

‘ and finds that this was done accordingly, by the confirmation of Atkinson, Mure, and Bogle, as executors creditors *ad omnia*, whereby they vested in themselves a right to the said funds, and in consideration of which they have by that diligence a preferable right to the other competing creditors, who neglected to use that diligence in proper time.’

No. 3.

The Lord Ordinary afterwards reported the case to the Court on memorials, and the Lords adhered, (14th January 1808.)

In deciding the question between these parties, it was unnecessary for the Court to do more than to adhere to that part of the Lord Ordinary’s interlocutor, which finds, ‘ That the arrestments used by Learmonth and Lindsay, although prior in date to those used by Messrs. Atkinson, Mure, and Bogle, cannot give them any preference, or be of any avail, in respect the same were used before the time that Mrs. Mary Hamilton had by confirmation vested any proper right to herself in the funds in question ; and that therefore the arrestments of Atkinson, Mure, and Bogle, being posterior to Mrs. Mary Hamilton’s confirmation, are to be held preferable to the others ;’ because the arrestments of Learmonth and Lindsay, being in this respect inept and null, there was no longer any party having an interest to agitate the second and important point of law laid down in the last finding of the Lord Ordinary’s interlocutor.

But it is proper to notice historically, that the Court were no less clear with respect to that part of the interlocutor. They considered that, in a competition, confirmation as executor creditor *ad omnia* was the only proper and regular diligence to attach the fund *in medio*, where the nearest in kin had only expedite a partial confirmation ; and that this question had been well and solemnly decided in the case 27th July 1779, Sloane Laurie against Spalding Gordon, quoted in support of the pursuer’s argument.

Lord Ordinary, Cullen. Act. J. W. Murray.
Alex. Boswell, and Robinson & Ainslie, Agents.

Alt. W. Boswell. Tod & Romans,
M. Clerk.

J. W.

Fac. Coll. No. 23. p. 76.

1808. May 25. HENRY VEITCH against DAVID YOUNG.

LORD ELLIOCK, by a deed of entail 23d February 1790, resigned his estate of Elliock, “ in favour and for new infertment to be made and granted to myself, and the heirs whatsoever of my body, whom failing, to Lieutenant James Veitch of the 72d Regiment of Foot, and the heirs male of his body ;” and failing them to certain other heirs and substitutes therein mentioned, under the usual prohibitive, irritant, and resolutive clauses.

In the same deed, he added a clause in the following terms : “ And I do hereby assign, and make over to the heirs whatsoever of my body, whom

No. 4.

If Books and Furniture, though rendered heritable *destinatione*, transmit from the dead to the living without service by possession ?

- No. 4. “ failing, to my other heirs of entail and substitutes before specified, not only
 “ the whole writs, title deeds, evidents, and securities, old and new, made,
 “ granted, and conceived, or which anywise can be interpreted in favour of me,
 “ my predecessors, or authors, of and concerning the lands and estate herein
 “ contained, with the whole procuratories of resignation, precepts of sasine, and
 “ all other clauses therein contained, with all that has followed or may follow
 “ thereupon, but also my whole household furniture, or plenishing of whatever
 “ kind, or denomination, which shall be within my house of Elliock at the
 “ time of my decease, together with my whole library of books of every kind,
 “ which shall be within my said house of Elliock, or my house in Edinburgh,
 “ or any where else.”

Lord Elliock died in July 1793; and was succeeded by Lieutenant James Veitch. Lieutenant James Veitch never made up any title to any of Lord Elliock's property by service or confirmation; but by means of persons acting for him, he did take possession of the books and furniture above mentioned*. In particular in December 1795, his sister Miss Lilius Veitch, by his order (as was said), went to the house of Elliock, packed up the books and furniture, and sent them off, the first to Dumfries, the last to Edinburgh, to be forwarded to him at London.

On this, Henry Veitch presented a bill of suspension and interdict, to stop the further removal of these effects. And he also made applications to the Sheriffs of Edinburgh and Dumfries, to have them sent back to Elliock. These actions were removed into the Court of Session by advocacy.

Previous to this, Lieutenant Veitch had sold some growing wood on his estate to David Young and others, who had accepted bills for the price, being £2,000. In January 1796, Lieutenant Veitch being in bad health, these persons brought an action against him to have it found and declared, that they were not bound to pay these bills till he had granted them sufficient warrandice of their right to the wood against the challenge of any subsequent heirs of entail in the estate of Elliock; or if the bills were indorsed away, to have him decerned to grant such warrandice.

On this depending action, they (6th January 1796) arrested the furniture in the hands of Miss Veitch at Edinburgh, and the books in the hands of Crosbie and Jardine, merchants in Dumfries, to whom Miss Veitch had sent them. Lieutenant Veitch died in the beginning of May 1796.

The books and furniture being also arrested by other persons, creditors of Lord Elliock and Lieutenant Veitch, multiplepointings were raised by Miss Veitch and by Crosbie and Jardine, in whose hands these articles were, (30th May 1790.) These two multiplepointings, together with the suspension and interdict, and the two advocations above mentioned, came before Lord Justice-Clerk Braxfield, by whom these five processes were conjoined.

* This was disputed; but the Court were clear that it was fully proved.

After a variety of proceedings, the other arresting creditors having withdrawn, on the motion of David Yonng, &c. the Lord Ordinary in the conjoined processes of multiplepointing, (then Lord Armadale,) ‘ granted warrant for letters of incident diligence, at the instance of all parties interested, against havers, for recovering of the catalogue of books belonging to the late Lord Elliock.’

Against this interlocutor Henry Veitch represented on two grounds; *1st*, That the books and furniture having been rendered heritable *destinatione*, and never having been vested in Lieutenant Veitch by service, could not be attached by any diligence at the instance of his creditors; *2d*, That at any rate the arrestments of these subjects were inept, or ineffectual, for a variety of reasons. Young, &c. on the other hand, maintained, that possession of these subjects was equivalent to service, and that the arrestments were good.

On considering this representation, the Lord Ordinary found, ‘ in respect that no title by service or otherwise was made up by Lieutenant Veitch to Lord Elliock’s library, which, by his Lordship’s settlement, was rendered heritable *destinatione*, that the arrestments used by the creditors of Lieutenant Veitch were ineffectual to attach the same; and therefore recalled diligence granted in absence for recovering catalogues of said library, and deçerned accordingly.’

On a reclaiming petition against this interlocutor, with answers, the Court, (5th March 1806,) adhered; but on a second reclaiming petition for Young, &c. the interlocutor of Court was, (June 2, 1807,) ‘ Alter the interlocutor of the Lord Ordinary reclaimed against; sustain the arrestments used by the petitioners as sufficient to attach the furniture, books, and effects conveyed by the assignation in the deed of entail executed by Lord Elliock; prefer the petitioners in virtue of their interests produced upon the fund *in medio*; and remit to the Lord Ordinary to proceed accordingly.’

† Against this interlocutor Henry Veitch presented a reclaiming petition, which was answered. The whole cause was gone over in these papers; but as no decision was given on any point but the first above mentioned, it seems sufficient to report the argument on this point.

Argument for Henry Veitch, petitioner.

It is not necessary to maintain that the entail of the subjects in dispute is effectual. It is sufficient to say, that Lord Elliock clearly intended to entail them on the series of heirs to whom his landed estate is destined; and that this entail must at least be effectual to the extent of rendering them heritable *destinatione*.

There is no rule better established in the law of Scotland than this, that heritage does not pass *ipso jure* from the dead to the living; but that such heritable rights as are not clothed with infeftment must be taken up by general service, and such as are clothed with infeftment by special service or precept of *clare* and infeftment thereon. Upon this rule the well known distinction of heir apparent and heir is founded; and the whole system of our

No. 4. law respecting heritable rights depends on it. Ersk. B. 3. Tit. 8. § 54—Stair, B. 3. Tit. 5. § 25.

Lord Stair in this passage mentions all the exceptions to this rule that exist. But moveables made heritable *destinatione* is none of them. Nor is there any of them in which *possession* is equivalent to *service*. Wherever service is unnecessary to vest an heritable right, it is because that right vests *ipso jure*.

Heirship moveables are said to form an exception to this last observation. But, in the *first* place, there is no authority for this but a solitary old decision, Blackburn against Rigg, 2d Feb. 1610, (No. 29. p. 14384.) And this decision is contrasted by a later one from Auchinleck MS. Dec. 22, 1630, (No. 31 p. 14386.)

In the *second* place, supposing this were one exception, that would not be a sufficient reason for making another exception in a different case.

But, *thirdly*, the right to heirship moveables is not an heritable right in the proper sense of that term. It is not a right which descends from heir to heir like heritable succession. It is more truly analogous to legitim or *jus relictæ*. It goes to the heir once for all like a legacy of moveables; and becomes instantly, in all respects, a part of his moveable property, going to his executor not his heir. The heir receiving heirship moveables may, to be sure, leave heirship moveables out of his own estate, as a child receiving legitim may leave legitim to his child, but there is no identity of the one heirship with the other. Nor is there any connection whatever between the receipt of heirship by any person and the transmission of heirship out of his estate. If he be a prelate, baron, or burgess, he will leave heirship whether he receive it or not; if he be not any of these, he will leave no heirship whether he received it or not.

Heirship moveables, therefore, are not proper heritage descendible *de haerede in haerem*; and do not form any exception to the rule that no property of this kind can vest by mere possession, which is as universal in our law as it is marked and decisive.

The law of apparençy shews this very clearly, for it all rests on the assumption, that the apparent heir has the fullest possession, while yet the right of fee and property never is vested in him. The act 1696, C. 24. recognizes this rule, in the most striking manner, by the cautious and limited relief which, in a certain case, it affords against the operation of the rule; and this act too has received a strict interpretation.

No analogy can be drawn from the transmission of proper moveables by possession, for the whole law of descent and transmission is altogether different in regard to heritable and moveable rights. And even as to proper moveables, the effect of possession in transmission from the dead to the living, seems to have been owing to special statute, 1690, C. 29. Bankton, vol. 2. page 407.

The consequences of the doctrine maintained on the other side sufficiently shew that it is inadmissible; for they are absolutely irreconcilable with the established forms of transmitting heritable property.

Supposing the heritable right to these subjects to have been vested in Lieutenant Veitch by possession, then it could no longer be taken up by a service to Lord Ellick, along with the right to the landed estate; but must be taken by a separate service to his apparent heir—and the first, and only general service that ever was expedite as heir to the institute in the personal deed which carried all these heritable rights, would not have the effect to transmit the whole, but only a part of them; a consequence very contrary to the ideas hitherto entertained of heritable rights and services, and tending directly to involve our law on this subject in confusion.

But, further, it is admitted that, on this supposition, a service to Lieutenant Veitch would in all cases be competent; and if possession could not otherwise be allowed, it would be necessary, in order to take up these subjects. But in this service, where would be the evidence that the fee of this heritable right was ever vested in him, without which the service could not proceed? Will it be said that parole proof of possession would be adduced in order to shew this? Such a thing never was heard of; and is absolutely inconsistent with the form of services and of the transmission of heritage, as invariably fixed in practice, by which there must be a series and connection of written titles; and no person can be served heir to a preceding heir, unless that preceding heir has had the right vested in him by the written title of a service, or by infeftment when infeftment is necessary.

Argument for Young, &c. respondents.

I. The clause conveying these subjects is not only not capable of constituting a proper entail of them, but it does not appear that it was intended to create such an entail, nor to create any heritable destination, in the sense in which that word is used by the petitioner. It merely assigns the moveables that *shall be* in the house of Ellick at the time of Lord Ellick's death, to his heirs; which seems to be nothing more than a bequest of these moveables, once for all, to the heir,—without any attempt at a perpetual destination. There is no reason to say, that the nomination of heirs is more than a conditional institution.

II. But at any rate there is no authority in our law for saying that a perpetual destination of moveables can be effectually made by any terms, or that they can, by the will of any person, be converted into proper heritage. None of our law writers lay down such a doctrine, which seems in itself very unreasonable. Moveables may be bequeathed under what conditions the testator pleases, but still they are moveables, and may be taken by the person to whom they are bequeathed as moveables are taken.

Now, it cannot be denied that moveables, in every form but that in question, pass from the dead to the living by possession.

No. 4. That possession is equivalent to confirmation in transmitting the *ipsa corpora* of moveables, is clear from Erskine, B. 3. Tit. 9. § 30.—Bankton, B. 3. Tit. 8. § 119. Nor did this rule arise from special provision of the Stat. 1690, C. 29. but from views of common law and ancient practice. See M'Whirter, No. 38. p. 14395. This statute had no tendency to supersede confirmation where it formerly was necessary for transmission, but merely to take away the burden of it where it was not necessary, but was insisted upon only by the commissaries for their fees. Possession has the same effect as to *jura crediti*, which pass to the executor or general disponee by payment or corroboration, the only sort of possession such rights admit of.

The property of heirship moveables passes in the same way, though this is destined, by law itself, to the heir, and is carried, if he chose it, by a service. Nay, it *must* be carried by a service, if the moveables are in the hands of third parties, who do not chuse to deliver possession without it; and yet, if possession of heirship moveables is obtained, the property of them passes to the heir by that possession. This is the true import of the decision in the case from Auchinleck, 22d December 1630, which is erroneously reported in the Dictionary, (Folio *.) In that case a clock, which was heirship, was ordained to be given up to the heir when served; but the reason was that it was in the hands of a third party, and had never been in the possession of the heir, or of the purchaser from him, who claimed it.

And this doctrine is supported not only by the case of Blackburn, quoted by the pursuer, but by the opinions of Erskine, B. 3. Tit. 8. § 17 and 77; Bank. Book 3. Tit. 5. § 13; and Lord Kames' Elucidations, page 97.

It is said that the right to heirship moveables is not proper heritage; but it is at least as much so as the right to moveables made heritable *destinatione*. These rights equally go to the heir; they may equally be taken by service, and not by confirmation; Erskine, B. 3. Tit. 8. § 63. The right to heirship cannot be conveyed away on deathbed; Erskine, *supra* § 98. If the heir intermeddles with them, he incurs the passive title of *gestio pro heredede*; Erskine, *supra* § 63. Accordingly, the right to heirship is uniformly treated as heritable, Erskine, B. 3. Tit. 8. Bank. B. 3. Tit. 5.; in all these respects heirship differs totally from the legitim or *jus relictæ*, which vest without either service or confirmation, or possession, and never were imagined to be in any respect heritable.

It is said heirship moveables do not descend to a line of heirs, at least, they do not necessarily do this; but neither do moveables, heritable *destinatione*, necessarily descend to a line of heirs. The first heir may, at his pleasure, deprive them of their heritable nature,—even a bond secluding executors, or destined to a series of heirs, may lose its heritable nature by payment or assignation: Books and furniture are certainly not less liable to return altogether into the class of moveables.

* The *ipsa verba* of this case from the MS. will now be found p. 14386 of this Dictionary.

Since then, in every other instance, moveables transmit by possession, even where they are heritable, there seems to be no reason whatever for denying the effect of transmitting them to possession, where they are destined to heirs.

As to the difficulties that are started, they only shew that it is impossible by destination to take moveables entirely out of their own class, and apply to them all the rules and forms relating to proper immoveable rights; and after all these are difficulties of form only, from which no serious bad consequence could be feared.

But, on the other side, there are substantial mischiefs to be feared from refusing to allow possession to transmit moveables destined to heirs.

It will be observed, that there is no record of such destinations; and, therefore, it is impossible the public should have any suspicion, that a man, possessing moveables to which no body else pretends any claim, is not truly the proprietor of them. Purchasers and creditors must therefore be exposed to a new danger from which there is no defence; and to the very danger from which our law was anxious to protect them, by refusing to sustain transferences of moveables, *retentia possessione*. Rights to moveables would in that case come to be affected by all the neglects and errors, to say nothing of frauds, that might take place in following the intricacies of services.

The Court unanimously pronounced this interlocutor, (25th May 1808.)
 “ Find that the property of the library and furniture of the late Lord Elliock
 “ was effectually vested in the person of the late Lieutenant Veitch; and in so
 “ far refuse the prayer of this petition, and adhere to their interlocutor reclaim-
 “ ed against: But, with respect to the objections to the arrestments and all
 “ other points of the cause, remit to the Lord Armadale, Ordinary, to hear
 “ parties thereon, and to do therein as he shall see cause.”

There was however some difference as to the reasons on which different Judges concurred in this judgment.

Three of the Judges expressed their opinion, that the clause in the entail, relating to the moveables in question, was not so expressed as to constitute a proper heritable destination. That it was rather of the nature of a bequest to the heir, or a conditional institution; and that if it had been a proper heritable destination, they thought the argument for Mr. Veitch very strong, and would have had great difficulty in acceding to the interlocutor. The President, and three other Judges, expressed their opinions on the ground, that there *was* an heritable destination, but that still the subjects, being *sua natura* moveable, might be transmitted by possession.

The Lord President in particular observed, That service was properly a feudal form, and intended to satisfy the superior of the heir's right of succession, and to procure investiture: That it had been extended to cases of heritable *jus crediti*, and was used to satisfy the debtor of the heir's right of succession, and consequently lay him under an obligation to pay or perform to that heir.

No. 4. That, even in these cases, the feudal right, or the *ius crediti*, vested without service by precept of *clere constat* from the superior, or acknowledgement of the debt from the debtor, if they were willing to grant such precept or acknowledgment.

But that, in no case, was service necessary, or proper, where there was no superior and no debtor, where the right was real and allodial, on which the heir had only to take possession without the consent of any person. That possession of such property was full investiture in it. That besides heirship moveables, leases afforded an example of this; for these when granted to heirs, passed without service by possession, because a lease was not a *ius crediti*, and there was no investiture of them required from the landlord. That moveables destined to heirs must pass in the same way, since, though thus destined, they were still allodial property; and if the heir took possession of them, there was nothing more left for him to do. He might use a service if he pleased, but he had no need of it. That it would be an odd incongruity if an heir succeeding to a lease, and to farm stock settled to go along with it, might take the lease without service, but required a service to the farm stock.

Lord Ordinary, *Armadales*. Act. *Mat. Reas.* Alt. *John Reid*.
A. Kincaid Tate, and *Will. Keyden*, W. S. Agents. S. Clerk.

M.

Fac. Coll. No. 44. p. 160.

1808. June 23.

MAJOR JAMES MOODIE of Milsetter, *against* ROBERT RUSSEL and Others.

No. 5.

An heir of entail having succeeded as next of kin to a creditor upon the entailed estate, the debts do not vest in him without confirmation.

IN the year 1760, Mr. William Budge, writer to the Signet, succeeded to the estate of Toftington in the county of Caithness, under an entail executed in 1751, by his cousin James Budge the former proprietor. By the deed of entail, William was left at liberty to burden the estate with such debts as he chose to contract.

In 1763, William Budge died, leaving two daughters, Janet and Grizel Budge, and a widow, Mrs. Catharine Sinclair.

Janet, the eldest daughter, succeeded to the entailed estate, which she possessed on her apparenacy, and died. Grizel the second daughter then made up titles to the estate, which she possessed till the year 1798, when she died; and the estate devolved on the next heir of entail, with whom she was altogether unconnected.

Mrs. Catharine Sinclair acquired an assignation to certain personal debts which had been contracted by William Budge, and were effectual against the entailed estate. She died in the year 1789. Upon the death of Mrs. Catharine Sinclair, Grizel Budge, then her only nearest in kin, intromitted with her