

No 88. third parties, none of which things he can do ; of course, he cannot transmit to another what was not in himself.

As to the instance of an executor-nominate's assigning to the nearest of kin, which is understood to be an execution of the testament, it was *answered*, That, if such an executor assign, it will entitle the assignee to sue the debtor ; and, if he obtain decret before the executor die, the assignation may be good ; but, if he die before decret, it is believed, the assignation would fall with the cedent's right, because, till the testament is executed, the executor is not fully in the title.

THE LORDS found, That Patrick Mitchel having confirmed the 2000 merks and interest in dispute, as creditor to his brother James Mitchel taylor, to whom he was nearest in kin, the property thereof belonged to Patrick, from the time of the confirmation, and was *in bonis* of Patrick, at his death ; and that James Mitchel, the son and executor of Patrick, having confirmed the same, might habilely assign the same to Blairgorts ; and found the confirmation of James, as executor-creditor *quoad non executata*, was inept and void ; and therefore found Blairgorts, the assignee, preferable. See EXECUTOR-CREDITOR.

Fol. Dic. v. I. p. 278. G. Home, No 60. p. 104.

* * * This case is reported by Lord Kames, Rem. Dec. vol. 2. No 9. p. 21.,
voce NEAREST OF KIN.

1744. December 4.

MRS ISABEL SOMMERVILL *against* CREDITORS of MR HUGH MURRAY.

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A partial confirmation by executors *qua* nearest of kin, establishes a right to the whole dead's part.

HUGH SOMMERVILL having died intestate, his estate real and personal descended to his two daughters, who, in September 1739, were confirmed executors *qua* nearest of kin, upon giving up a full inventory of all the moveable debts and effects that at that time were known to belong to their father.

In March 1741, an account due to the said Hugh Sommervill by the Marquis of Annandale was discovered, amounting to above L. 3000 Scots. Hugh Murray, husband to one of the daughters Isabella, died in December 1741 ; and the foresaid balance was eiked to the testament in June 1743. This produced a dispute betwixt Isabella and her deceased husband's creditors. She claimed this balance in conjunction with her sister, as being a subject not vested in her person till after her husband's death, and therefore not conveyed to her husband *jure mariti*. His creditors, on the other hand, claimed her half of this balance, upon the following medium, That confirmation by a next of kin, being *aditio hæreditatis in mobilibus*, is an universal title to all the personal estate, however defective the inventory may be ; and therefore, that as by the said confirmation, the full right of the dead's part was vested in Isabella before her husband's

decease, the same passed to him *jure mariti*, and consequently to his creditors by regular attachment.

This was a new point, which claimed a hearing in presence; and as the partial confirmation was found to be an universal title, it is unnecessary to embarrass the point by stating the arguments *pro* and *con*. It will give more satisfaction to state the chain of reasoning which moved the Court to give the cause for the Creditors.

For clearing the point in issue, it was necessary to trace the history of this branch of law.

In England, originally the goods of the intestate passed by a kind of descent to the children; afterwards by a Saxon law, the wife had her part; and this continued a considerable time after the conquest, till the clergy getting more and more power, came at last to swallow up entirely the moveable estates of those who died intestate*.

And so it came to be settled, that if a man died intestate, neither his wife, children, nor next of kin had any right to a share of his estate; but the Ordinary was to distribute it according to his conscience, to pious uses; and sometimes the wife and children might be amongst the number of those whom he appointed to receive it: But, however, the law trusted him with the sole disposition.

The first statute that abridged the power of the Ordinary, was 13th Edward I. cap. 19th, by which it is enacted, 'That where a man dies intestate and in debt, and goods come to the Ordinary to be disposed, he shall satisfy the debts so far as the goods extend, in such sort as the executors of such person should have done in case he had made a will.'

By statute 21st Henry VIII. cap. 5th, 'In case any person die intestate, or the executors refuse to prove the testament, the Ordinary shall grant administration to the widow or the next of kin, or to both, taking surety for true administration.' This statute gave admission to the next of kin to the office; but without benefit further than what they could make by the good will of the Ordinary. In process of time this appeared to be hard, and it came solemnly to be resolved, That the Ordinary, after administration granted by him, cannot compel the administrator to make distribution. But at last the right of the next of kin was fully established by statute 22d and 23d, Charles II. c. 10.; which enacts, That after payment of debts, funerals, and just expenses of all sorts, the surplusage shall be distributed as follows: 'One-third to the wife of the intestate, the residue among his children, and such as legally represent them, if any of them be dead. If there be no children nor legal representatives of them, one moiety shall be allotted to the wife, the residue equally to the next of kin to the intestate in equal degree, and those who represent them; but no representation shall be admitted among collaterals after brothers and sisters children. And if there be no wife, all shall be distributed among the chil-

* See Bacon's Discourse of the Laws and Government of England, p. 144.—See New Abridgement of the Law, Tit. Executor, p. 398.

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‘dren, and if no child, among the next of kin to the intestate in equal degree, and their representatives.’

The law of Scotland, with respect to the present matter, appears to have been originally the same with that of England. It is, indeed, laid down in the Reg. Majest. lib. 2. c. 37. That the wife and children are each of them entitled to a third share of the moveables, and that when a man makes a testament, he has no power of disposal but of the remaining third part, which therefore is called the dead's part; and the same appears also to have been the law of England, Fleta, lib. 2. c. 57. § 10. But however plausible the inference may be, yet it does not hold, that the Ordinary, in distributing the goods of one who died intestate, was limited in the same manner as the proprietor himself was in making his testament. In England, as above observed, though the wife and children had a legal claim against the deceased himself, which he could not disappoint, yet such was the authority and influence of the clergy, that the Ordinary was laid under no such restriction: In distributing the effects of an intestate, he was under no restraint but that of his own conscience; even creditors had no legal claim till it was given them by a statute. The case was the same in Scotland; for which we need no other authority than the statutes of King William, c. 22. subjecting the Ordinary to pay the defunct's debts to the extent of his moveables. If, before that time, the creditors had no legal claim, the wife, children, and next of kin could have none. This defect, however, with regard to the wife and children, was not severely felt, as the Ordinary seldom ventured to defraud them of their legal share. In a provincial council of the Scots clergy held *anno* 1420, recorded in Wilkin's Concilia Mag. Brit. v. 3. p. 397. it is laid down as the established practice, That the goods of those who die intestate, are divided into three shares, one to the wife, another to the children, and a third called the dead's part, which last paid to the bishop a shilling of the pound in name of quot.

But, with regard to the dead's part, the Ordinary took more liberty. Every man had it in his power to dispose of this portion of his effects; but if he made no will, it was understood to be his intention, that the Ordinary should have the management and distribution; and it was not thought a hardship that the church should ingross this power, when it appeared to proceed from the will of the defunct. But cases occurring of persons under age dying before they were capable of making a testament, which left their next of kin without remedy, this was thought a grievance; to remedy which, the act 120th, Parl. 1540, was introduced. The preamble is, ‘Whereas, persons often dying young who cannot make a testament, the executor named by the Ordinary does, notwithstanding, intromit with the whole goods, and withdraws the same from the nearest of kin, who should have the same by law;’ therefore enacted, ‘That where any person dies within age, who cannot make a testament, their next of kin shall have their goods, without prejudice to the Ordinary's claim of quot.’ But it must be observed, that the remedy here given to the next of kin, is far from

affording them a claim against the executor in all cases: The statute takes place only where the predecessor dies so young as not to be *testamenti capax*.

This commencement, however, was attended with further salutary regulations. One article of the instructions given to the commissaries 1563, is, 'that if one die intestate, or his executor nominate refuse to accept of the office, the commissaries must give the office to the nearest of kin, being willing to find caution.' This is plainly copied from the above-mentioned statute of Henry VIII. which passed a few years before. But the regulation had a more extensive effect in Scotland than in England: In England, it required a statute to complete the right of the next of kin, and to support their natural claim against the encroachments of the clergy; but in Scotland, episcopacy being abolished soon after the reformation, and the bishops, upon the reformation, having lost all civil jurisdiction, the next of kin obtaining possession by confirming the defunct's effects, held them for their own use, no person being entitled to claim the same: The bishop had lost his claim; and the commissaries never had any.

So far the right of the next of kin was established when the predecessor died intestate. But where a testament was made, which was the more frequent case, they were left without remedy, unless provision was made for them in the testament. They had no right hitherto established in them, save the privilege of being preferred before others to the office of executry. But this privilege could not take place where an executor was named; nor was any action competent at common law, to oblige the executor nominate to account to them. It was understood to be the will of the deceased, that the distribution should be left to the discretion of the executor where the contrary was not exprest; just as formerly it was understood to be his will to leave all to the discretion of the Ordinary, where he died intestate. And thus it happened that the very nomination entitled the executor to retain to himself the free moveables, even where he was not named universal legatee. This was remedied by act 14th, Parl. 1617, which gives to the next of kin the like action against the executor nominate to account for the effects, that was before competent against him at the instance of the wife and children.

Such were the steps taken by our fore-fathers to bring the succession of moveables nearer the law of nature. But the remedy was not complete: There still remained cases in which the next of kin had no claim. For instance, where a man died intestate, and his next of kin, being infants, or abroad, had no opportunity to confirm, no action lay at their instance against the procurator-fiscal, nor against any other confirmed executor-dative by the commissaries. It is true, that upon the foundation of the above-mentioned instructions 1563, the next of kin might reduce the nomination of the executor-dative, if they could excuse their absence, and show by what means they were prevented from demanding to be confirmed executors. But at any rate this remedy comes too late after the testament is executed, and the goods distributed. This defect was sup-

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Thus, as the law stands at present, the next of kin, where the predecessor dies intestate, are entitled to the office of executor, which enables them to retain the free effects after discharging all the claims upon the executry. If another person be named executor by the deceased, that person is accountable to the next of kin; if an executor-dative slip into the office by surprise or otherwise, a reduction of his nomination is competent to the next of kin, or, at their choice, a direct action against him to account. These are the privileges which are bestowed on the next of kin. At the same time, the next of kin have, to this day, no legal claim equivalent to what children have for their share. The legitim is a claim which operates against the predecessor himself, and can be made effectual against every intermeddler with his moveables by a proper action to account. The next of kin have no other privilege than to succeed to the dead's part; and, to make this succession effectual, there must be a confirmation. If the next of kin apply, they are entitled to the office; and if the office be already filled, they have an action for the dead's part against the executor. But if the person, who is next of kin at the predecessor's death, die before there is a confirmation, he can transmit nothing to his representatives; he cannot transmit his privilege of being preferred to the office, which, like the privilege of entering heir, is purely personal. If another executor be confirmed, the action which arises to him against that person, to account for the dead's part, is transmissible to his representatives, or to his assignees; but, if there be no executor, he cannot transmit to his representatives or assignees an action which did not exist in his own person.

From these premises, it is clear, that, without confirmation, there is no right established in the next of kin that can be transmitted to representatives or assignees. And this leads to the question in dispute, whether a partial confirmation, or, more properly speaking, a confirmation with a partial inventory, is not sufficient to vest the next of kin so as to transmit their right to their representatives and assignees? It is admitted, that confirmation upon a limited title, such as that of executor-creditor, cannot have an universal effect with respect

to the next of kin. But an universal title, such as that of an executor nominate, of an executor dative, or of an executor *qua* next of kin, may be justly held an *aditio hæreditatis in mobilibus*. And the reason is, that such title empowers the executor to intromit with the whole moveables, whether contained in the inventory or not; with this single provision, which is no limitation upon the title, that the executor is bound to add to the inventory what further subjects he intromits with; partly with the view to make a charge against himself, and partly to secure payment of the quot.

It was *observed*, That if a partial inventory were to have no further effect, than to establish in the next of kin existing at the time the dead's part of the subjects contained in the inventory, very heteroclite effects would follow. It has hitherto been understood, that all in the same degree are entitled to the dead's part: whereas if the next of kin at the time existing were entitled to nothing but what is contained in the inventory, the dead's part may be split among two or three sets of next of kin; which is a phænomenon that never was heard of in law.

“ FOUND the confirmation of Sommerville's two daughters, as executors *qua* next of kin to him, did so far establish their right to the whole dead's part of the executry, as to make the same transmit to their assignees, whether voluntary or legal; though some particulars of the said executry were not specially contained in the inventory of the confirmed testament.”

Fol. Dic. v. 3. p. 191. Rem. Dec. v. 2. No 59. p. 89.

* * * Kilkerran reports the same case :

HUGH SOMMERVILLE writer to the signet, dying intestate in May 1739, his two daughters, whereof one was married to Mr Hugh Murray Kynnynmound, were, in September 1739, jointly confirmed executors to him *qua* nearest in kin. In December 1741, Mr Hugh Murray died, and in June 1743, an account of about L. 3000 Scots due to the defunct, Mr Sommerville, by the Marquis of Annandale was by the said daughters added to their father's testament.

Upon this, a question arose between the executors-creditors of Mr Hugh Murray, and Isabella Sommerville his relict, whether Isabella's half of this sum, though not confirmed during Mr Murray her husband's life, became *in bonis* of him by the partial confirmation, and therefore affectable by his creditors? or if, not being confirmed in his life, it remained *in bonis* of Hugh Sommerville her father, till the same was confirmed by her after her husband's death, and therefore fell not under her husband's *jus mariti*, but belonged to her in her own right?

Upon the 4th December 1744, the LORDS, upon report, and after hearing parties, “ Found the confirmation of Mr Sommerville's daughters as executors *qua* nearest in kin, did so far establish their right to the whole dead's part of the executry, as to make the same transmit to their assignees, whether voluntary

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or legal, though some particulars of the said executry were not specially contained in the inventory of the confirmed testament ;” and upon the 24th January 1745, “ Adhered.”

Kilkerran (SERVICE AND CONFIRMATION) No 6. p. 512.

* * * This case is also reported by D. Falconer :

UPON the death of Hugh Sommerville writer to the signet, his two daughters, Mrs Geddes and Mrs Murray-Kynnymound were confirmed executors to him, and gave up an inventory, out of which was omitted a sum of L. 3331 Scots due to the defunct.

Mr Hugh Murray, husband of one of the executors, having died, the above sum was eiked to the inventory, and there arose a competition about his Lady's share thereof, between her and his executors, which was solemnly determined on a report and hearing in presence ; and the interlocutor afterwards adhered to on a Bill and Answers.

The question was, whether a partial confirmation determined the interest of all parties concerned, with regard to the whole deads-part of moveables, or only with regard to the subjects contained in the inventory : In the one case, Mrs Murray's share of the sum in question, being carried by her husband's *jus mariti*, would go to his executors ; in the other it would belong to herself.

Pleaded for the executors, Confirmation is *hereditatis aditio* in moveables ; so it is described by Stair, title Executry, § 51. He says, “ the executor confirmed *adit hereditatem*, and this for all parties having interest :” And adds, “ the interest of the nearest of kin is only extended to those who are existing nearest of kin at the time of the confirmation.”

It makes no odds whether the nearest of kin, or another is confirmed ; in both cases the *hereditas* is *adita* ; in the one, *in rem suam*, in the other, *in rem alienam*, but still it is *adita* ; and if the nearest of kin die, there needs no more, but that his executor be confirmed to him.

The genius of our law equiparates, as far as the nature of things will permit, the general service of an heir, and the general confirmation of an executor : the statute which introduces the benefit of inventory in heritage, refers to the confirmation of executors ; and in both cases the inventory is the rule of the charge ; and, as a general service gives an universal title to the subjects falling under it, though they might happen to be left out of the inventory ; so the same rule ought to obtain in executry ; the confirmation is the *aditio hereditatis* ; and if a debtor cannot be obliged to pay till his debt is put into the inventory, it is for the same reason that the debtor of a pupil is not obliged to pay till his debt is put into the tutorial inventory.

Any seeming difficulty in this subject arises from not distinguishing betwixt these two things, viz. What is necessary to establish the right of the nearest of kin, and what further is required to vest the executry in the person of the exe-

cutor, so as to become part of his property as trustee for all concerned. That these differ widely, appears from the following considerations, *first*, the inventory is necessary to make the charge against the executor, as is the tutorial inventory, to make it against the tutor; without which, in neither case is a debtor obliged to pay: The confirmation is the *aditio hæreditatis*; and in both cases, whatever act may be necessary to entitle the executor or tutor, who have each an office, to intromit; the rights of the pupil or nearest of kin stand upon quite different principles.

2do, It is the execution, and not the confirmation, vests the effects in the executor; and if he dies there must be a confirmation *ad non executâ*: yet it is not doubted that the right of the nearest of kin transmits upon the confirmation.

3tio, When the nearest of kin is himself executor, his death will vacate the office, but his right will transmit to his executor.

4to, An executor nearest of kin can pursue without a licence, which proceeds from his inherent right.

5to, When any thing is omitted by an executor dative, there must be a new confirmation *ad omissa*, because he has no universal title; but the nearest of kin will be allowed to eik, being by his first decerniture and confirmation universal *hæres in mobilibus*.

6to, There can be no passive title incurred by the nearest of kin's intromitting further than the inventory.

The nearest of kin's right is established by the decision, 12th February 1662, Bells against Wilkie, *voce* NEAREST OF KIN; and Sir George Mackenzie gives his opinion to the same purpose, that confirmation is the *aditio hæreditatis in mobilibus*.

Pleaded for Mrs Murray; The nearest of kin has no compleat title to the subjects till confirmation, which is very justly by lawyers termed the *aditio hæreditatis in mobilibus*, and this very consistently with another maxim, that the executor has an office: It was for want of attention to this, that ever it was doubted if confirmation was sufficient to vest such an interest in the nearest of kin as was transmissible; for the confirmation is a complete *aditio hæreditatis*, although, in respect of the office, if the debts be not recovered on the executor's death, there would be occasion for an executor *ad non executâ*. Agreeable to this was the decision in the case, Bells against Wilkie, That three sisters having confirmed the testament of their brother, and one dying before execution, she transmitted her right to her children, though the office accresced to the surviving sisters.

This then being the *aditio hæreditatis in mobilibus*, and only title to debts, the question is, if a partial confirmation be sufficient to vest the defunct's whole moveables in the nearest of kin? The negative of which appears from this, that it is an established usage to appoint an executor *ad omissa*, who has the only

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title to the subjects by him confirmed; and therefore the *aditio hæreditatis* in the confirmation is like a special service, as was precisely determined November 1686, Inglis against Macmoran, observed by Harcarse, *voce* NEAREST OF KIN. *2do*, This new doctrine is inconsistent with all the practice hitherto: There is no passage in any law-book, nor any decision looking like it; and that one Chiesly *against* Chieslies, 7th June 1709, *voce* NEAREST OF KIN, which finds, that the price of lands not confirmed in the lifetime of an executor, did transmit, because it was a question whether it was heritable or moveable, which was only decided after his death going on specialities shews the rule to be otherwise: As, if Mrs Murray had died before the confirmation, this sum would not have been transmitted; so not being confirmed till after her husband's death, it was never *in bonis* of him.

At the hearing, several further observations were made by the lawyers on both sides, as also by the LORDS at advising; some of which were for Mrs Murray, the great danger of abstractions, if a partial confirmation gave a title to the whole subject; that a simple decerniture was no title, but was equal to a testament; that the stile of a confirmation was giving a right to intromit with the subjects contained in the inventory: And in like manner, the stile of an eik gave the title to those contained in the eik; that it was a fallacy to argue from the *aditio hæreditatis* in the civil law; and as, when execution of the testament was thought necessary, no more was transmitted than was executed; so when confirmation is made the rule, no more can transmit than is confirmed, 14th February 1677, Buccleugh against Tweedale, *voce* NEAREST OF KIN.

For the Executors; That the inconveniencies were as great on the other side; what a field of processes would be opened, if in all cases where the nearest of kin had obtained payment without confirmation, their executors might be obliged to repeat to other nearest of kin, and if the debtors could be obliged to pay again; that the title was the decerniture, as in a tutory-dative, the title was the gift, though in both cases an inventory was necessary; and Hope, title TESTAMENTS, expressly said an eik was competent without any new confirmation; that our law had undergone great changes in this affair; that formerly the moveables of defuncts intestate were wholly at the disposal of the Bishop. This was remedied first with regard to the effects of minors, act 120, Parliament, 1540, and by degrees by statutes, instructions to the commissaries, and acts of sederunt, till by the statute 1690, our law came to be settled as it now stands, that no confirmation is necessary, but the *jus sanguinis* vests the full right and transmits the subject; hence it was found that the commissaries, who had sealed up a defunct's writs, were obliged to give them up to the nearest of kin without confirmation, 17th December 1729, Shearers against Wilson, *voce* NEAREST OF KIN.

For Mrs Murray; That no alteration was made by the act 1690, chap. 26; and by act 1695, chap. 41, a confirmation was necessary to make

a title to debts. This being fixt it remained to know what confirmation was, and that Hope mentioned the making up and swearing the inventory as a requisite of confirmation; that in the act of sederunt 1679, anent executors creditors, the term, "confirmed," was applied to debts, and there was no such thing as a general confirmation.

Observed on the Bench; That the right of the nearest of kin had always obtained, as appeared from the *Regiam Majestatem*; and the laws cited to infer the contrary, related only to the office, which the Bishops disposed of; that our Lawyers, speaking of confirmations, never stated the case of a partial one, but enquired betwixt confirmation, and the execution of the testament, which gave the right to transmit; and therefore talked of confirmation transmitting indiscriminately, because they were talking of a total confirmation.

On the the other hand, that the question was only concerning the dead's part; that the relict's and bairn's part vested without confirmation; that their several rights were not a share of the particular subjects, but of an *universitas*, viz. the defunct's free gear; that, consequently, this question did not impinge on the necessity of confirmation before any could regularly intromit; nor take away the vitious passive title, as neither relict nor children, who undoubtedly transmitted, could intromit at their own hand; that, supposing a partial confirmation, and, after the death of the nearest kin, an eik, and debts to pay, off whom ought they to come? That the whole must also be laid together, to determine the relict and children's shares; and, if the transmission was not universal, the thing would be inexplicable.

THE LORDS, 4th December 1744, found, That the confirmation of Mr. Somerville's two daughters as executors *qua* nearest of kin to him, did so far establish their right to the whole dead's part of the executry, as to make the same transmit to their assignees, whether voluntary or legal, though some particulars of the said executry were not specially contained in the inventory of the confirmed testament.—And this day (23d January, 1745) they adhered. See NEAREST OF KIN.

Act. Lockhart & Home. Alt. W. Grant, Ferguson, & Geddes Clerk, Kilpatrick.

D. Falconer, v. 1. p. 52.

* * * See 23d January 1745, Carmichaels against the nearest of kin of Carmichael, *voce* NEAREST OF KIN.

1753. August 10.

AGNES and JEAN BRODIES *against* JAMES STEPHEN Commissary-depute of Moray.

AGNES and Jean Brodies obtained themselves decerned joint executors dative *qua* nearest of kin to their deceased sister Margaret Brodie, and gave up in the inventory nothing but a small part of the household-furniture which had be-

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The nearest of kin may confirm either a part or the whole of the