

1714, February 12.

HENRY KER of Graden *against* ANDREW INGLIS, Merchant in Edinburgh.

IN the reduction and improbation at the instance of Henry Ker against Andrew Inglis for reducing his right to a tenement of land in Edinburgh,

Alleged for the defender, That in the year 1620, George Abernethy, advocate, did, in a contract of marriage betwixt Elizabeth Abernethy, his daughter, and John Dunlop, dispoise to them and their children, the tenement aforesaid, whereupon the said Elizabeth Abernethy and her husband were infeft; and the defender produced a connected progress of writs from them, by virtue whereof he instructed possession since the year 1688 by an adjudication; and *contended*, That his author's possession should be presumed *retro* till the year 1620, when his author's title commenced, unless the contrary be proved.

THE LORDS found, That the defender's possession is presumed *retro*, unless the pursuers prove, that some of his authors or predecessors possessed within the years of prescription, or used interruption.

Forbes, MS. p. 26.

No 613.

Possession presumed *retro*, until the possession of another appear.

SECT. IX.

Property of Moveables.—Bargain of Moveables.

1626. December 14.

MITCHELL *against* L. CAPRINGTON.

IN an action at the instance of Robert Mitchell against the L. Caprington, for making of certain silver work, as bason, laver, cups and spoons, arrested in his hands, as belonging to the Lady Ochiltree, and so as pertaining *jure mariti* to Andrew Lord Stewart of Ochiltree, her husband, debtor to the pursuer, to be forthcoming for satisfying of the said debt; it being controverted, how that part of the summons, viz. bearing the said silver work to pertain to the Lady, should be proved, seeing the defender, Caprington, *alleged*, That it could not be proved by witnesses, but allenarly either by writ or oath of party, especially seeing it was a matter of great importance, and that there was no special qualification libelled then how the same pertained to her, either that she bought the same, or that they were marked with her name, nor any other qualification to make them pertain to her; this allegeance was repelled, and the summons was sustained, bearing the same to pertain to her, which the LORDS found might be proved by witnesses, and no necessity of writ, or to refer the same to the party's oath; for the defender might allege and propone his defence upon

No 614.

In a *rei venditio*, it is not sufficient to prove the pursuer's property, unless he prove further *quomodo desit possidere*, because writ not being necessary to the transmission of moveables, possession presumed. The defender has acquired lawfully.

No 614. any other person's right to the same, if they did not pertain to her, wherein he was not prejudged by this interlocutor, if he pleased to propone the same. But J. C. *Dominium non potest probari per testes quia, Incorporalia non cadunt sub sensibus.* Vid. Bartol. Tract. De Testibus.

Act. Mowat.

Alt. Cunningham.

Clerk, Gibson.

*Fol. Dic. v. 2. p. 270. Darie, p. 246.***No 615.**

The cause of being put in possession of moveables may be proved *prout de jure.*

1628. December 10. CRANSTON against ADAMSON.

PATRICK CRANSTON, assignee constituted by Catharine Pringle, pursues Adamson, who had married the said Catharine's daughter, for delivery of certain goods and gear alleged pertaining to the said Catherine, and wrongously introduced with by her said son-in-law, extending to the avail of 2000 merks. To which it was *answered*, That by a verbal contract of marriage, which afterward was accomplished betwixt the said pursuer's daughter and the defender, she permitted to him the whole goods and gear upon the ground, and put him in possession of her room, he giving to her sustentation in the house with him and her daughter; likeas, he occupied the room, and paid the master the duty therefor, as tenant, for the space of five years preceding the intending of the cause. To this it was *replied*, That this exception could not be proved but *scripto vel juramento partis*. THE LORDS found, That it might be proved *prout de jure.*

Auchinleck, MS. p. 154.

1629. July 29.

A. against B.

No 616.

EXECUTORS being pursued for spoliation of teinds committed by the defunct, and the libel referred to the defender's oath, the LORDS found, that the executors could not be held to give their oaths *super facto alieno*.

Auchinleck, MS. p. 151.

1629. November 27. PATERSON against EDWARD.

No 617.

Proof of the property of moveables allowed *prout de jure.*

THOMAS PATERSON pursued Nicol Edward for making certain goods and sums of money forthcoming to him, which he had arrested in his hands, as pertaining to John Mackcubie his debtor. The defender *contended*, That the pertaining of the goods libelled to John Mackcubie could not be proved but *scripto vel juramento partis*, especially considering, that the said John Mackcubie