restore them; and *frustra petitur quod mox est restituendum*, which is a good defence in all cases except a spuilzie. No. 36.

Replied for the pursuer: The Act 26. Sess. 2. Parl. W. & M. declaring special assignations not intimated or made public in the cedent's lifetime to be good and valid rights to possess, pursue, or defend, without confirmation, implies that a general assignation can be no title to defend or pursue; *casus omissus* being held *pro omisso*. And if a general assignation were a sufficient right to retain, the defunct's means and estate might be huddled up to the prejudice of creditors.

The Lords found, that the defender, by virtue of the general assignation, had right to retain the moveables that were in her own custody without necessity of a confirmation; the pursuer being only executrix decerned with a license to pursue, and not having confirmed the goods.

Fol. Dic. v. 2. p. 369. Forbes, p. 546.

1744. *February. 3.* THE CHILDREN of BAIRD *against* GRAY (or GREIG).

No. 37.
The father's possession found to be the child's possession, to the effect of excluding the necessity of confirmation.

WHEN a wife predeceased her husband, leaving one child of the marriage, who died within pupillarity, without having had a title made up in his person by confirmation to his mother's third, in an action against the husband, at the instance of the nearest in kin of the wife, the Lords, without any hesitation, "Found the father's possession to have been the child's possession, and preferred the father to the wife's nearest in kin."

It was by all agreed, that had this child lived, he would without confirmation have had action against his father to account, and who upon accounting would have been effectually discharged, though his son had thereafter died without confirming his mother's third; which could only be on this ground, that the father's possession was the child's, which supersedes the necessity of confirmation.

Fol. Dic. v. 4. p. 270. Kilkerran, No. 4. p. 511.

*** This case is also reported by C. Home:

THE said Adam Greig married one Margaret Baird, with whom he entered into no written articles, or marriage-contract. The wife died, leaving an infant-son of the marriage, who likewise dying a few months after the mother, her brothers and sisters, as nearest of kin to the deceased wife, brought a process against the defender for the third part of the free goods in communion belonging to him, in respect the child had died without being confirmed to his mother's third.

For the defender it was pleaded, That as he was a merchant, whose whole stock consisted in moveable or shop-goods, he had continued to dispose or sell them as customers offered, after his wife's death, in the same manner as he had done before; that his infant son had attained possession in the sole and only manner he was capable by the act of the defender who was his administrator in law, and who was entitled and obliged to act for his own child an infant, that could not act for

No. 37. himself. And herein lies a material difference betwixt the present case and that of Mary M'Whirter, (No. 38. *infra*), as the son in that case was past the years of pupillarity at the death of his mother, and so capable of acting for himself, as every minor must do; whereas tutors or administrators for a pupil or infant, must act for him; and such act is, in the eye of law, the deed of the pupil himself, especially when *de ejus commodo agitur;* and his *commodum* it must be taken to be, that he should be vested in the right of the moveables that fell to him by the death of his mother, in the method that would be most effectual and least expensive; that is, by possession of the goods themselves, without the unnecessary charge of confirmation. In the case quoted, as the son was of age to act for himself, consequently some evidence was requisite to show that he had attained possession; because, the single act of the father was not his act; but, in the present case, the infant could not act for himself, therefore his father's acting must be deemed his; and if the goods were vested in the son by possession, the defender, as heir to his own child, has the only right thereto.

For the pursuers, it was answered, That the only question here was, Whether the infant acquired possession, yea, or not; and with respect to this, it was observed, that as the father was debtor in this third to the child, and still continued the natural possession, without so much as making any division of it, by giving the third to any body to be kept for the infant's behoof, or making any inventory thereof, the pursuers were at a loss to figure how the father's possession could be deemed the child's, when he the debtor did no act or deed by which his part could be distinguished from the son's. Nor can it make any difference, whether the child is a pupil or minor, seeing in both cases there must be some act or deed of the father's, showing there was an actual division, and possession following thereon, in order to vest the goods in his person; and if the father neglect to do this, or confirm his son, *sibi imputet* if the third goes away by law to the nearest of kin of the deceased wife: In a word, the proposition the defender maintains, is, that there must be a real division and possession given to the child *aliquo modo*, otherwise the necessity of confirmation is not taken off: And if no evidence were required of the child's getting possession, this absurdity would follow, that wherever a child died in pupillarity, there the nearest of kin would be always cut out of their claim, on pretence of the father's being administrator in law. It is true, that the act of the tutor is, in the construction of law, the act of the pupil, especially when *de ejus commodo agitur;* but that maxim does not apply to the case in hand, where the father did nothing to distinguish betwixt his and the child's third. If, indeed, moveables were to fall to an infant *jure successionis*, there, if the father got possession, the same might be deemed the child's, because the father, as administrator, had obtained possession *nomine infantis*. But, where the father is debtor himself, the case is quite different; and the law will never suppose division or possession given, when in fact it is acknowleged there was none; and, as the child is now dead, it is quite out of sight to plead that his *commodum* is concerned, to suppose the goods were vested in his person, to avoid the expenses of confirmation, when the present question is by no means with him.

The Lord's found the father's possession to be the child's possession, and preferred the father to the wife's nearest of kin. No. 37.

C. Home, No. 259. p. 416.

1744. *November* 14.

MARY M'WHIRTER *against* ROBERT MILLER.

No. 38.
The right of a defunct's moveables vests in the person who might have confirmed them, by his obtaining possession.

ROBERT MILLER, tenant in Kilbride, married Elizabeth M'Whirter, and the marriage having dissolved by her decease, leaving issue one son of the age of 19, who lived in the family with his father till he died, aged 25, Mary M'Whirter, sister of Elizabeth, pursued Robert Miller for her sister's third of moveables, the same having never been confirmed by the son, and consequently now belonging to her as nearest of kin. The Lords, July 1743, "Found, that the children of a marriage, attaining possession of their mother's third of moveables in communion, need not confirm these moveables, in order to bar those, who, on the death of these children, should become nearest of kin to the said defunct wife, from claiming the said moveables; and found sufficient evidence to presume in this case, that the defender's son did attain possession of his mother's share of moveables."

A reclaiming petition was given in against both points of this interlocutor, on which the Lords, 2d November, 1743, "Adhered to the first part thereof, and ordered the bill to be seen and answered as to the rest." The petition proceeded by considering the law as it stood before the act 1690, and then what alterations were made by that act. It argued, That by the genius of the law, a title made up was necessary in all cases to transmit subjects from the dead to the living; a service in heritables, and confirmation in moveables: No distinction had ever been known in practice, or noticed by any author, betwixt the *ipsa corpora* of moveables in the defunct's possession, and the rest of the executry; and had there been any such distinction, it could not have been overlooked by all those who have wrote on the subject. A doubt had been suggested by the defender, Whether a service was necessary to vest the heirship moveables in the person of the heir; but there was no foundation for that doubt; as it was admitted in general that the rule was otherwise, it was incumbent on him to prove his exception. But the contrary appeared from our authors: there were certain privileges competent to apparent heirs, which Stair enumerating, B. 3. T. 5. from § 1. to § 4. inclusive, did not mention this; and, in the subsequent paragraphs, describing the rights of the heir entered, § 5. he took notice of heirship moveables. And B. 3. T. 4. § 23. he said, That heirs who do not orderly enter, became successors *passive*, but not *active*; and Craig was cited to the same purpose, L. 2. D. 17. § 3. And if an heir was not so active, how could it be imagined, that by a vitious intromission he could appropriate to himself any part of his predecessor's estate. Agreeable to this, was a decision of the Lords, 27th June, 1629, Robertson *against* Dalmahoy, No. 30. p. 5402. The widow of a defunct who had intromitted with