the office, the office falls by the course of law to the nearest of kin, who is not expressly excluded therefrom, and the free benefit falls to the Lady by the said disposition, which resolves in an universal legacy.

*Dalrymple, No 88, p. 118.*

\*\* This case is also reported by Forbes:

In the competition for the office of executor to Sir William Scot, betwixt dame Jean Nisbet his relict, and Robert his heir and nearest of kin; the Lady founded her preference on a general disposition in the year 1688, wherein, by a mutual agreement betwixt Sir William and her, the survivor, failing children of the marriage, is to enjoy and have the absolute disposal of all moveable goods and gear, and executry, belonging to the other, with the burden of debts contracted, or to be contracted.

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*Alleged* for Harden; The moveable estate being still in *bonis defuncti*, notwithstanding the general disposition which infers only *jus ad rem*, or an obligation upon the successor to perform, and doth not entitle the receiver to pursue, without confirming, the debtors and havers of the defunct's goods; there is evidently place for the nearest of kin, who, as successor in law, is liable to all the defunct's just debts, and to the haver of the general disposition, if it shall be found valid. This is agreeable to the instructions given to the Commissars who first confirm the executor testamentary; and if there be no nomination in testament, or the person named refuse to accept, confirm the nearest of kin, and next to them, creditors, &c. So that the haver of a general disposition doth only come in to confirm as a creditor, upon the nearest of kin's neglecting the office: And the heir, who here is nearest of kin, has interest to be relieved of moveable debts with which the general disposition is burdened.

*Answered* for the Lady; *1mo*, Her right to the office of executor is founded on the express will and design of the defunct, who cannot be imagined to have given his whole executry, and the absolute disposal of his moveables to his Lady; and yet to have allowed his nearest of kin to be executor and disposer of all his moveables. Must not the power of disposing upon, include a *jus retentivnis*? Were it not superfluous in law to give the office to one who must restore what he meddles with; seeing *frustra petit, quæ mox est restitutus*? The Lady cannot properly have right to the executry, without being executrix; that denomination being only competent in a proper sense to the moveable estate, in the interval betwixt the defunct's death and the complete execution of the testament, which can be no where lodged but with the executor; consequently she must carry the office, by virtue of her right to the goods. *2do*, By the act of Parliament 1690, a general disposition with confirmation is as good as any special assignation, which excludes the interest of the nearest of kin; now, in all competitions *de acquirenda possessione* upon incomplete rights, the greatest interest is ever preferable; and in this case the nearest of kin, by being preferred to the office, would only get his pains for his reward. Again, the interest of creditors is sufficiently secured by the inventory given up upon oath, and the caution to be found by the general assignee, in whose custody the moveables will continue more valuable to be made furthcoming to all concerned, than if the administration were lodged in one who in the event can have no interest in a fair way; and consequently cannot be presumed so careful and vigilant. *3tio*, The Lady's interest is confirmed by the practice of all other nations; for, as Swinburn Part 4. § 4. observes, the consistorial law regards not so much the words, as the meaning of parties; among the Romans, who were very nice about the institution of heirs, a man was understood to be institute heir, being made *dominus bonorum* L. 48. ff. de Hæred. Instit. Mantica de conjectur. ult. volunt. Lib. 4. Tit. 3. And the canon law, in this matter looks more to the substance of things and the defunct's meaning, than to the sound of

words, and the scrupulosity of forms. *4to*, This is consonant to the analogy of our own law, Jan. 31. 1667, Henderson *contra* Henderson, *voce* TESTAMENT, and *voce* PRESUMPTION; and Dirleton observes, That, July 2. 1667, *voce* VIRTUAL, a simple assignation to mails and duties in all time coming was sustained as importing an obligation to dispoſe heritably and irredeemably. *5to*, It is needless to object that a general assignation doth not denude the defunct, without confirming; for the Lady pleads not exemption from confirming, but that her right entitles her only to be confirmed. By the Commissary's instructions, the nearest of kin are indeed ordinarily preferred, unless excluded *ab officio* as well as *a beneficio*, by the defunct's naming another; but here the Lady has right to the office by the general disposition, which is equivalent to a nomination of her to be executrix; and consequently the Laird must drop his pretensions thereto. Though all heirs have interest to be relieved of their predecessors' moveable debts, it doth not follow that all heirs should be executors or preferred to the office; their relief being sufficiently secured, as the interest of other creditors, by the inventory and caution found at confirming. And by a decision Oliphant against Dobie, *voce* SERVICE and CONFIRMATION, the LORDS preferred the relict's general and universal right, though nothing so express as the Lady Harden's, which would prefer her to the defunct's creditors.

*Replied* for Harden; It is frivolous to allege that the general disposition is a virtual nomination; for as an evidence of the contrary, the Commissaries never confirm a general assignee *qua* executor nominate, but only *qua* executor creditor, and creditors are never admitted where the nearest of kin offer to confirm. Besides, Harden hath not only right as nearest of kin to the office, but he hath good interest as heir to see the effects applied for payment of the debt. And it cannot be inferred that the office of executor should fall to the person who has right to the executry; the right and the office being distinct. But it is more presumable, that the defunct did not intend that his Lady should have the office, seeing he hath not exprest so much by naming her executrix, which is ordinary in such a case; and a disposition *omnium bonorum* is but an universal legacy which only takes place after payment of debt. *2do*, *Quid inde* that a general disposition with confirmation is equivalent to a special assignation; when the nearest of kin has right to obstruct the confirmation. *3tio*, The case of Oliphant's relict is not to the purpose, for there the nearest of kin were expressly excluded; and the other cited decisions are foreign to the case in hand.

THE LORDS preferred the Laird of Harden to the office of executor; notwithstanding of the Lady's pretensions upon the general disposition.

*Forbes, p. 229.*