

thereof, after they were removed out of his, the pursuer's house, into another, where they were lodged before the defender acquired right thereto, who was not bound to know that any privilege of hypothec was competent to the pursuer; and though a legal hypothec may furnish a title to detain, or even recover goods while extant, no person who hath either *bona fide* acquired and disposed of them, or who never intromitted, although he had a title to intromit, can be overtaken on that head. *2do*, The defender cannot be liable for the rent upon the account of his producing to the messenger the disposition and instrument of possession; seeing, if the same could not debar the pursuer from pointing, he might have proceeded; and if the disposition was good and valid, there is no reason to make the defender liable.

Answered for the pursuer; There being a manifest collusive design in French to cover Drew's possession by the disposition, as appears from the instrument of possession containing a back-tack of the goods set to Drew; the intimation of French's right to the messenger the very same day that Selkrig charged Drew; and the stopping his pointing upon pretext of the disposition; French's attaining possession by getting the key of the house wherein the goods were, back-setting them to Drew, and allowing him to possess, was upon the risk of French, who, having got into possession of the goods, disposed thereof by setting them in back-tack to the common debtor, and debarred Mr Selkrig, is to be held as intromitter therewith, and consequently liable for the rent for which they were hypothecated; since it is by his own fault and fact of setting a back-tack to the debtor, that he did not intromit. It is of no moment to pretend that the pointing was to have been executed in another house than Selkrig's; for wherever a tenant's goods are carried, they are still affected with the right of the hypothec. *2do*, It is trivial to allege, that the defender could not hinder Selkrig to go on in his pointing; because the messenger was actually scared and hindered from proceeding after production of the disposition, least he should incur the guilt of a riot; and it was not the messenger's business to quarrel the disposition, there being a legal remedy.

THE LORDS repelled the defences, in respect of the answers.

Forbes, p. 255.

1723. November.

CUNNISON against STEWART.

In a tack of burgh acres where it was alleged to be the custom to sell the corn directly off the ground to the inhabitants of the burgh, the buyers were not found subjected to the hypothec; and here the tenant had been a year out of the ground, and bankrupt before intenting of the action. See APPENDIX.

Fol. Dic. v. I. p. 418.

No 33.

rent *jura*
hypotheca,
and did back-
let the goods
to the tenant,
found liable
to the pro-
prietor for
the rent,
although the
pointing was
to have been
executed in
a house not
belonging to
him, to which
the goods had
been remov-
ed before
granting the
disposition.

No 34.