

No 9.

*** Stair reports the same case.

JOHN PARK pursues Ryslaw for a spuilzie of sheep, who *alleged* Absolvitor, because the sheep were pastured upon his lands, and so they were hypothecated for his rent, and were carried away privately in the night by his tenant, and sold by him to the pursuer, his good-brother, who had them near the Border, to have carried them over to England; and, therefore, the pursuer got warrant from the sheriff to bring them back. It was *answered*, *Non relevat*, because though heritors may detain the tenant's goods on the ground for the rent, when there doth not sufficiency of goods remain, yet they may not summarily, without order of law, take them out of the possession of persons who bought them, otherwise all commerce would be marred; and the sheriff's warrant, without process or citation, is of no importance, for the most he could have done, was, to arrest or secure them where they were.

THE LORDS found that the pretence of the hypothecation, and of the sheriff's warrant, might excuse from the rigour of the spuilzie, but that it was wrongous intromission, and that neither sheriff nor master of the ground could warrantably bring back the goods *ex intervallo*, except it had been recently after the removal thereof, but that the buyer was liable, as intromitter, for the year's rent, if there were not sufficient goods beside; and to shun multiplicity of processes, they ordained what would be thereby due to the defender as master of the ground to be instructed, that upon payment thereof, the sheep might be restored.

Stair, v. 2. p. 412.

1724. November 19. & December 1.

ARCHIBALD BROWN, Butcher in Edinburgh, *against* SIR JOHN SINCLAIR of Stevenson.

No 10.

The landlord has no hypothec on cattle put into his tenant's park to graze.

SIR JOHN, in the year 1720, set a grass-park to one Plummer, who falling in arrear of rent, Sir John was about to poind some black cattle which he found pasturing in the park; to prevent which, Plummer gave Sir John 25 of them, at the rate of L. 50 Sterling, for which he got a receipt to account of his rent.

The cattle belonged to Archibald Brown, who had put them to grazing for that season in Plummer's parks. About three months after Sir John had carried them to his own Parks, Brown came and demanded them; but Sir John had, before that time, sold off 12 of them; upon which Brown pursued Sir John for delivery of the 13 that were extant, and for the price or value of the 12 that had been sold.

The defences insisted on were, *imo* as to the 13, That Sir John had bought them *bona fide*; for they being in Plummer's possession, the property of them was presumed to be his, Stair, l. 1. tit. 9. § 17. *2do et separatim*, Sir John

was entitled to detain the cattle in virtue of his right of hypothec for the rent of the park still owing, Hay against Elliot, March 29. 1639, No 26. p. 6219. 3tho, As to the 12 which were sold *bona fide* by Sir John, there could ly no action against him for them, according to Lord Stair, B. i. T. 7. § 11.

Answered to the first, That as the property was not conveyed to Plummer, he could not transfer it to Sir John, and therefore Brown, the proprietor, could vindicate his cattle. To the *second*, That in *prædio rustico*, the fruits of the ground, such as corn, &c. were only subject to the master's hypothec; and it would be absurd to plead, that beasts which are put in for pasture to grass-parks near Edinburgh, or any populous place, should be liable to be carried off by the master for his rent, since a landlord might at that rate set his grass to the greatest bankrupt without any danger. Is was *answered for the third*, That Sir John being possess of the price that came in place of the cattle sold or consumed, ought to make it forthcoming, in the same way as he could have been obliged to deliver the cattle, in case they had been extant.

THE LORDS found Sir John liable for the 13 oxen found in his parks by Brown at the time of the citation, according to the price they were sold by Plummer to Sir John, unless Brown offered to prove a greater value at the time, and allowed Brown to prove the property.

December 1. 1734. THE LORDS found Sir John not liable for the value of the 12 cattle which were disposed on when Deacon Brown claimed them.

Act. Adam Watt. Alt. Mich. Menzies. Reporter, Lord Polton. Clerk, Murray.
Fol. Dic. v. 3. p. 293. Edgar, p. 123.

1726. *January.*

MR ROBERT HEPBURN, Writer to the Signet, *against* GEORGE RICHARDSON.

WILLIAM JAMIESON had a tack from Mr Robert Hepburn, whereby he was bound to pay him a silver tack-duty for every year of his possession, the first half at Martinmas, the other half at the Whitsunday thereafter. George Richardson, a creditor of Jamieson, upon the 10th June 1724, carried off his cattle and other stocking, by virtue of a pointing, leaving nothing on the ground but the fruits that were growing. Upon this, Mr Hepburn, as landlord, intented an action against the pointer; concluding, that he having intromitted with the pursuer's tenant's goods, though in virtue of a pointing, was liable for the whole rent 1723, the goods pointed standing hypothecated for that year's rent. The defence was, That there being a hypothec upon the stocking only for one year's rent, the hypothec for the year 1723 ceased at Whitsunday 1724; and the defender having pointed that stocking near a month thereafter, is secure. To which it was *answered*, Though the hypo-

No 10.

No 11.

The master's hypothec upon his tenant's stocking subsists three months after the year's rent falls due.