

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 disponent 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 disponent 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 disponent 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 disponent 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 infestment 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 disponent retained possession until he failed, but it was sustained so far as concerned the heritage, although the disponent was likewise allowed to continue to uplift the rents thereof.

No 252.

Replied for the pursuer; *Perinde est* whether the disposition be an absolute right, or only a right in security, creditors being defrauded by the one, as well as by the other. The instrument of possession cannot be regarded; since a bunch of ribbons, as the symbol for the ware in the shop, was not delivered there, but clandestinely in Tait's house at the foot of a closs, where the instrument was taken; and, in the case of Robert Hamilton merchant, January 11. 1682, No 156. p. 1066. such a disposition as that made to the defender was found simulate, *ad hunc effectum*, to bring in all the creditors *pari passu*, or according to their diligence. Were contrivances of this sort allowed among merchants, nobody could know whom to deal with; for, notwithstanding of one's open trading, and a fair sight of goods in his shop, all may belong in the mean time to another person. Such practices have been redressed by several decisions, as Street *contra* Masson, No 32. p. 4911.; and February 12. 1669, Pollock *contra* Pollock, No 31. p. 4910.; November 28. 1679, Cathcart *contra* Glass, No 112. p. 1005. As to the practise betwixt Burnet and Fraser; the lands contained in the tack, against which the latency was objected, were possessed by the husband, and his possession was her's; besides, the assignation to the tack was *provisio remuneratoria*, the same as if it had been contained in the Lady's contract of marriage, and so could not be thought latent.

THE LORDS sustained the disposition in so far as concerned the heritage; but found Tait's retaining possession of the shop, and household plenishing, and selling the goods in the shop until he broke, relevant to reduce the disposition *quoad* these.

Fol. Dic. v. 2. p. 157. Forbes, p. 275.

1711. June 19.

MR GEORGE LIDDEL, Professor of Mathematics in the Marischal College of Aberdeen, *against* GEORGE DAVIDSON of Cairnbrogie.

No 253.

One who confirmed his debtor's household furniture as executor-creditor to him, was preferred to the receiver of a general disposition thereof to take effect at the disponent's death, though the receiver of the dispo-

IN the action at the instance of Mr George Liddel, as executor-creditor to William Bisset, merchant in Aberdeen, against George Davidson, intromitter with the defunct's household plenishing, for restitution or the value;

Alleged for the defender; That he had right to the said plenishing by virtue of a disposition from William Bisset, with an instrument of possession and symbolical delivery in his lifetime, which completed his right; as is clear, not only from the civil law, L. 1. C. De Donat. L. 1. § 21. L. 18. D. De acquir. et amitt. Poss. where the very pointing out of a thing and using the form of a delivery is equivalent to natural possession, and the disponent is understood thereafter to possess in the name and for the behoof of the other; nay further, the defender attained also the natural possession after the disponent's death before the pursuer's confirmation, which is a sufficient ground to prefer him.