

1707. July 8.

MARGARET DOBIE, relict of William Oliphant, Merchant in Edinburgh, *against* MARGARET OLIPHANT, his only Daughter, and CHARLES ROBERTSON, her Husband, for his interest.

No. 35.

Since the act 26. Parl. 1690; by which the necessity of confirmation is superseded, a general disposition of moveables is a good title to maintain possession, though not to pursue.

WILLIAM OLIPHANT having disposed to Margaret Dobie, his second wife, in implement of her contract of marriage, his goods and gear, merchant ware in his house, shop, and cellars, household-plenishing, gold, silver, compt-books, tickets, &c. providing that she, out of the superplus, after satisfaction of her contract of marriage and his own just debts, should pay to Margaret, his daughter of a former marriage, what she wanted of her provision of 8000 merks at his decease; and having by a second disposition, narrating the former, and a faculty therein to alter, disposed to the said Margaret Dobie the liferent of all free goods and gear, debts and sums of money, heritable or moveable, which should belong to him at his decease, with the burden of entertaining William Robertson his grand-child, and the one half of the fee to her, and the other to the said William Robertson, to whom she and other two were named tutors;—upon William Oliphant's decease, Margaret his daughter and her husband got the defunct's shop and cabinets to be locked and sealed up by an order from the commissaries of Edinburgh.

Margaret Dobie applied to the Lords for an order to remove the seals, and to get up the keys of the house, shop, ware-houses, and cellars.

Answered for Margaret Oliphant. That the relict could not be allowed to possess till once an inventory were made of all that pertained to the defunct at his decease, heritable and moveable, and she find caution for the interest of all concerned; because, inventoring is a necessary *interim* remedy against smuggling trade, and Margaret Oliphant is a creditor for her provision of 8000 merks, &c; and as nearest of kin has right to the office of executry; and to a legitim.

Replied for Margaret Dobie: For a creditor to require an assignee to heritables and moveables by a deed *inter vivos* to inventory the same and find caution, is a novelty in law; and the inventories to be made and recorded in a competent judicature for the pupil will secure his interest.

The Lords ordained the seals and padlocks to be taken off, and the goods in the house, shop, ware-houses, and cellars, to be inventoried and valued, but found no necessity to inventory the writs concerning the heritage, or to inventory the count-book, and in respect of the disposition produced, found Margaret Dobie not obliged to find caution, and continued her possession by virtue thereof.

Fol. Dic. v. 2. p. 369. Forbes, p. 177.

* * * Fountainhall reports this case:

WILLIAM OLIPHANT, merchant in Edinburgh, grants a general disposition to the whole ware in his shop, and his count-book debts, to Margaret Dobie, his wife,

in liferent, with the burden of his debts, and fulfilling his first contract of marriage to Margaret Oliphant, his only child of that marriage; and the fee of the rest to be divided equally betwixt his said relict and William Robertson, his grandchild by his said daughter, secluding herself and her husband from any share or benefit therein, because she had married without his consent, and her husband was bankrupt, and retired to the Abbay; only he did not omit their son, but gave him the half of the whole free gear, after paying of the 8000 merks, provided by the first contract of marriage, to the bairns to be procreate therein. William dying in the middle of June last, his daughter Margaret applies to the commissaries of Edinburgh, and offering, as nearest of kin, to confirm, they appoint the cellars, shop, and cabinets, to be all sealed up, till the said Margaret should expedite her confirmation, and then they would inventory and value the merchant goods, for security of all parties having interest. Of this interlocutor of the Commissaries, Dobie, the relict, raises advocacy, and gave in a bill to the Lords, complaining, that she was dispossessed, contrary to the express will of the defunct, and the shop shut up, where they used to draw £20 or £30 a-day, which was the evident loss and prejudice of all parties; and that it was impossible to value every pin and needle, it being a dry ware shop; and therefore craved, that, conform to the tenor of the disposition, she might be continued in possession of the shop, and the embargo taken of, seeing there was no necessity for a confirmation here, the goods being all conveyed and disposed *inter vivos*, which, by the 26th act 1690, is equivalent to a nomination and confirmation, the power of compelling parties to confirm being thereby abolished and taken away. Answered for Margaret Oliphant the daughter, The disposition founded on was procured *delinementis novercalibus* to her exheredation, and the Commissaries had done no injustice; for they had reserved determining who was to be executor, and what was to be confirmed and what not, and how far the general disposition would carry the property of the goods; and had only appointed a sequestration, which was a necessary remedy during the interim against all smuggling, embezzling, and concealing of these goods, which, without inventory, can be easily abstracted; and though by the late act they cannot force people to give up inventory, (as they did formerly), yet, in a competition, who shall be preferred to the office of executry, as here, they can very well secure the goods till the question be decided; and they have a clear rule, for, *1mo*, Where there is a testament, and an executor named, he must be preferred; *2do*, Where that fails, then the nearest of kin may claim it; *3tio*, If they lie by, then the creditors and legatars succeed in the right and title to seek the office, all which exclude the fiscal. Now here Margaret Oliphant, his only child, craves preference, *1st*, as nearest of blood, and *jure legitime*, of which he could not by any voluntary gratuitous deed prejudice her, *2do*, as creditor on her mother's contract of marriage; though it was alledged the 8000 merks were paid; but her claim to the conquest yet remains; and *3to*, there were a general disposition to the wife, yet that gives no absolute right, seeing the Lords every day ordain such to confirm before extract; and her father's means ought not to be carried away by an elicited and

No. 35.

extorted disposition, a few weeks before his death, to her ruin. Replied, the commissaries have plainly committed iniquity in shutting up the shop, and having no regard to the relict's disposition, which is as special as any one of that nature can be; even like a flock of sheep and goats disposed, it will be reputed special, though it neither tell the number nor the kind, what are lambs and what are wethers.

The Lords thought it was the general benefit of all parties concerned, that the trade should be continued; therefore they ordained the seals and padlocks to be taken off, and allowed the relict, by virtue of her disposition, to continue the possession and disposal of these perishing goods; and appointed the Commissaries to cause value and inventory the same, that either they, or their price, might be made forthcoming to any that shall in the event be found to have best right. Some were against giving any such directions or instructions; but the Lords thought it just and necessary in some cases. It was proposed that the widow, before her intromission, should find caution for the claims her good-daughter had on her father's estate; but this was left to the Commissaries to regulate, according as they saw cause to prefer, in the competition arising before them for the office of executry to the defunct betwixt his relict and daughter.

Fountainhall, v. 2. p. 376.

1711, November 22.

ELIZABETH DICKSON, Spouse to Patrick Heriot, Merchant in Fisherrow, *against* Mrs ISOBEL LOGAN, relict of Mr John Dickson.

No. 36.

A general assignation *omnium bonorum*, found a sufficient right to retain moveables in the assignee's custody, without necessity of confirmation, in a competition with an executor decerned, who had a licence to pursue, but had not confirmed.

IN the process at the instance of Elizabeth Dickson, as executrix decerned to Mr. John Dickson her brother, and having a licence to pursue, against Isobel Logan his relict, for exhibiting some of her husband's moveable effects in her custody, that the pursuer might make up inventory and confirm,

Alleged for the defender: She cannot be obliged to exhibit and deliver the goods, because she hath a general assignation from the defunct to all moveable goods and gear that should belong to him the time of his decease, which, though not good, without confirmation, to recover the subject from a third party by way of action, is good for retaining what the assignee hath in her proper custody; as in an action upon the passive titles, it is a relevant defence, if the goods be in the hands of a third party, that the escheat is gifted and declared; but it sufficeth for the defender, if they be in his own custody, to say, that the escheat is gifted, though not declared; in which case possession of the goods supplies the want of a declarator, as it doth here the necessity of a confirmation. Nor can the pursuer obtrude to the defender the want of confirmation, seeing the former cannot have decreet against the latter until she herself confirm the same goods as executrix for the interest of all parties; and both cannot confirm the same subject. Now though the pursuer had confirmed and were in possession, the defender would oblige her to