

No 245. nation was only *procuratio in rem constituentis*, which THE LORDS found just and expedient ; because the assignation being that they made the pursuer assignee to charge, to obtain them rentals, and my (Lord of Chester added judiciously,) that the assignation made by the husband and her, and to obtain them rentalled, was a legal authorising of the pursuit to her behoof. In respect whereof, THE LORDS found the letters orderly proceeded.

Haddington, MS. No 2718.

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1667. November 16. GARDINER against COLVIL.

No 246.

IN an action Gardiner against Colvil, the pursuer being ejected during her husband's absence out of the country, and when it was supposed he was dead,

THE LORDS sustained the pursuit, though the time of the advising the probation, it was offered to be proved that he was living; and did declare, that albeit the husband were at the bar, they would give the wife the benefit of *juramentum in litem*, in respect of the wrong done by the defender, and the particulars and quantities could not otherwise be proved.

Act. Longformacus.

Alt. Wallace.

Reporter, Castlebill.

Fol. Dic. v. 1. p. 405. Dirleton, No 105. p. 44.

\*.\* Stair reports the same case.

CHALMERS and her children pursue Hugh Colvil and others, for ejecting them out of their house and lands of Ladykirk, and spuizie of their goods therein. The libel being admitted to probation, not only a witness deponed, that he saw the defender open the pursuer's doors, they being absent in Edinburgh, and the keys with them, and cast out their goods and enter in possession, who was admitted, *cum nota*, as being interested as tenant, and concurring with these pursuers, in a pursuit with the same defenders before the council, upon the same ground ; the rest of the witnesses proved, that the pursuers were in possession at or about the time libelled, and that they went to Edinburgh, and locked their doors and took away the keys ; and some of them deponed, that the night before the defender's entry, they saw the doors locked, and that the next day after they saw Hugh Colvil and several others in the house, and several goods that were in the house cast out of the door, and that Hugh continued in possession, and took in the goods again.

Which the LORDS found sufficient to prove the ejection and spuizie, seeing the defender did not instruct that he entered by authority of law.

The defender alleged at advising the cause, that the pursuer had a husband, who within this month was seen at Air, and offered to prove by his oath, that

he had ceded the possession being warned, and gave warrant to the defender to enter, and therefore, he being *dominus bonorum*, his wife and bairns had no interest to pursue, and though they had, his oath was sufficient to instruct the lawfulness of the defender's possession, and that the wife's oath *in litem* could not be taken, to esteem her husband's goods. It was answered, that it was notourly known, that the husband had been two years out of the country, and having gone sea, was commonly reputed dead, and therefore the wife being in natural possession, might lawfully pursue this action; neither was it relevant that the husband promised to quit the possession, which being but an obligation, could not warrant the defender, *brevi manu*, to cast them out, unless he had been present, or consented to the entry, or had given a renunciation of his possession, with a warrant to enter *brevi manu*.

No 246.

THE LORDS, in respect both parties acknowledged, that the husband had been a great while absent, found the action competent to the wife; and found that the husband's ceding the possession, as was alleged, was not relevant, and ordained the wife's oath, as to the quantity and value of the goods spulzied, to be taken, and granted diligenece to the defender to cite the husband, if they could find him, to the same diet to give his oath, reserving to the Lords what the wife's oath could work, as to the estimation of the goods, without the husband's oath.

Stair, v. 1. p. 485.

1673. July 8.

HACKET against GORDON.

CHRISTIAN HACKET as one of the heirs portioners of her father, pursues reduction of a disposition of lands made by her father to Gordon of Chapletoun as being on death-bed. The defender *alleged* no process, because the pursuer being a wife, was not authorised by her husband's concurrence, without whom she can pursue no action, unless she were particularly authorised by the Lords, as in actions against the husband. It was answered, That the summons was raised at the instance of the husband for his interest, and if the defender produce any warrant to disclaim, which they must instantly verify, and which he pretends to be a ratification by the husband, in that case the Lords ought in justice to authorise the wife to insist, this being an heritable right, wherein the husband could have no more interest but by his *jus mariti*, and the courtesy, and the wife declares, that the reduction shall proceed with reservation of any right flowing from the husband.

THE LORDS found that the husband behaved to be *in processu*, but if he refused concurrence, the Lords would authorise the wife to insist to reduce the right, in so far as the husband had no interest further than his *jus mariti*, and the courtesy.

No 247.  
An action was not sustained at the instance of a wife, though the summons was raised in her name and her husband for his interest, she not being authorised by her husband's consent, but the Lords declared they would authorise her to insist by herself, if her husband referred to concur.

Fol. Dic. v. 1. p. 405. Stair, v. 2. p. 206.