

1678. *February 13.* BLAICKWOOD *against* ALEXANDER.

WILLIAM Blaickwood, as having right, by disposition, to certain household-plenishing from Archibald Edgar, pursues Robert Alexander, for delivery thereof;—

Who ALLEGED Absolvitor, because this plenishing being in Archibald Edgar's house, wherein he was tenant to the defender, he had a tacit hypothec therein, for the maill of his house.

The PURSUER ANSWERED, That this hypothec cannot reach further than a term, or year's maill, and doth not hinder the tenant to dispose of his goods in the house; much less can it reach the goods of any other, which even in an express impignoration *a non suo domino* could not affect.

The defender REPLIED, That this plenishing, being the plenishing of the house, is liable for the maill to whomsoever it belongs. *2do.* This did once belong to the tenant, and was in the house, and therefore remains *sub nexo hypothecæ*, so long as they are continued in the house. *3tio.* The pursuer's disposition, with the instrument of possession, doth not transmit the property of the goods, except there had been natural possession; but this disposition being *retenta possessione* by the space of two years, till the defunct's death, law presumes the same to be simulate.

The PURSUER DUPLIED, That these goods being disponed to him before any maill was due, he was thereby proprietor; and the hypothec could not extend to any goods whereof the tenant ceases to be proprietor before the maills be due. Neither doth retention of possession infer simulation, except in the case of escheat-goods, and that by the special statute, 1592. Neither did the disponent's making use thereof, infer simulation, or that the property was returned to the disponent; the pursuer's title not being merely presumptive by possession, but positive by writ, and must require a positive probation that the goods were re-disponed.

The Lords found, That the disposition and instrument of delivery did instruct the property of the goods to the pursuer; and that thereby they were not liable to the hypothec of any posterior maills; and that the retention of possession, in this case, did not infer simulation; neither making of some use of the plenishing, without disposing thereof, did infer recovery of the property, without a positive probation: and therefore decerned the goods to be delivered to the pursuer.

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1678. *February 14.* CALDERWOOD *against* ANGUS.

By charter-party, James Angus became obliged to carry a loading from Leith to Burdeaux, for David Calderwood, with all convenient diligence: whereupon Calderwood pursues Angus before the Admiral for damage upon his delay, and failing in implement of his contract; offering to prove, that he had loaded the ship, by the 20th day of December, with herring and other goods;—that he had often desired the skipper to sail, the wind being fair; and that he came from