

1712. February 17.

WILLIAM BOYD of Drum *against* GEORGE HAY in Drum.

## No 310.

A relict's possession of her husband's moveables 28 years, after the same had been confirmed by his executors creditors, sustained as a presumption, that she had right thereto from the executors confirmed.

MR ROBERT SELKRIG and John Hamilton having, after the decease of Robert Boyd of Drum *in anno* 1684, confirmed his moveable debts and household plenishing as executors-creditors to him; and, in the 1685, adjudged from his apparent heir his heritable estate, particularly the heirship moveables; Anna Charters, Robert Boyd's relict (who had a liferent right to the house of Drum) continued after his decease to possess the same, with the household plenishing, for eight years sole, and then married George Hay, who, for the space of twenty years that she lived with him, possessed the household plenishing without molestation. In the year 1710, after Anna Charters died, Selkrig and Hamilton conveyed their right to the household plenishing in favour of William Boyd, now of Drum, who pursued George Hay to deliver up the same to him, upon this ground, That he, the pursuer, offered to prove by witnesses, that these moveables were in Robert Boyd's possession the time of his death.

*Alleged* for the defender; He having come lawfully to these goods *jure mariti*, (which is a legal assignation) is not bound to instruct his wife's right to the same from the executors creditors; but the property is presumed to have been transmitted by sale or otherways to the defender's wife, from her twenty-eight years peaceable possession as her own. For it being impossible to clear the progress of moveables, which pass from hand to hand without writ, and often without witnesses, the property of them is presumed from possession; so that they cannot be recovered *via actionis* from any possessor, unless the pursuer not only instruct that he once had right to them, but also that *desiit possidere* by loan, or some other way, not *habile* to transmit the property, Stair, Instit. Lib. 2. Tit. 1. § 42. Lib. 3. Tit. 2. § 7.

*Replied* for the pursuer; Possession of moveables is but a presumptive right which may be taken off by contrary evidence; now, his instructing them to have been in Robert Boyd's house at his decease, clears that the relict's possession was at first precarious, and it is presumed to have continued so; for none can change the cause of their possession, and *initium possessionis inspiciendum est*. No supervenient title in another can accrue to the possessor, unless the manner of conveyance be proved; and the executors creditors' long neglect to prosecute their right, cannot exclude them from it within the years of prescription, nor can the husband's right be thought any better than his wife's was; so, in a late case of Hume of Restoun *contra* Jean Pitcairn, (See APPENDIX.) Mr Ainsworth her husband was found liable to restore moveables possessed by her as her own, by a conveyance to her from her first husband, upon Restoun's producing a declaration that the goods belonged to him, and had only been lent to her author.

*Duplied* for the defender; His wife's possession after her first husband's decease was necessary *et custodia causa*, or she was *in possessione tantum*; which

possession ceased when the executors creditors' title came to be made up in the 1684 and 1685. Their suffering her to possess thereafter argued *post tanti temporis intervallum*, that they conveyed these moveables to her. Vindication of a parcel of nolt poinded was refused, though the pursuer offered to prove they were his, and set a grazing to the debtor; because the debtor had, some few years before the poinding, used all deeds of property upon them; during which time the pursuer had been out of possession, November 24. 1624, Turnbull *contra* Cavers, No 286. p. 11615.; June 17. 1625, Brown *contra* Hudilstoun, *vocc* SPUIZIE. The practique betwixt Hume and Pitcairn doth not alter the case; for no presumptive right within the years of prescription could take place against a plain contract of loan; but January 28. 1679, Hog *contra* Hamilton, No 9. p. 9119, the LORDS repelled possession by a relict, unless confirmation were instructed; consequently, *argumento e contrario*, twenty-eight years possession here after confirmation ought to be sustained.

No 310.

THE LORDS found the defender's long possession, since the year 1684, at which time the defender's wife's first husband's testament was confirmed, presumes a right thereto from the executors confirmed, and therefore assoilzied the defender.

*Fol. Dic. v. 2. p. 163. Forbes, p. 588.*

1734. July 30. CARSTAIRS of Radernie *against* STEWART of Dunearn.

No 311.

AN assignee to a liferent-right having been long in possession, was pursued to remove, upon the presumption that the liferentrix was dead, she not having been heard of for 60 or 70 years backward. The defender admitted, were he insisting for possession upon his liferent-right he must prove his libel, viz. the existence of the liferentrix. But he *contended*, That, having once legally attained possession, he has nothing further to prove; his possession must continue, and the person who brings a process of removing against him, must prove that the right is at an end by the death of the liferentrix; and therefore, though *in dubio* the presumption of 50 or 60 years might take place as the most ordinary period of life, the question here does not turn upon the preponderating presumption; the pursuer cannot prevail unless he prove his libel, which must be done one of two ways, either by a direct proof of death, or by the lapse of such a time, after which its past all human probability that the person is alive. THE LORDS found, That the pursuer not offering to prove the Lady's death, the presumption in law is for life to 100 years. See APPENDIX.