

1687. *July.* JOHN GORDON of Davidson *against* ARCHIBALD MENZIES.

No 14.

THEFT of horses being pursued by way of spuilzie against the Lord of the Clan, it was *alleged* for the defender, That the horses were bought in public market, with burgh and hamehald, which must assoilzie from restitution as well as spuilzie, which the LORDS found relevant. But the burgh ought to be solvent.

*Fol. Dic. v. 1. p. 593. Harcarse, (SPUILZIE.) No 865. p. 245.*

1695. *January 22.*

SIR WILLIAM KER of Greenhead *against* SCOT and ELLIOT.

No 15.

A disposition of sheep and other moveable goods, granted for relief of cautionry, with symbolical delivery, found insufficient to bar a posterior sale of the same goods, with actual delivery.

CROGERIG reported the debate between Sir William Ker of Greenhead, Scot, and Elliot, on a disposition granted by Scot of Bowhill to Greenhead, &c. (for relief of cautionry) of some sheep and other goods, as many of them as would satisfy the debt, and a symbolical possession following thereon; if this general right would defend against a posterior sale of the same goods, and an actual tradition thereon? the LORDS found it not sufficient, if considered as a vendition; but some demurred if it might not subsist as an hypothec. But the generality of the LORDS inclined to reject this as unusual in such kind of moveables, especially *retenta possessione*; though *in legato gregis* the same individual *capita* are not requisite, their offspring coming in their room; and actual delivery is only in absolute dispositions. But where it is for security, retention of possession does not import simulation.

1696. *January 7.*—THE case betwixt Sir William Ker of Greenhead, and Scot and Elliot, mentioned 22d January 1695, was again re-considered and decided. And the LORDS found Scot of Bowhill's right of the goods to Greenhead was neither a vendition nor a formal hypothecation, (which may take place in moveables, but then tradition should follow, which was not heré,) though by the subtilty of the Roman law, that pledge called *hypotheca* by them, in opposition to *pignus*, wanted delivery. The law has authorised sundry tacit hypothecs, as of the *invecta et illata in domum seu fundum* for the rent, but a hypothecation of a great flock of sheep, in security of a sum far below their value, *retenta possessione*, is unknown in law; and such pledges were very inconvenient, for there is no register to certiorate the lieges of such impignora-tions when they continue in the impleger's hand. Yet the same hazard attends double alienations of moveables undelivered; for the symbolical tradition, or general edictal intimations of such rights at the market-cross come to the knowledge of few or none, to put them *in mala fide* to buy the same thing over again.

*Fol. Dic. v. 1. p. 592. Fountainball, v. 1. p. 661. & 696.*