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The Lords found, that the defenders, as lawful and onerous creditors to Thomas Thomson the tenant, having *bona fide* received the sheep in payment of their just debts, are not obliged to restore the sheep, or their values, to the pursuer, by virtue of his hypothec; in regard it appeared, that goods sufficient to pay the current year's rent were left upon the ground, which afterwards were intromitted with by the pursuer; and repelled the allegeance, that the same were poinded for former arrears, in regard the hypothec does extend to no more than the current year's rent; and, therefore, that the pursuer could plead no preference for former years against other lawful creditors, but according to his diligence.

C. Home, No 28. *p.* 52.

*** See Pringle against Scot, No 20. p. 6216.

No 36.

1744. *February.* A. *against* B.

The heritor having a hypothec, and after the term is past, detaining the tenant's goods against a poinder, was thought not bound to assign, but only to discharge on payment; nor will the master be found fault with, should his servants, upon general order, stop the poinding, although payment be offered; because the heritor is not bound to be always present to grant a discharge, and it is the creditor's business to apply to the heritor and offer payment of his rent before he proceed to poind; and, therefore, the heritor pursued, as having unlawfully stopped a poinding on pretence of his hypothec, notwithstanding payment was offered to those, who, in the heritor's absence, stopped the poinding, on their giving a discharge, "was assoilzied, and the pursuer condemned in expenses."

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

No 37.

1748. *June* 2. Sir John Hall *against* Nisbet.

In an action at the instance of Sir John Hall of Dunglass *contra* Mr Nisbet of Dirleton, for payment of the debt in his horning, on this ground, that Dirleton had stopped his poinding in the month of January, notwithstanding an offer made of caution for payment of his rent, the Lords found, November 20. 1747, "That the rent being barley, payable in kind, the offer of a responsible man as cautioner for payment of the farm-duty (or victual rent) *currente termino*, was not sufficient to entitle the pursuer to proceed in his poinding of the barley hypothecated for the defender's rent; nor to debar

the defender upon his right of hypothec from stopping the pursuer's poinding." No 37.

And on June 2. 1748, they "adhered, with this variation, that the poinder, not having specifically offered to pay the barley of the growth of the ground, or to separate as much for that end as was due, the poinding might be stopped."

Fol. Dic. v. 3. p. 291. *Kilkerran*, (HYPOTHEC.) *No* 5. *p.* 274.

*** D. Falconer reports the same case:

SIR JAMES HALL of Dunglass was creditor to John Martin by bond for L. 500 Scots, payable at Candlemas 1704.

John Martin became tenant to William Nisbet of Dirleton, his rent being partly payable in victual betwixt Yule and Candlemas.

Sir John Hall, heir to Sir James, attempted to poind Martin's corns in January 1744, but was stopt by Dirleton's factor, upon his master's hypothec; and offering caution for the farm-duty and money-rent, it was refused; whereupon he pursued Dirleton for the debt.

Pleaded for Dirleton, That when rent is paid in victual, the master is not obliged to accept of caution, because he is entitled to receive for his farm the produce of the ground; and therefore he may detain the whole corns till he is paid.

Pleaded for the pursuer, The caution offered was to pay the rent; and if that behoved to be with the corns growing on the farm, the caution was a security for delivery to him of these corns.

For Dirleton, If he had suffered the corns to have been removed, he could not have been sure any part would have been again delivered to him; and he cannot be made liable for not suffering it, upon a caution which, whatever sense the pursuers now put upon it, perhaps in that case they would have pretended was sufficiently satisfied by making up to him *id quod intererat*.

THE LORDS, 27th November 1747, 'found the offer of finding a responsal man as caution for payment of the defender's farm-duty in victual-rent and money-rent *currente termino*, was not sufficient to entitle the pursuer to proceed to his poinding John Martin's corns hypothecated for the defender's current rent of victual, nor to debar him upon his right of hypothec to stop the pursuer's poinding.'

On bill and answers, observed that the term of payment was come, so that the *ratio decidendi* ought not to be laid on the poinding being attempted *currente termino*; but that after the term the defender was not obliged to suffer the corns to be removed, unless instant payment had been offered, by threshing out, and delivery to him.

THE LORDS found, that upon the interposition of the defender's chamberlain to stop the poinding, till his master's rent, which was payable in victual, was

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satisfied and paid, the offer of finding a responsal man as caution for payment of the rent, without offering to set aside as much of the victual as would satisfy the rent, was not sufficient to entitle the pursuer to proceed in his poinding, nor to debar the defender's chamberlain, upon the right of hypothec, to stop the poinding.

Reporter, *Drummore*. Act. *R. Craigie. W. Pringle.* Alt. *H. Home.* Clerk, *Hall.*

D. Falconer, v. 1. *No* 252. *p.* 339.

*** This case is also reported by Lord Kames.

By a tack from Dirleton, John Martin became bound for thirty-six bolls two firlots bear, and four bolls oats, of the growth of the lands; which in common form he was taken bound to deliver betwixt Yule and Candlemas. Execution having been taken out against him by Sir John Hall, a creditor by bond, a poinding was begun of the corn-stacks in the yard, 16th January. Dirleton's chamberlain interposed for behoof of his master, to secure the current year's rent. The poinder offered to find caution to pay the rent when it should become due. This offer was refused by the chamberlain for the following reason, That as Candlemas was approaching, and as Dirleton was entitled to have the *ipsa corpora* of the corns for his rent, he could not be bound to accept caution in place of the *ipsa corpora*; especially as this offer can bear no other construction but to pay money in place of victual. The interruption of the poinding produced a process against Dirleton for damages, who put in the following defence, That his chamberlain acted legally in stopping the poinding, seeing there was no offer to set aside corn sufficient for the year's rent.

And, in support of this defence, the following topics were stated. Originally every thing upon a man's estate was considered to be his property, horses, corns, &c. without distinction, whether possest by himself or his tenants; nay, even his tenants were considered in some measure as his property, and could be transferred with the land. But bondage wore out by degrees; and, after a tenant came to be considered as a free man, and capable of holding property of his own, it was reckoned a hardship that his goods should be subjected *per aversionem* for payment of the landlord's debts, which was every day done by the brief of distress. This was remedied in part by the act 36, Parl. 1469, statuting, 'That from henceforth the poor tenant shall not be distressed for 'the lord's debt, further than to the extent of a term's mail:' and even this power, restricted as it is, has since gone into desuetude, most reasonably.

But there is one consequence from this original constitution, which still remains *in viridi observantia*. Though the property of the landlord in the tenant's goods came to be restricted as in the said statute, the landlord is still considered as proprietor of all the corns growing on his estate, so long as any of the rent of that crop remains due to him. It is upon this foooting that an

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action is competent to the landlord against all intromitters with the tenant's corns; which is properly a *rei vindicatio*, whereby he can call back the *ipsa corpora* of the corns, or any part till the last farthing of his rent be paid. Whence it follows, that where the rent is payable in kind, the tenant has no access to sell a boll of corn till the landlord's rent be paid; this boll is claimable by the landlord as his property, and he can demand it *a quocunque*, as part of his rent.

The regulation must be different where the rent is payable in money. A tenant cannot raise money but by making sale of his corns and stocking; and it would be absurd to give the landlord a privilege to bar this commerce, and with the same breath to oblige his tenant to pay him money. This would be the Egyptian method of exacting bricks without affording straw. All the landlord can justly do in this case, is to exact caution *currente termino*, where the tenant is disposing at large, or where the tenant's creditors are carrying off his effects.

But when the rent is payable in kind, there is no instance of obliging the landlord to accept security, even when the poinding is *currente termino*; and it would be robbing the landlord of his property to oblige him to accept security: the corn is his property to the extent of the rent of that year: he draws his rent out of that crop, and no mortal is entitled to touch the crop till his rent be set aside. And taking the contract in the strictest sense, that the tenant is not bound to deliver till Yule, or perhaps till Candlemas, it is still the landlord's privilege to have the first corns that are threshed set aside for his use, to be delivered to him when the term shall come.

Hence it must appear a downright inconsistency, to oblige the landlord to accept caution where his rent is payable in victual. Ler us consider that the tenant is bound to deliver the victual of that very possession as his rent. Payment, therefore, in money will not answer, nor in victual of the growth of other lands. What place is there then for caution? Were sufficiency of victual left to answer the rent, there might be some pretext; but to oblige the landlord to accept caution, where the poinder runs away with all the victual, is, in other words, to say, that the tack is not binding, and that the landlord cannot demand the rent stipulated.

In the *second* place, as the victual was deliverable betwixt Yule and Candlemas, it seems clear that the landlord may claim as his rent, any corns threshed after Yule. When victual-rent is deliverable betwixt Yule and Candlemas, no more is intended by this *laxamentum temporis*, but to give the tenant time to thresh out his corns. If he keep them in the yard, the landlord has nothing to say before Candlemas; but if they are threshed out, what interest or what pretext can the tenant have to detain them from his landlord after Yule? Now, as the creditor could not compleat his poinding without threshing out the corns, the defender says, that these corns, when threshed out, were his property to the extent of his rent. The term of delivery was come, being af-

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ter Yule, and therefore he could lay hold of the corns as his property, and was not bound to accept any caution.

'Found, that upon the interposition of the defender's chamberlain to stop the poinding, till his master's rent, which was payable in victual, was satisfied and paid, the offer of a responsal man as caution for payment of the said rent, without offering to set aside as much of the victual as would satisfy the rent, was not sufficient to entitle the pursuer to proceed in his poinding, nor to debar the defender's chamberlain, upon the right of hypothec, to stop the poinding.'

Rem. Dec. v. 2. No 90. p. 149.

1785. *March* 8. Andrew Blane *against* David Morison, and Others.

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A landlord having granted to a tenant power to subset, found to have no hypothec over the effects of the sub-tenants. But there were particular circumstances in the case.

David Morison and others possessed the estate of Kerse under Ronald Chalmers, the tenant, who had powers to subset; and to him for many years they paid their rents, without any challenge from the landlord.

Their tack-duties for the year 1782, which were due at Martinmas, had in this manner been paid to the principal tacksman before 23d January 1783, at which period, Mr Blane, the factor on this estate, applied to the Sheriff-depute for a sequestration of their crop and stocking, in security and payment of the hypothec-rent due to the landlord.

The question thence arising having been brought into the Court of Session by bill of advocation, Mr Blane, the factor,

Pleaded; The fruits or yearly produce of a farm, as well as the effects which have been brought into it, are viewed by the law of Scotland, as the property of the landlord, and unalienable, until the stipulated rent has been paid to him. He is accordingly provided with an action, while these are extant, for converting them into money for his payment, to the exclusion of every other person; and when they are no longer to be found, he is warranted to pursue the intromitters, for their value; Kame's Law Tracts, 4. p. 151, 152; Erskine, b. 2. tit. 6. § 56; Voet, *In quibus causis pignus tacite contrahitur;* Dict. *voce* Hypothec; Durie, 5th March 1630, Fowler *contra* Cant, No 25. p. 6219.

Nor are sub-tenants exempted from this general rule. Where, indeed, a landlord has signed as consenter to the sub-lease, or where he has accepted from the sub-tacksman the rents specified in it, there might be some reason for holding effectual against him the performance of an agreement he has so explicitly recognised; and to such cases any authorities which can be quoted for the sub-tenants are alone applicable. But a mere liberty to subset, whether particularly expressed, or implied from the endurance of the principal lease, cannot be attended with the same consequences. A landlord is thereby debarred from insisting on the personal residence of the principal tacksman; but in every other