

No 11.

thec upon the stocking is but for one year at once; still, after the last term of payment of the year's rent, a competent time must be allowed to make the hypothec effectual to the master; which cannot be during the currency of the term, before the rent is due. Now, this time must depend much upon the discretion of the landlord; and neither reason nor custom hath restricted it to so narrow a space as a month after the term of payment; especially considering, that it is the interest of tenants more than of masters, that it continue longer; for it is certain, if the hypothec be found to last but till the next day after the term, it will oblige masters to prosecute their tenants for their rents the very term day, which will be an intolerable rigour; and therefore as it is every where esteemed a well paid rent, when one term is discharged before another comes on, the hypothec ought to last till the term next following the term of payment of the rent.

“The Lords found, That the master has three months after the term of payment, to do diligence upon his hypothec against his tenant and stocking.”

*Fol. Dic. v. 1. p. 416. Rem. Dec. v. 1. No 76. p. 152.*

1745. June 25.

CURRIE against CRAWFORD.

No 12.

After a poiding not opposed by the landlord, he cannot bring back the goods *via facti*.

IN this case the following point occurred, whether or not, after a poiding, the master is entitled, in virtue of his hypothec, within 24 hours *via facti* to bring back the goods.

And at first it was found, ‘That he was;’ on this reasoning, that the right to bring back *de recenti* was as broad as the right to retain, agreeable to the decision, December 11th 1672, Crichton *contra* the Earl of Queensberry, No 9. p. 6203.; and that a contrary judgment would render the hypothec of little use.

But upon a review, the LORDS pronounced a contrary judgment, and found, “That after the property was transferred by a regular poiding, without any opposition then made by the heritor or any in his name, the heritor, or his factor, could not *via facti*, though within 24 hours, bring back the goods.

The case was put of a conventional pledge, poided from the *creditor hypothecarius* in his absence, and no body in his name opposing it; it was thought that, in that case, nothing remained to the creditor but an action. A stronger case was also put, that the goods of a third party are poided for the debt of another; and, even in that case, it was thought that the proprietor could not, after such poiding, recover his own goods *via facti*; and that the right of hypothec could not be stronger than the right of property in the supposed case.

The case of Crichton *contra* The Earl of Queensberry, was also observed to be different from that now in question; for that, in that case, the property was not at all transferred, only the tenant, who had two farms in tack from different heritors, had carried the stock of one of the farms into the other, whereas, here the property is by a proper diligence transferred,

which no man can *via facti* reverse. It further occurred, that pointing was a public act, which excludes all suspicion of collusion, and that there is a method competent to the master, whereby, when he suspects the tenant, he may prevent the hazard of eluding the hypothec, namely, by application to the Judge Ordinary for sequestration; and for these reasons, the former judgment was altered, as has been said.

*Fol. Dic. v. 3. p. 292. Kilkerran, (HYPOTHEC.) No 4. p. 273.*

\* \* \* Lord Kames reports the same case :

A TENANT'S cattle being carried off by a pointing executed in June, the master having no other security for the arrears of the former year's rent, did *via facti* follow the pointer, and bring back the goods without losing a moment. In a process of spuilzie against him at the instance of the pointer, his defence was, that the hypothec upon cattle for the arrears of the former year's rent was still subsisting, and that detention is not only implied in the nature of the hypothec, but also a power of bringing back the goods *de recenti*; otherways a hypothec upon a tenant's corns and cattle would avail little. And the decision, Crichton *contra* The Earl of Queensberry, No 9. p. 6203, was appealed to, where a landlord was justified for bringing back his tenant's goods *via facti*, which under cloud of right were carried off by the tenant himself. The Lords were all of opinion that the decision, Crichton *contra* The Earl of Queensberry, is right. But the doubt was, whether, in any case whatever, goods carried off by a pointing can be seized *via facti*. The case was put, of a pointing for any common debt, where goods that belong not to the debtor happen by mistake to be pointed; yet that even in this case the proprietor can not *via facti* seize upon his goods, but must claim by a process. This consideration determined the Lords to repel the defence.

A pointing is of the nature of a decree; it is a sentence of a competent judge, adjudging and decerning the goods to belong to the creditor, and this decree cannot be taken out of the way otherways than by a proper reduction. This consideration lays open a remarkable difference betwixt a title acquired by private consent, and a title acquired by authority of a Judge. If my goods are stole, I can take them back *via facti*, even from a *bona fide* purchaser; but if the goods be pointed, supposing it even from the thief himself, there are no means of coming at the goods but by a process.

*Rem. Dec. v. 2. No 67. p. 104.*

\* \* \* D. Falconer also reports this case :

THOMAS and John Andrews, tenants to Alexander Fairly of that Ilk, being debtors to Thomas Currie of Annanhill, he pointed the cattle upon their joint possession.

No 12.

The next day after the pointing, William Crawford factor on the estate carried back the pointed goods from off the possession of the pointer, who brought against him an action of spuilzie.

The LORD ORDINARY, 14th February 1744, 'sustained the defence of hypothec, and assolizied.'

A reclaiming bill was presented, and answered, in which several things were pleaded on both sides; but the point argued amongst the Lords was, whether the pointing being complete, an heritor could at his own hand carry back the pointed goods?

*Urged* for the defender, That an heritor had undoubted right of retention, which would be of small use to him, if he could not *de recenti* recover; and so was decided 11th December 1672, Crichton against The Earl of Queensberry, No 9. p. 6203.

For the pursuer, That an heritor could have no stronger right in virtue of his hypothec than an owner by his right of property, who could not at his own hand seize his own goods pointed, as belonging to another; and there was this difference betwixt the present case and that of the decision, that there the goods were not pointed, but carried off by the tenant from one possession to another. "THE LORDS repelled the defence."

Act. A. Macdouall.

Alt. H. Home.

Clerk, Gibson.

D. Falconer, v. I. p. 107.

1764. July 27.

HENRY BUTTER of Pitlochrie, and Others, Creditors of the deceased GEORGE CUMMING, Sub-tenant of the lands of Colpach and Kilmorie, *against* DUNCAN M'VICAR, Collector of the Customs at Fort-William, principal Tenant of these Lands.

No 13.

The landlord found preferable to creditors on the steel-bow-stock of a tenant who died bankrupt.

COLLECTOR M'VICAR having obtained from the Barons of Exchequer a tack of the lands of Colpach and Kilmorie, part of the annexed estate of Lochiel, subset them in May 1758, to George Cumming; and, by the subtack, M'Vicar lets, and in steelbow-tack and assedation sets, to Cumming, 30 milk-cows, 30 yeld cows, 15 stirks, &c. at a certain value; as also, 25 bolls white oats, 5 bolls bear, &c. to be delivered to him under comprisement, at a certain value, of the present standing crop on the ground, immediately before it be cut down; and delivering to him all the labouring utensils now at Colpach, conform to an inventory, and comprised at a certain value; and Cumming was obliged to re-deliver to M'Vicar, at the expiry of the tack, the said number of cattle, of the different kinds, species and qualities, of equal value as he now receives them, or the said agreed price of them; it being optional to M'Vicar to accept of the cattle under comprisement, or the agreed price, upon giving notice of his