

Wright pursued Butchart for the price of the goods. It was *alleged* for Butchart, That he ought to be assoilzied, because he had right to the goods by a written disposition from Comrie, who, as owner, had possess the samen, without payment of any duty therefor; and, conform to the disposition, the goods were delivered to the defender by way of instrument, and he in possession accordingly. It was *replied*, That the defender cannot be heard to say, that Comrie was owner; because the goods were *per expressum* adjudged from the apparent heir of James Johnston, who was in possession thereof, and they extant within his dwelling-house; and Comrie cannot say that he was in possession thereof otherways than a tenant in the house under James Wright, to whom, though he paid not duty expressly for the goods, yet having taken the house from him for payment of mail and duty, and as tenant having entered to the possession of the house where the goods were, and accordingly having possess both house and goods, any possession Comrie had was the pursuer's possession, and consequently the defender's right, and pretended possession, cannot be respected.

THE LORDS repelled the allegiance, in respect of the answer or reply.

*Gilmour, No 46. p. 33.*

1666. *January.*

RAMSAY *against* WILSON.

COLONEL CUNNINGHAM gives in custody to the deceased Mr James Aikenhead, certain curious jewels of a considerable value, conform to an inventory under Mr James his hand: Thereafter the Colonel goes for Germany, and being there, draws some bills upon Mr James, who answers them accordingly. The Colonel dies, and the jewels remain in Mr James his hands all this time: Mr James assigns the bills to John Ramsay, his brother-in-law, who gets the keeping of the jewels also; and a bond is granted by him and Mr Robert Byres, for the Colonel's use, to make them furthcoming. After the incoming of the English, John Ramsay having hid the jewels in a coal-cellar in his house at Edinburgh, the said Mr Robert deals with the damsel of the house, and gets the jewels, and carries them north with him: And after the English were settled, he returns and keeps still the jewels, till after several years, Mr Robert being become very necessitous, he did impignorate diverse of the jewels to James Wilson, and others; and, before he redeemed them, he died. The said John Ramsay, by his assignation granted to him by Mr James Aikenhead, his brother-in-law, to the Colonel's bills, confirms himself executor-creditor to the Colonel, and pursues the havers of the jewels, to make them furthcoming to him. It was *alleged* by James Wilson, That he should be assoilzied; because, the jewels having been in the possession of the said Mr Robert Byres for many years, it was lawful for the defender to take them as pledges for money

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Found, that jewels, and other such valuable moveables, being disposed of by a trustee, tho' they pass through *mille manus*, the haver of them is liable in restitution to the proprietor.

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THE LORDS sustained the summons, and repelled the allegiance.

*Fol. Dic. v. 1. p. 592. Gilmour, No 175. p. 126.*

\* \* \* Stair reports this case.

1665. December 12.—COLONEL CUNNINGHAM having impignorated a number of jewels of great value, immediately thereafter, went out of the country, and never returned. These jewels were in the custody of John Ramsay, who and Mr Robert Byres had given bond to make them furthcoming to the Colonel; and now John Ramsay having been confirmed executor to the Colonel, pursues James Wilson, and others, for exhibition and delivery of the jewels. The defenders *alleged*, Absolvitor; because the jewels were impignorated by Mr Robert Byres for a considerable sum of money, who having them in his possession, it was a sufficient ground for the defenders to contract with him, because property of moveables is presumed by possession; and, therefore, it is not relevant to libel, that once the jewels were Colonel Cunningham's, and, therefore, they must be restored to his executors, unless it were also libelled *quomodo desiit possidere*; so that the jewels behoved to have passed from him, without his own consent, or alienation, otherwise it is always presumed,

that he sold or gifted them, and needs not be proved; else no man could be secure of any moveable; if he who could instruct that he bought it, could recover it from all possessors, unless they could instruct all the ways the same passed from the first owner. The pursuer *replied*, That the case is not here as to moveables, that are ordinarily sold in market, but in relation to jewels of great value, which cannot be presumed to have been Mr Robert Byres's, because they were never worn by him, as being his proper goods, nor were they competent to any of his quality; and, therefore, the defenders were *in mala fide* to acquire them from him, without knowing his right.

*2dly*, It is instructed by Mr Robert Byres's letter produced, that he acknowledged them to be Colonel's, before the impignoration; and it is offered to be proved, that he broke up John Ramsay's cellar, and took them out; *3dly*, The Colonel impignorated them by writ, and so the presumption of alienating them ceased, because, he went immediately out of the country, and never returned. It was *answered*, That there is no difference of jewels more than any other moveables, which use to pass without writ from jewellers that sell them; and the pursuer having possessed them these 10 or 12 years, without question, has right thereto, by usucapion.

THE LORDS found the allegiances jointly relevant to elide the presumption, and that there is no usucapion in moveables in Scotland, by possession, in less than 40 years, but only a presumptive title, which is altogether elided by the answers.—See PRESUMPTION.

*Stair, v. 1. p. 326.*

\* \* \* This case is also reported by Newbyth.

1665. December 12.—THE deceased Colonel Cunningham having, *in anno* 1636, left some jewels with Mr James Aikenhead, gave him an inventory thereof under his own hand, with an acknowledgment of the receipt, and an obligation to restore; and thereafter the Colonel did draw precepts upon Mr James for sums of money, which precepts, and receipts of money therein contained, the said Mr James did assign to John Ramsay, for payment of sums of money due to him; for satisfaction whereof, the said John having raised a summons for exhibition and delivery of the said jewels so confirmed, the said Mr James, to prevent the issue of the said action, did deliver the said jewels to the said John, in whose possession they did thereafter continue, till the year 1650, the jewels having been buried in the said John Ramsay his coal-cellar. Mr Robert Byres did most unwarrantably take out of the said cellar the whole jewels, by connivance and tolerance of John, his servant; as he acknowledged himself, by a letter under his hand, wherein he likewise promised to restore the same. Many of the jewels being now discovered, after the death of Mr Robert Byres, to be in the hands of James Wilson, and others, the defenders,

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who got the same from Mr Robert Byres ; there is action intented at John's instance, as having right, as said is, for exhibition and delivery thereof. And some of them being exhibited, and the defenders oaths taken upon having of the rest, reserving their defences against the delivery, it is *alleged* for the defenders, That they cannot be decerned to deliver the jewels, because they *bona fide* got the same for security of their money lent to Mr Robert Byres, in whose possession they then were ; and the said jewels being *mobilia et paraphernalia*, they were not bound to enquire what right Mr Robert had to them. For, as to moveable goods, it is enough for any man to say, that they acquired the same lawfully, albeit it be *a non dommo* ; and they having possessed the same by the space of 10 or 12 years, without interruption, the right thereto is now prescribed by the civil law, which, in *usucapionibus mobilium*, requires only *annalem et triennem possessionem* ; and, by our law and practise, it hath been found by the Lords, that horse and kye, bought in public markets, being possessed by the buyers for the space of one year, cannot thereafter be quarrelled by the true owners ; and, therefore, the pursuer never having intented action against Mr Robert Byres, or any of the defenders, as having right from him, cannot now crave the same *rei vindicatione*. To which it was *replied* by the pursuer, That he opposes his summons, having a good and valid title to the said jewels, being executor-creditor confirmed to the said umquhile Colonel Cunningham, as is clear by a subscribed inventory, registered in the Session-books ; and the defenders cannot instruct that ever Mr Robert Byres had right thereto, or that they themselves have right by assignation or disposition from him : The most they can allege being only that the said Mr Robert was debtor to James Wilson by personal bonds ; 2do, Mr Robert Byres's possession being vitious, *et clam et furto*, as he has confessed under his own hand, *contestatur rei alienæ*, being *vitium reale*, it so affects the thing itself, that *non potest usucapi etiamsi per mille manus transierit* ; 3tio, Albeit by the civil law, *usucapiuntur mobilia per vicennem possessionem* ; yet it is not so by the laws of this kingdom ; and any decisions that have been given have only been as to horse, kye, and sheep, *quæ usu consumuntur* ; whereas, the question here is concerning jewels of a great value, and being in the hands of so mean a person as Mr Robert Byres, are suspected to be ill come ; 4to, The pursuer's silence cannot be obtruded to him, in regard of the troubles of the time, wherein he durst not discover the same, lest the usurers had seized on them.—THE LORDS repelled the defence, in respect of the summons and reply ; and found, that the pursuer had good right upon all that was libelled *conjunctim, viz.* they being jewels, and being clandestinely abstracted, by such as the defenders might have known could not belong to Mr Robert Byres, pursuer therefor, *rei vindicatione*.