

Pleaded for the executor, the confirmed testament is a complete assignation in her favours, and as an assignee is procurator *in rem suam*, and can prosecute the cause either in his own or the cedent's name, it follows he can take it up in the same shape it was left by the cedent; nor will his death vary the case, since procuratories *in rem suam* may be executed after the death of the granter.

2dly, By the practice of the Commissary Court, diligences as well as debts are given up in inventory, and the present subject was given up as contained in the decret and precept thereon; and though the horning be not mentioned, yet as the precept was its warrant, it is apprehended to have been sufficiently conveyed.

3dly, Whatever defects the conveyance of the horning was subject to, were sufficiently supplied by the judicial power of the messenger, who, on seeing the translation of the right, might, as Sheriff in that part, proceed: For as by the civil law, upon a case being decided, the Magistrate was applied to, that he might name judges to put the sentence in execution, which procedure was called the *actio rei judicatae*, *Mathews de judiciis, disp. 12. § 11. & 12.*: So in our law messengers are by the King's letters constituted judges for the execution of sentences.

THE LORDS ordained the Writers to the Signet to report the practice in cases of hornings, poidings, and arrestments, whether ever used in the name of assignees or executors; on which they reported, that it was the constant practice in all these cases to raise new diligence; whereupon, having heard the report made by the Keeper and whole body of the Writers to the Signet, with respect to the practice, they sustained the objection to the arrestment. (See EXECUTION, Warrant of.)

Reporter, *Lord Drummore.* For the Arresters, *Mainland.* For the Assignee, *Craigie.*
Clerk, *Gibson.*

Fol. Dic. v. 3. p. 46. D. Falconer, v. 1. p. 96.

See February 5. 1745, Elizabeth Ramsay against the Creditors of Clapperton.

D. Falconer, v. 1. p. 62. voce PASSIVE TITLE.

Whether Assignation not intimated denudes.

1614. February 11. CLERK against NAPIER.

IN an action of special declarator, pursued by John Clerk, donatar to the estate of John Cuthbert, against William Napier of Wrights houses; the LORDS found, That a declarator made by John Cuthbert, before the rebellion, That the hail

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No 22.

A donatar of echeat, found entitled to a subject, although previously assigned; but

No 22.
the assigna-
tion not in-
timated.

fums pertained to William Napier; which also contained an assignation to the fums; could not prejudice the King's donatar, because it was not intimate.

Kerse, MS. fol. 54.

No 23.

The contrary
found, where
a third party
concerned.

1615. *January 19.* STEWART *against* MAXWELL.

IN an assignation betwixt Sir James Stewart and Alexander Maxwell, the LORDS sustained an assignation made by James Stewart of _____, to Mr John Wardlaw, for relief of his cautionry, albeit the same was not intimate before the rebellion; and that because Mr John was obliged as cautioner, by an act of Council before the rebellion, and also had taken his assignation before the rebellion.

Kerse, MS. fol. 54.

No 24.

An assigna-
tion not inti-
mated during
the cedent's
life, is not
sufficient war-
rant to raise
diligence
without
transferring.

1624. *January 23.* STEVENSON *against* L. CRAIGMILLER.

STEVENSON having comprised the lands of Peppermill, pertaining to Patrick Edgar, for a debt owing to him by the said Patrick: He charges the L. of Craigmiller, superior, and of whom the lands are holden, to infest him therein, who suspends upon this reason, viz. That the said Patrick being addebted to Clement Edgar a certain sum, conform to his registate bond, the said Clement had made the L. Craigmiller assignee to that bond and decret; who, upon the same, as assignee, had comprised the said lands that same day of this charger's comprising, and which was also allowed by the Lords that same day; and so the property was consolidate with the superiority; and he being equal in diligence, ought to be preferred, and ought not to be compelled to receive this charger.—This reason was not found relevant; for the LORDS found this comprising null, seeing it was deduced by the L. Craigmiller, as assignee, by Clement Edgar, which Clement was deceased before the denunciation of the comprising; and the said assignation not being intimated in the defunct's time, before he died, the LORDS found, That no execution could summarily be used, at the assignee's instance after his decease, by virtue of an assignation, not intimated in the cedent's lifetime, except that the decret, whereto he was constituted assignee, had been first transferred, which ought to have preceded the comprising, even as the assignee could not, after the cedent's decease, charge by letters of horning the debtor, where the decret assigned was not transferred, nor the assignation intimated to the debtor in the cedent's lifetime; and this nullity was received and admitted, by way of objection in the suspension, to take away the comprising standing, albeit that a part consisted *in facto*, viz. That Clement Edgar the cedent was deceased before the comprising; but the LORDS ordained the same to be instantly proven, and would not assign a term thereto.

Clerk, *Scot.*

Fol. Dic. v. 1. p. 62. Durie, p. 100.