No 10.

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. 3*tio*, 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. 1. 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 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 possest 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.

No 11.
The master's hypothec upon his tenant's ftocking subsists three months after the year's rent falls due.

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 poinding, leaving nothing on the ground but the fruits that were growing. Upon this, Mr Hepburn, as landlord, intented an action against the poinder; concluding, that he having intromitted with the pursuer's tenant's goods, though in virtue of a poinding, was liable for the whole rent 1723, the goods poinded 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 poinded that stocking near a month thereafter, is secure. To which it was *answered*, Though the hypo-

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 poinding 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 poinding, 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 poinding, 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, poinded 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 poinded for the debt of another; and, even in that case, it was thought that the proprietor could not, after such poinding, 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,