

of the wife, so that she might dispose of the same. And those who acquired right thereto are not concerned to enquire whether the price be converted to the use and satisfaction of the creditors, who will have a personal action against the wife. So that she will in effect be in the case of an executor or trustee. But if the goods so affected be extant, the creditors of the husband will be preferable to the wife's proper creditors, her right being fiduciary, (as said is) and to the use foresaid. See No 141. p. 5939.

No 8.

Fol. Dic. v. 1. p. 593. Dirleton, No 320. p. 155.

1679. January 28.

HOG against HAMILTON.

MR WILLIAM HOG having right to some moveable goods from the nearest of kin to Andrew Wardlaw, and likewise having assignation from the donatar of his escheat, pursues Mr Robert Hamilton for delivery of the goods; who *alleged*, Absolvitor; because, the possession of these goods presumes the property thereof, and there can be no ground to vindicate them upon Wardlaw's interest, who is dead 20 years ago, and the goods have always been possessed by Marion Geddes, his relict, and were *invecta* by her in the defender's lodging, and so liable to the mails and duties thereof. It was *replied* for the pursuer, That the property of moveables, arising from possession, is but a presumptive title, and admits of contrary probation; but, in this case, the presumption ceaseth; because, it is offered to be proved, that these moveables were in the possession of Wardlaw when he was denounced, and also when he died; so that they could not pass by commerce, unless they were instructed that they were confirmed; and the relict's possession, though for 20 years, could not infer property, because, the goods being confiscated by the husband's rebellion, the relict's right ceased.

No 9.
Found in conformity with
Sample 3
against Givan,
No 6. p.
9117.

THE LORDS did not sustain the reply upon the rebel's possession at the time of the rebellion, which, though it exclude his relict's interest, doth not hinder the disposal of the moveables by commerce to creditors; but sustained the reply on the possession of the defunct, unless confirmation were instructed.

Fol. Dic. v. 1. p. 592. Stair, v. 2. p. 683.

* * * Fountainhall reports this case.

A DONATAR to the escheat of a rebel pursues some intromitters with moveables belonging to the rebel. *Alleged*, I cannot deliver these moveables to you, because I have now possessed them by the space of these 20 years; and possession *in mobilibus* presumes property, and needs no other title. *Replied*, Posses-

No 9. sion is only *titulus putativus et coloratus*, and makes a presumption in behalf of the possessor, unless a better title be shown, and then presumption *ceci: veritati*. But here it is positively offered to be proved, that these goods belonged to the defunct rebel, and his relict only continued in the possession, *jure familiaritatis*, and so it cannot prejudge the *fisk*, *cui erat jus quasitum per denunciationem*. This being reported, "The LORDS found the donatar had right to the goods, he proving they were in the rebel's possession the time of his death, and this notwithstanding of the long posterior possession and taciturnity."

Fountainhall, v. 1. p. 38.

1679. June 5.

Captain HOME against MRS ATCHISON.

No 10.
An executor was allowed to prove that a gold chain had been in the possession of the deceased, from which property was to be presumed.

CAPTAIN HOME of Foord pursues Mrs Atchison his cousin, as he who is confirmed executor to his mother, that she may re-deliver to him a gold chain, or necklace, which was his mother's. *Alleged*, She could not restore it; because it was gifted to her by Rachel Home, the pursuer's sister, when the said Rachel was dying. *Replied*, That donation *non relevat*; because he offered to prove it was in his mother's custody and possession at the time of her decease, and so must belong to him as her executor, his sister Rachel having no right thereto. *Duplied*, Possession *in mobilibus* supposes a title, and both the defender, and her author Rachel Home, who gifted it to her *mortis causa*, possessed it 11 years without ever being quarrelled: *Ergo*, "The LORDS found it relevant for the pursuer to prove, that the said gold chain was in his mother's possession at the time of her decease, to give him right thereto, as her executor; as also, sustained this duply as relevant to the defender to prove, for eliding the pursuer's right, that Rachel Home, her author, wore it in her mother's lifetime about her neck, or that she was then in possession of it. And allowed to both parties a conjunct probation for proving thereof."—Which probation being led, and this day advised by the Lords, "They, in supplement thereof, ordained the defender to give her oath anent her own, and her author's, possession of the said chain; whereon if she depone *affirmative*, they will prefer her, as having best right thereto."

Fountainhall, v. 1. p. 49.

No 11.

1680. November 18.

FORSYTH against KILPATRICK.

Restitution of a horse sustained against a *bona fide* purchaser from a person to whom the owner had lent him.

WILLIAM FORSYTH pursues Hugh Kilpatrick, to deliver to him an horse, hired by him to one Vauchan to Irvine. The defender *alleged*, Absolvitor; because he had *bona fide* bought the horse, and paid the price, and the property of moveables is always presumed by possession, much more when he offers to instruct his right. Is was *answered*, That the presumption is excluded by the