

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 license 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

restore them ; and *frustra petitur quod mox est restituendum*, which is a good defence in all cases except a spuilzie.

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).

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