

No 249.

pertained to himself, by a disposition from the said John Wood, for a very onerous cause, viz. for farms and duties owing by him to the defender, his master, long before the arrestment. It was *answered*, That the disposition was made *retenta possessione* for the space of divers months; and, before any possession apprehended, Wood was denounced rebel at the pursuer's instance, and consequently the disposition was null *quoad* the pursuer. It was *replied*, That the disposition being made before the disponent was rebel, he might lawfully suffer the disponent (his own tenant) to keep still the goods, as long as he pleased, the rebel's escheat not being gifted and declared; and the act of Parliament doth not annul any disposition before the rebellion, but only such as are made *stante rebellione*.

THE LORDS found the allegiance and reply relevant.

Fol. Dic. v. 2. p. 156. Gilmour, No 45. p. 33.

1666. February 9. Colonel HAITLIE *against* ARTHUR LYLE and Others.

No 250.

THERE is a spuilzie pursued at the instance of Colonel Haitlie, against Arthur Lyle and certain other persons, for spuilzie of a great quantity of yarn belonging to the pursuer, and in his possession. It was *alleged* for the defenders, That the said yarn was lawfully pointed. It was *replied*, Ought to be repelled, unless the defender would allege that the yarn was pointed for a debt due by the pursuer after the said yarn being bought and delivered to him, and the price paid, and he in possession by the space of divers days before the pointing, could never be pointed for any other debt, nor can the pointing liberate. THE LORDS assoilzied the defender from the libel, in respect the yarn pointed was in the common debtor's cellar, and pointed out thereof, and that it was looked after by the common debtor's servants.

Fol. Dic. v. 2. p. 156. Newbyth, MS. p. 57.

1682. January 11. CREDITORS of HAMILTON *against* HAMILTON.

No 251.

IN a reduction at the instance of creditors, of a disposition granted by the common debtor in favours of his sister and brother-in-law, of his house and shop, upon this reason, That the same was simulate, seeing it was made *retenta possessione*, he having continued in the possession for two years, keeping open shop, and continuing his business as formerly; the LORDS, in respect that the sasine upon the tenement was not taken for 18 months after the date of the disposition, and that the common debtor continued to possess, and the same being all the estate he had till he broke, reduced the disposition as simulate, *ad hunc effectum*, to bring in all the creditors *pari passu* according to their diligence. In this case the LORDS refused to reduce upon the act 1621, because

the pursuers had done no diligence, and the defender offered to instruct the onerous cause of the disposition.

No 251.

Fol. Dic. v. 2. p. 156. Falconer.

* * * This case is No 156. p. 1066. *voce* BANKRUPT.

1708. July 27.

ANNA and ELIZABETH BOIGS and their CURATORS, *against* GEORGE WATSON,
Merchant in Edinburgh.

IN the reduction at the instance of Anna and Elizabeth Boigs, as creditors to John Tait, merchant in Edinburgh, against George Watson, for reducing a disposition granted to him by Tait in security of debt, upon these grounds; *imo*, It was a disposition *omnium bonorum*, acquired, and to be acquired, whereby the disponer became bankrupt, and the pursuers, with his other creditors, disappointed of their payment; *2do*, The disposition was latent *retenta possessione*, in so far as the defender allowed the disponer to continue in his shop, to buy and sell as formerly, and also allowed him to possess the household plenishing, and to uplift the rent of a tenement disponed till such time as he broke.

Answered for the defender; By no law is the taking a hypothec or security of such goods forbidden; on the contrary, the civil law allows a flock of sheep to be hypothecated for debt, L. 13. D. De Pignor. et Hypoth. in Rebus in Taberna. L. 34. D. eod. If, then, it was lawful for the defender to take a corroborative security (which is virtually but a hypothec) in the plenishing and shop-goods, by the very nature of the right, he might forbear to make use of it, if he thought fit; consequently, his not entering to possess, by virtue thereof, can never prejudice him. Again, forbearing to take possession of goods disponed in security doth not so easily infer simulation, as forbearing to possess upon a disposition of property, would do; in respect the one wholly denudes the granter, and the other does not, but is consistent with retaining possession for a time. This accessory security needs not be made use of immediately when given, but the receiver is at freedom to make use thereof when his other security fails, unless he be prevented by another creditor's more timely diligence. It would be of dangerous consequence to sustain latency *per se*, as a sufficient ground to reduce a disposition; for, at that rate, even bonds might be reduced for the like reason; and latency was found to be no sufficient ground of reduction; February 7. 1673, Burnet *contra* Fraser, *voce* REDEMPTION, Nor can the defender's right be thought latent, seeing he took immediately symbolical possession; and the reason of his abstaining from real and actual possession was, because his annualrents were punctually paid, which is sufficient to clothe a base infetment with possession, and take off the presumption of simulation.

No 252.

A disposition *omnium bonorum* by one merchant to another, in security of debt, found reducible *quoad* goods in the shop and household furniture, of which the disponer retained possession until he failed, but it was sustained so far as concerned the heritage, although the disponer was likewise allowed to continue to uplift the rents thereof.