

1704. June 15.

Scot against Low.

Scot sells 20 sheep to Brown, who pays the price. Paterson is employed to deliver the sheep, and thereby getting the possession, he sells them to Low as his own sheep, and receives the price. Brown having obtained repetition of the price paid by him, Scot pursues Low, who bought the sheep from Paterson, for restitution of the sheep, or value: and, there being an act in the process for proving the property of the sheep, at the time that Paterson sold and delivered them, Low, the defender, offered a bill to the LORDS, further *alleging*, That *esto* Scot could prove his property, and that they were delivered to Paterson as libelled, yet the defender having bought them from Paterson *bona fide*, finding him in the possession, which presumes his property, and having again disposed of the sheep, he could not be liable, either to restore them, or the price; because the only action competent to the pursuer was *rei vindicatione*; in which two things must be proved, property on the pursuer's part, and possession on the defender's; at least that *dolo desiit possidere*; in which case, *dolus pro possessione habetur*.

It was *answered*; The defender must be held as possessor of the sheep; because he either has the sheep in his possession, or sold them for the value; and so has the price which comes in place of the sheep, or has employed them for the use of his family.

It was *replied*; *Rei vindicatio* is founded upon the property of a *corpus* or species, only against the possessor, though it pass through a hundred hands, and by lawful titles of sale, or the like, and no intermediate author is liable after the goods are conveyed, though the price remain. Nevertheless, it is acknowledged, that if the defender were *lucratus*, as having sold for a greater price than he bought, or having got the goods freely by donation, and sold for a price, the pursuers might allege, he should be liable *in quantum lucratus*; *quia nemo debet lucrari ex alieno damno*; but, in this case, if the price remain with him, he bought them as dear.

THE LORDS found the libel not relevant, unless the pursuer could allege, that the defender was in possession the time of the citation, *aut dolo desiit possidere*, or that he was *lucratus*.

*Fol. Dic. v. 1. p. 593. Dalrymple, No 48. p. 61.*

1710. January 3.

PRINGLES against GRIBTON.

THE children of the deceased David Pringle chirurgion in Edinburgh, having staid with their aunt, Maxwell of Kirkhouse's Lady, and being minors, they delivered into her custody some rings and jewels of their mother's paraphernalia, and got her husband's receipt and her's, obliging to redeliver. The

No 16.

The buyer of goods *et non domino*. not liable for the value, unless the pursuer could allege that the defender was in possession at the time of the citation, *aut dolo desiit possidere*, or that he was *lucratus*.

No 17.

Found in conformity with Ramsay against Wilson, No 5. p. 9113.

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