

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.