

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 there-
in, 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 ex-
press 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, ex-
cept there had been natural possession; but this disposition being *retenta pos-
sessione* 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 dispo-
ner's making use thereof, infer simulation, or that the property was returned to
the disponer; 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 in-
struct 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 pos-
session, 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

his own house, from Edinburgh to Leith, and staid in the defender's house, being to go aboard himself: and that, upon the 2d day of January, he took protest against the skipper for damage, by the loss of his market, especially the herring; which, if they were not landed before Lent, would lose the market.

The defender ANSWERED, That, after the protest, he had used all diligence, and made sail the next day, but was stopped by storm until the 13th day of January, when the pursuer left him, and cited him before the Admiral. Which defence the Admiral thought relevant.

Whereupon the pursuer raised advocation on these reasons: *first*, That the Admiral did wrong, in not sustaining the libel upon the delay before the protest; for though protest may be taken *ad majorem evidentiam*, yet the defender was *in mora et culpa* in not using diligence, when he was first required and when other ships went out. *2do*. That he ought to prefer the pursuer to the probation that the wind was fair; at least given a conjunct probation as to the wind and weather.

The defender ANSWERED, that, in this contract, there being no term nor ly-days, *ubi dies interpellat pro homine*, he was not *in mora* until interpellation; which overly words cannot infer, but must be solemn by instrument. Neither was it competent to the Admiral to give a conjunct probation, which was only *ex nobili officio*. And that there was a storm, is much more positive and pregnant than the being of fair weather.

The Lords found, that interpellation was requisite by instrument, and found no delay till then: and found that the Admiral did no wrong therein, or in sustaining the defence: And therefore remitted the cause.

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1678. *February 21.* OLIPHANT *against* COWPER.

THE tutor of Stormont having drawn a precept upon Cowper to pay to Kinfauns 800 merks, Kinfauns assigns the precept to Laurence Oliphant; who thereupon pursues Gilbert Cowper for payment, who alleged compensation upon debts due by the cedent before the assignation; which was found relevant, and an act extracted: which being called, the defender produced some writs for proving the cedent's debts; the pursuer was content to allow what was produced, and craved decret for the rest.

The defender ALLEGED, That the Ordinary could not advise the writs produced for satisfying the desire of [the] act; but the same behoved to be advised by the Lords, proven or not proven, according to the ancient and inviolable custom; for though the Ordinary may refuse to admit writs not relating to the cause, when offered, to stop circumduction of the term, yet if that which is proper be offered, he cannot advise whether it proves in the whole or in part; which is a great security to the lieges, and hath this advantage to defenders,—that, before the probation come in to be advised by the course of the roll, he may produce further.

The Lords found, That the Ordinary could not advise the production; but declared,—that if the defender would not consent to a decret for the superplus, but delay, the same should be *cum onere expensarum*.

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