

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

pursuer's libel, offering to prove the horse his own, and that he did not sell him, but set him for hire, and, therefore, hath *rei vindicationem* against any haver thereof, whether he acquire *bona fide* or *mala fide*.

No 11.

THE LORDS repelled the defence, in respect the pursuer offered to prove, that the horse did not pass from him by alienation, but by location.

*Fol. Dic. v. 1. p. 592. Stair, v. 2. p. 801.*

1684. February.

GRAY against COWIE

No 12.

JOHN RUTHERFORD having taken a house from Andrew Cowie merchant in Edinburgh, and Arthur Straiton having retained the said John Rutherford's household plenishing for his former mail, and Andrew Cowie having become cautioner for the house mail, and for his security and relief both of his cautionry and of his own house mail, having taken a disposition from Rutherford to the household plenishing; Mr David Gray, to whom Rutherford had granted a disposition, having pursued Andrew Cowie for the goods, *alleged*, That he ought not only to be preferred for his own house mail, as a part of the tacit hypothecation, but also for relief of his cautionry, albeit Mr David Gray had a prior disposition, upon which there followed only a symbolical tradition; seeing he had not only a disposition, but was actually in possession of the goods, and a posterior disposition, with actual and real possession ought to be preferred to a prior disposition with symbolical possession, especially where the common debtor did retain the possession. *Answered*, That a disposition of moveables upon which there follows symbolical possession, being a competent and valid right, gives the party a sufficient right, albeit the common debtor retain the possession, seeing our law makes no difference between symbolical possession and actual possession of moveables, the right of property of the goods being as validly conveyed by a symbolical possession as by an actual possession; and albeit the common debtor retained the possession, yet that does not alter the case, because in that case, after a symbolical tradition, the disposition is reputed in law to be the party's possession to whom the goods are disposed. THE LORDS preferred Mr David Gray by virtue of his disposition and symbolical possession, which they found did give him a sufficient right to the goods disposed.

A prior disposition with symbolical possession, preferred to a posterior disposition clothed with real possession.

*Fol. Dic. v. 1. p. 592. Sir P. Home, MS. v. 1. No 184.*

1683. February 27.

EARL of LEVEN against MONTGOMERY.

No 13.

FOUND, that a jewel, or other precious moveable, left to a family on condition that it shall not be alienated, cannot be disposed of gratuitously.

*Fol. Dic. v. 1. p. 593. P. Falconer. Sir P. Home. Fountainball. Harcarse.*

\*\*\* This case is No 43. p. 5803. *voce* HUSBAND and WIFE.