1672. *February* 24. SEMPLE *against* GIVAN.

No 6.
A relict having, at her own hand, impignorated the defunct's moveables, and, among the rest, his heirship moveables, the heir was found to have a good action against the possessor.

JOHN SEMPLE, merchant in Edinburgh, having died without testament, and his children being infants, Agnes Martin, his relict, their stepmother, continued in possession; who having married a second husband, they impignorated a part of the goods to David Givan, and others, for security of sums borrowed from them; Agnes, only child to the said umquhile John, pursues the said David Givan, and others, havers of the goods, for delivery of the heirship moveable; and produced a declarator by Agnes Martin, expressing the particular goods. The defender *alleged*, Absolvitor; because, the goods in question being moveable, possession presumes a title, *et possessor non tenetur docere de titulo*; and they having impignorated the goods for sums of money delivered by them to Agnes Martin and her husband, who had continued long in possession of the goods, it is sufficient for them, without enquiring to whom they belonged before; which is necessarily introduced for commerce; because, moveables passing from hand to hand, without writ, if any party who once had right to them, should thereupon pursue the posterior acquirers, and should overtake them, unless they could instruct a progress, which is scarce possible, no party could be secure, and all commerce behoved to cease; and though *in rebus furtivis*, the Roman law hath introduced *labem realem*, which makes the goods recoverable from any singular successor, that can be extended to no other case, nor is it here pretended; 2*do*, Agnes Martin had the communion of goods, and a half, or third was her's, and the property of heirship moveable cannot be in the heir, till they be chosen and drawn; for the best of every kind is according to the fancy and choice of the party; until which choice be made, the heir can have no constituted property, and so cannot pursue restitution, which is *rei vindicatio*. It was *answered*, That, albeit in moveables, lawful possession infer a presumptive title, and that one having had a prior right cannot put the present possessors to instruct their progress, yet that rule hath this exception, except the prior proprietor *doceat quomodo desiit possidere*, or that it was in such way, as that the goods could not pass by sale or commerce, as if the goods were stolen, or if they had strayed; and there is no way more competent than by the death of the proprietor; for, if it be instructed that the proprietor had the goods in his possession at his death, it doth fully take off the presumption, that they passed from him by sale or commerce to these defenders; and if this were not sustained, any insolvent person possessing the goods of defuncts, and selling the same, their children, or nearest of kin, should be for ever excluded; nor hath it any importance that an heirship was not drawn, because the pursuer being the only child, hath right to the whole moveables, except the wife's part; and though the relict's declaration should not prove, the pursuer offers to prove the goods in question were in her father's possession the time of his death, as his own goods.

No 6. THE LORDS repelled the defence, in respect of the reply and condescendence foresaid, unless the goods impignorated, and others intromitted with by the wife, did not exceed her share.

Fol. Dic. v. 1. *p.* 592. *Stair, v.* 2. *p.* 78.

1675. *June* 18. TAYLOR *against* RANKEN.

No 7.
Property of money was inferred by having the key of the chest in which the money was.

JOHN TAYLOR, in the contract betwixt James Taylor and Marshall, his spouse, dispones to them his whole moveable goods; and, after his son's death, by a contract with his good-daughter, he, as taking burden for his oyes, dispones the whole moveables to her for 1000 merks. After his death, his three daughters, as executors to him, obtained decreet against the said Katharine Marshall and Ranken, now her second husband, in the Regality Court of Falkirk. They suspend on this reason, that the defunct was an indigent person, and lived and died with the defenders; and, by his general disposition, could not be presumed to have any means; and yet the decreet in absence was for L. 640 of money, and some body-clothes that were in two chests in the defenders house; which chests were a part of the moveables disponed by the defunct, and to which the defender had frequently access, by opening the chests, and putting any thing therein he pleased. It was *answered*, That this reason is not relevant; because, the defunct having lived long after both his dispositions, did and might acquire this money; 2*do*, The charger hath proved, or shall prove, that the defunct had the keys of the chests in his possession the time of his sickness, and delivered the same to one of his good-sons, which sufficiently instructs that the money and clothes were in his possession, and so belonged to him and his executors, albeit the chests were the defenders; for the having of the key doth evidently infer the possession of what is under that key.

Which the LORDS found relevant, unless the defenders, by a positive and stronger probation, could prove, that the money and clothes were theirs, and how the same were put in the chests.

Stair, v. 2. *p.* 333.

1675. *December* 17. THOMSON *against* ELIES.

No 8. THE LORDS found, in the case of a right of moveables, granted by a husband to his wife, with the burden of his debts, and a provision that they should be affected with the same, that the property of the goods was settled in the person