

ment was so taken upon mistake, did by a disposition, bearing the narrative foresaid, dispone the fee in favours of the said children; and there was a pursuit intended, at their instance, against the said Earl of Crawford, for poinding of the ground, wherein it was *alleged*, That the mother and grandmother being only liferenters, could not resign the fee, which they had not; and if the pursuers made use of their right from them, the defenders ought to be assoilzied, because the mother and grandmother, by a transaction betwixt the said Earl of Crawford and them, had accepted, the time of the Englishes, a parcel of lands, in satisfaction of the said debts.

THE LORDS found, notwithstanding of the said allegeance, that the pursuers ought to have process for poinding the ground; in respect the mother and grandmother had *de facto* the fee in their person upon the said precept and sasine; and the same being given *indebite*, as said is, they might have been compelled to denude themselves thereof; and therefore might voluntarily, and accordingly did, denude themselves thereof; and the said transaction could not prejudice them, seeing they derived their right from the said persons *qualificate*, in respect of their interest and error foresaid, and they might have been compelled to give the same; and the Earl of Crawford was not *in bona fide* to contract with them, seeing by the bond granted by himself, they were only fiars, and the other but liferenters. *In præsentia*.

Act. Lockhart & Beaton.

Act. Cunningham & Seyinton.

Clerk, ———.

Dirleton, No 338. p. 161.

1676. February 17.

DUNDASS against TURNBULL, and other Creditors to WHITEHEAD of Park.

IN a competition betwixt an infestment of annualrent, and a posterior infestment upon a comprising, the LORDS inclined to find, that the infestment of annualrent was made public by a pursuit of poinding the ground before the infestment upon the comprising; but some of the LORDS not being clear, the case was not decided.

Reporter, Gosford.

Dirleton, No 341. p. 163.

1676. July 1.

The LAIRD OF POWRIE FOTHERINGHAM against LORD BALMERINOCHE.

POWRIE of Fotheringham having obtained a decret of poinding of the ground against the Lord Balmerinoch and his tenants, which he caused the tenants suspend, upon that ground, that they were only liable to be poinded for their yearly tack duty, and the yearly annualrent, conform to the infestment in the lands; it was *answered*, That they were not only liable yearly for the annualrents, but for all bygone annualrents resting unpaid by their master, for which the ground was poindable in law, being *debitum fundi*. THE LORDS did find, That tenants could only be distressed by poinding, in so

No 16.

led to the process of poinding the ground.

No 17.

No 18.

No 18. far as they were due to their master, either for bygones, or in time coming; and that an annualrent out of a barony exceeding the duty of a particular tenant, he ought not to be distressed for more than his duty.

Gosford, MS. No 881. p. 562.

No 19.

Poinding of the ground found effectual against the goods of tenants or of inhabitants within the burgh as *invecta et illata*, but not against those of merchants not being tenants or inhabitants.

1679. February 6. COLLET against The MASTER of BALMERINOCHE.

COLLET, an English merchant, and his factor, pursue the Master of Balmerinoch for breaking up the doors of two cellars which they had taken weekly for ware, and taking out the ware thereof. The defender *alleged*, Absolvitor; because he had a decret of poinding of the ground of certain tenements, whereof the cellars were a part, and therewith had poinded the ware as *invecta* in the tenement. The pursuer *replied*, That the poinding of the ground could only reach the proper goods of the tenants and inhabitants, and not the goods of others, which would mar all commerce; and by the act of Parliament in favours of tenants, they can be poinded only for one term's mail for their master's debt, which can be only understood of his real debts, which are *debita fundi*; for his personal debts could never affect the tenant's goods, but only real debts, by poinding of the ground, which is the case of distress, at is evident by the act 36th, 1469, and in this case, the pursuer's factor compearing, and offering to make faith that the goods were his, and although he had not, he hath *rei vindicationem*, and must be restored. It was *duplied*, That albeit tenants by the foresaid act suspending, would be only liable for what is resting, and one term current, yet otherways the poinding may proceed; and there is no ground for restitution, but only an action against the debtor for repayment. *2do*, This restriction hath never been yet applied to tenements in burgh, which have no fruits, in place of which are *invecta et illata*.

THE LORDS found the act of Parliament to extend to tenements in burgh or landwart, and that the proper goods of the tenants and inhabitants only could be affected by poinding of the ground, and that the pursuer, or his factor, if they made faith that the goods were their own, and belonged to no inhabitant, it did infer a spuilzie, and if not, restitution only.

Fol. Dic. v. 2. p. 96. Stair, v. 1. p. 688.

A. against B.

No 20.

WHERE a disposition is granted with the burden of this or that particular debt, although the creditor in that debt has no infestment, yet the practice is for poinding of the ground to proceed on such debts.

Fol. Dic. v. 4. p. 83. Kilkerran, (POINDING OF THE GROUND.) No 1. p. 405.

Decree of Poinding the Ground for terms to come; see LEGAL DILIGENCE.

See APPENDIX.