

says, that plough goods may be poinded after the debtor's labouring is over, suppose the neighbourhood be still labouring: Why not, *a pari*, should not the pursuer's goods have been privileged against poinding, till his labouring was finished, though the neighbours about had ended theirs?

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Forbes, p. 600.

1724. June 10. & 23.

JOHN GORDON Merchant in Rotterdam, and his FACTOR *against* ROBERT MANDERSTON Merchant in Edinburgh.

MR GORDON being a creditor of Belsches of Tofts, attempted to poind the household ~~pleishing~~ and other moveable effects in the possession of his debtor; but the messenger was stopt by one Craw, as factor for Manderston, who showed a general disposition from Tofts to Mr Manderston of all his moveable goods, dated *anno* 1714.

Mr Gordon insisted against Manderston for payment of his debt, upon the following ground, That the disposition was simulate and fraudulent, Tofts the common debtor having continued in the possession from the year 1714 to the time of the poinding in April 1723.

There was an act before answer pronounced; and at advising the proof it was *pleaded* for the pursuer, That the defender ought to be liable for his debt, it being established by a number of decisions, that such was the effect of stopping of poindings, on pretence of dispositions *retenta possessione*, and that because of the presumed fraud in the disponee, which subjects him to payment of damages to the person defrauded.

It was *answered* for the defender, That though such might be the effect of stopping of poindings upon gratuitous and simulate dispositions, yet where a disposition was granted for an onerous cause, as in the present case, either for payment or security of a just debt, no fraud could be presumed from the disponee's indulgence to the debtor in allowing him to possess; and the disponees afterwards insisting on his claim of property against a creditor who would poind these goods, could not, by any law known with us, subject him to the payment of that creditor's debt. *2do*, The corns of the crop 1722, and the young cattle could not fall under the defender's disposition in the year 1714. *3tio*, The Lord's factor, who appeared at the same time with a design to stop the poinding upon account of the hypothec, did thereafter seize and dispose of these very goods; and therefore the defender could not be liable for them. *4to*, The defender's factor had no special orders to stop the poinding, or produce the disposition.

It was *replied* for the pursuer, That whether the corns or young cattle fell under the defender's disposition or not, yet he was liable, because, under pre-

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A poinding was stopped by another creditor producing a disposition to the goods, although remaining in debtor's possession.

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tence of his disposition, he screened these goods from poinding, and the Lord's factor did not interpose to stop the poinding on account of the hypothec. And *lastly*, Mr Craw, besides his having a factory, was entrusted with the principal disposition, which was sufficient to presume a mandate; and therefore must subject the defender.

THE LORDS found the defender liable, by production of the disposition libelled, granted by the common debtor to him; and found, that the messenger having proceeded to poind and appreciate before the defender produced the disposition, that he was only liable for the value of the goods poinded and appreciated: But found the producing of the said disposition could not have barred the messenger from poinding the corns and hay which was of crop 1722, the disposition being of date 1714; and repelled the defence founded upon the master's hypothec.

A&T. *Ja. Graham sen. & P. Grant.*

Reporter,

Alt. *Ro. Dundas Advocatus.**Lord Milton*, Probationer.Clerk, *Justice.*

1724. *June 23.*—MR MANDERSTON reclaimed against the interlocutor pronounced the 10th of June last, and contended, That it appeared from the proof that his factor had no design to stop the poinding; on the contrary, that it was all a plain contrivance of the pursuer's, by a simulate poinding, to ensnare the factor: For, *1mo*, Craw the factor came not until he was sent for; *2do*, He did not produce the disposition until it was asked for by the pursuer and his factor, and then only gave a copy of it, at the desire of the notary; *3tio*, He refused to take instruments upon producing the disposition; *4to*, He did not compare at the poinding, but only met with the messenger in a public house; *5to*, Several of the witnesses concurred, that the pursuer's instrument upon the pretended stopping of the poinding, was taken after the factor went out of the room; so that he had no opportunity to answer it; *6to*, It was proven by concurring testimonies, that the pursuer told the Lady Tofts to take her plenishing out of the way, for he had no design to poind it; from which it would appear that his design of poinding was all a sham.

It was *answered* for the pursuers, *1mo*, That the factor had been sent for by the Lady Tofts, which shewed that he acted in concert with her. *2do*, Craw said, That he had in his custody a disposition from Tofts to Manderston of his moveables, which gave occasion for the pursuer's asking for it; and Craw said, it was sufficient to stop the poinding. *3tio*, His refusing to take instruments was only to save charges, because he might think that the producing of the disposition was sufficient. *4to*, The parties were about the poinding when the disposition was produced; for the goods were in the hands of the apprisers, and the messenger and notary were extending the schedules. *5to*, Two witnesses deponed that Craw was present when the instrument was taken. *6to*, The witnesses, who swore concerning the pursuer's desiring the Lady Tofts to put her furniture out of the way, say only, That he desired her to put away any thing

in the house that was necessary; which must be understood to be any small things that were necessary for her subsistence.

THE LORDS found, That Craw, the defender's factor, not having voluntarily produced the disposition, but that the same was produced at the pursuer's factor's desire, and when produced, Craw refused to take instruments thereupon; therefore found, That neither Manderston the constituent, nor Craw the factor, were liable for any of the sums acclaimed.

Act. *Ja. Graham & Pat. Grant.*

Adv. *Ro. Dundas Advocatus.*

Clerk, *Justice.*

Edgar, p. 56.

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1737. *January 21.*

CRAWFORD against SIR JOHN STEWART.

FOUND, that a creditor offering to poind a tenant, may be stopped by the heritor, unless the creditor offer sufficient security for the rent, if the term of payment of the rent be not come; and unless he offer payment of the rent, if the term of payment be past.

Found, that a poinder offering security to the heritor as aforesaid, *currente termino*, has right to insist for assignation to the rent and hypothec, and may so qualify his offer; nor will it be a good answer for the heritor, that he cannot be obliged to assign the hypothec in prejudice of his own debt of arrears due to him for former years; for, in general, no such objection is competent against assigning, but to one who has himself affected the subject for that debt, in prejudice whereof he refused to assign.

Found also, that corns are only hypothecated for that year's rent in which they grow.

N. B. The hypothec upon corns lasts as long as the subject is extant. The hypothec upon the stock, called the general hypothec, lasts only till the last term of payment of the rent, and for three months thereafter, as was found in Mr Robert Hepburn's case in January 1726, No 11. p. 6205.

During the currency of the term of payment of the rent, the master may stop a poinder, if security be not offered by the poinder, notwithstanding the poinder leave sufficiency of fruits on the ground, or in the barn-yard, as was found in Scot of Harden's case in June 1736, because, by many accidents, these may not be remaining at the term of payment; but if the term of payment of the rent is past, it is enough if the poinder either offer to pay the rent, or leave sufficiency of fruits behind. See No 20. p. 6216.

Where the offering security is enough, it is not necessary that there be also

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What competent to the heritor upon his hypothec, in the case of a poinding by a creditor.