

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 cross, 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.

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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.

Replied for the pursuer; The disposition with a symbolical delivery to the defender *retenta possessione* by the defunct, was feigned, and understood in law to have been for the granter's behoof; and, being a general disposition of plenishing, without relation to an inventory, it gave but *jus ad rem*, which required to be completed by confirmation; so that the subject disposed remaining *in bonis defuncti*, fell plainly under the pursuer's confirmation, which gave *jus in re*. Nor can the defender's possession after the disponent's decease be regarded, because it was but accessory to the former simulate possession, and altogether precarious, which could not hinder creditors to affect the goods as *in hæreditate mobilium jacente*; See June 1665, Procurator-fiscal of Commissariat of Edinburgh and Procurator-fiscal of St Andrew's, *voce* SUCCESSION; and the practise June 15. 1624, Strachan *contra* Scot, *voce* PROCESS.

THE LORDS preferred the executor-creditor.

Here the defender had allowed Bisset's relict to give up the plenishing to the Commissary of Aberdeen, in inventory as *in bonis defuncti*, and became cautioner that she should confirm the same, and make them forthcoming to all parties having interest.

Fol. Dic. v. 2. p. 157. Forbes, p. 508.

* * Fountainhall reports this case :

WILLIAM BISSET, merchant in Aberdeen, being debtor to George Davidson, he granted him a disposition of all his household plenishing, and by an instrument puts him in the possession thereof; but, in regard Bisset was married to his aunt, he suffers both of them to retain possession during their lives; and then, after their decease, he puts himself in the natural possession of the goods disposed. Mr George Liddel being likewise a creditor to Bisset, he confirms himself executor-creditor to him, and pursues Davidson *rei vindicatione* to deliver the goods to him; who founded on his disposition and symbolical possession granted to him for onerous causes, and so had a just ground to retain the goods for his payment. *Alleged*, Though your disposition be anterior to my confirmation, yet I am clearly preferable; for you suffered both the defunct and his wife to continue in possession of the goods disposed, and so *præsumptione juris* your right is simulate, being made *retenta possessione*. *2do*, General dispositions not clad with actual and natural possession, do not divest the disponent of the property, but they remain still *in bonis defuncti*, especially prior to the 26th act 1690, taking away the necessity of confirming special rights; and therefore I having confirmed these goods as lying *in hæreditate jacente*, I have the first complete right; for your disposition is no better than if you had been nominated executor; in which case if I have prevented you, by confirming executor-creditor, I will be preferred. *3tio*, You have plainly distrusted your own right, for you took the relict obliged to confirm the household plenishing, which you would never have done had your disposition and instrument of possession been a good and valid right of itself; and certainly confirmation was necessary *ex concessis* in competition with a creditor, as was found, 15th June 1624, Stra-

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sition had obtained possession after the disponent's death, before the confirmation.

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chan *contra* Scot, *voce* PROCESS; and such general dispositions give only *jus ad rem*, and are but a title *ad inchoandam litem*, but they must always confirm before extract, as was found, June 1665, Procurator-fiscal of the Commissariat of Edinburgh, *voce* SUCCESSION; and the Procurator-fiscal of St Andrew's against Hay of Balhousie, *IBIDEM*. For a general disposition can no more defend against a creditor of the defunct's confirming, than of old a base infeftment not clad with possession defended against a public infeftment, before the 13th act 1693, taking away the difference. *Answered*, There was no pretence for simulation here, the onerous cause of the disposition not being so much as denied, and the symbolical possession fully denuded the disponent of the property; so that he was no more but a *nudus detentor* for my use and behoof. And that such instruments of possession complete the right, is evident from the parallel of a sasine, which is no more but a symbolical tradition, and yet perfects the right; and which is consonant to the Roman law, L. 1. C. De donat. l. 1. § 24. l. 18. D. De acquir. et amit. possess. by which the very pointing at a thing, though the natural possession be not apprehended, is equivalent in law; *nec muto causam possessionis sed alium possessorem ministerio meo facio*. And as to his allowing the debtor's widow to possess, and give up inventory, that can never give advantage to a third party, but only to her, as to whom he dispensed, and ceded his right during her life; and on the 27th July 1669, the Executors of Reidpath *contra* Home, No 39. p. 2792. an assignee, though unintimated, was preferred to an executor confirmed. THE LORDS preferred the executor-creditor to Davidson's disposition.

Fountainhall, v. 2. p. 647.

1739. *January 18.*CHALMERS *against* M'AULAY.

No 254.

Simulation in a disposition by a debtor to his creditor, whence inferred.

A DISPOSITION of the furniture of a house being made by a debtor to his creditor upon the 16th of May, of which, notwithstanding the debtor continued in the possession till the 8th of August, when the disponent took the furniture into his possession; and another creditor having, upon the 2d of August, and before the disponent attained the actual possession, done diligence by horning against the debtor; and, upon the 10th of August, two days after the disponent had attained possession, arrested in the hands of the disponent; in a forthcoming upon this arrestment, wherein a reduction of the disposition was repeated, the LORDS "found the disposition simulate *retenta possessione*, and reduced and decerned in the forthcoming."

The argument for the disponent was, That though rights cannot be effectually granted after even the inchoate diligence of another creditor; yet, being granted before diligence is inchoate, they may be completed after it is inchoate; and that, therefore, the disposition being prior to the horning and arrestment, was preferable thereto, although not completed by possession till after the horn-