

No 17.

Lady having borrowed L. 16 Sterling from Irvine of Gribton, for his better security she impleged these rings and jewels to him, and he obliges himself to restore them when paid. The Pringles getting notice where their mother's rings were, pursue Gribton for restitution, and refers his having them to his oath. He depones, That the Lady Kirkhouse being his debtor by a bond produced, in L. 16 Sterling, she impignorated the jewels in his hands, and told him nothing of their being another's, and he really believed them to be her own. When this oath came to be advised, it was *alleged* for the children, Wherever they could find their own goods, they could recover them *rei vindicatione*; but *ita est* they proved their property in them by their aunt's obligation prior to the impignoration (for if her declaration had been after, it would not have been so probative,) and the defender's oath proved the having. *Answered*, His oath could not be divided, for he declared they were given to him as truly belonging to the Lady, who impleged them, and were not unsuitable to her quality to have the like; and this obligation is but personal, and may give them recourse against her, and her heirs, but can never take the rings out of his hands till he be paid. THE LORDS found the Lady's obligation constituted the property of the rings in the Pringles, they being the mother's, (who was unfortunately executed with Daniel Nicolson) and her impignoration could not alter the case, though he was ignorant of their right; and therefore decerned him to restore them, reserving him action for his debt against the Lady's representatives, as accords of the law; for it was in effect a *depositum* proved by writ, which no deed of the *depositarius* could invert contrary to his trust.

*Fol. Dic. v. 1. p. 591. Fountainball, v. 2. p. 550.*

1710. July 27.

THOMAS MAIN Merchant in Linlithgow *against* JAMES MAXWELL Merchant in Glasgow, and Partners.

No 18.

A declarator of a Weigh-house clerk, bearing that one had weighed over to another's wife, a parcel of tobacco, weighing so much, and marked with the initials of the husband's name, found to transmit the property to him.

THOMAS MAIN creditor to Robert Simpson merchant in Stirling, having arrested in the hands of Robert Falconer clerk to the Weigh-house of Glasgow, and in the hands of the tacksmen thereof, ten hogsheads of tobacco lying in the said Weigh-house, as belonging to Robert Simpson, to whose wife it was sold and weighed over by James Maxwell and partners in her sight, and pursued a furthcoming.

*Alleged* for James Maxwell, The parcel of tobacco could not be made furthcoming to the pursuer; because the property thereof was never transferred to Robert Simpson; the sale being incomplete till the price be paid, or *fides habita de pretio*, either expressly, or tacitly by actual delivery of the goods.

*Replied* for the pursuer, The property of the tobacco was fully transmitted to Robert Simpson, by the seller's weighing over the same to his wife in the public Weigh-house; especially considering, that the sacks were marked with

R. S. the initial letters of Robert Simpson's name. For a contract of sale is perfected *solo consensu*; and our law allows no hypothec to the seller, for the price of the goods sold.

No 18.

THE LORDS found, that a declaration of the Weigh-house clerk of Glasgow, bearing that James Maxwell had weighed over to Robert Simpson's wife ten hogsheads of tobacco, weighing 4500 pounds weight, marked R. S., did transmit the property to Simpson; and that therefore it ought to be made forthcoming to Thomas Main his creditor arrester.

*Fol. Dic. v. 1. p. 592. Forbes, p. 436.*

1714. June 17. WILLIAM CARSE *against* SIR JOHN HALYBURTON.

WILLIAM CARSE being creditor to Sir George Hamilton, causes a messenger offer to poind the plenishing in his debtor's dwelling-house. Sir John Halyburton compares, and produces a disposition to the plenishing and moveables in the house, conform to a particular inventory, expressing the particulars disposed, and the value exceeding the sum due to William Carse, upon which the poinding is stopt.

William Carse arrests in Sir John Halyburton's hand, and libels upon his debt and diligence, and stopping of his poinding by a simulate disposition; and concludes payment either upon his arrestment, or for damage by stopping his diligence.

The defender *alleged* the goods were disposed to him for just and onerous causes, which he instructed by production of bonds or borrowed money, and craved no further interest than the payment of his bonds, as likewise an instrument of possession of the goods.

It was *answered*, The possession was simulate, the disponent having retained the true possession of the goods by the space of three years and a half after the symbolical possession, during which time he transported the goods from one dwelling-house to another, and disposed of some of them at his pleasure, and likewise suffered the pursuer's debtors to continue the same possession for two years and a half since the poinding; so that the disposition is only a colour to cover Sir George, and defraud his creditors.

It was *replied*, There can be no fraud, because there was a just onerous cause instructed, and he might lawfully allow the disponent to continue a precarious possession.

It was *duplicated*; Though the defender be a true creditor, and by the disposition have *jus ad rem*, yet seeing no true possession followed for so long time before the poinding, nor any possession taken by the defender at the time of the poinding nor since, the property was not transmitted to the defender, but did still remain with the disponent; and consequently the pursuer had right to poind the goods belonging to his debtor and in his possession, and the defender

No 19.

A disposition by an insolvent person, with an instrument of possession, but *retenta possessione* for several years, found not to transfer the property.