tit. 11. § 4.; Spot. Pract. p. 93. And, with respect to the argument, that a master may set a flock of sheep, for instance, to his tenant, which could not be poinded for his debt, it was *answered*, that there could be no doubt various contracts might be entered into with a tenant; but, if he was not only to have the possession, but likewise the profits and offspring of the flock, such a bargain could not cover these goods from diligence at a creditor's instance. Stair, book 3. tit. 2. § 7. No 3.

THE LORDS found, That there was no steelbow legally established in this case, and therefore repelled the defence.

Fol. Dic. v. 1. *p.* 416. *C. Home, No* 49. *p.* 87.

1740. *Jan.* 11. TAYLOR *against* DAVIDSON and BROOMFIELD. No 4.

WHERE a tack was granted for fifteen years, commencing at Whitsunday 1740, for the pasture ground, and for the arable land at the Martinmas thereafter, and the tack-duty payable by way of foremail rent, the one half at Martinmas 1740, the other at Whitsunday 1741, and so furth termly; the crop reaped in harvest 1748 was found to be subject to the hypothec for the rent due at the Whitsunday preceding, and a petition against the interlocutor of an ordinary so finding, 'refused without answers.'

N. B. In reality the first years rent, though by agreement payable at the first Martinmas and Whitsunday after the entry, is paid for the year in which the first crop grows.

Fol. Dic. v. 1. *p.* 291. *Kilkerran,* (HYPOTHEC.) *No* 8. *p.* 276.

1765. *June* 20. EARL of MORTON *against* SOMMERVILLE. No 5.

Sequestration by the landlord will have effect in competition, only to the extent of his right of hypothec.

GEORGE SOMMERVILLE being creditor to Alexander Ranken, a tenant of the Earl of Morton's, in two different sums, executed two poindings of his growing corns upon the 2d and 14th of June 1763.

The Earl of Morton having brought an action against Ranken for his rents 1760, 1761, 1762, and 1763, applied for a sequestration of the whole growing corns, which was granted, and executed upon the 3d of June; and an arrestment laid by his Lordship, in the hands of the sheriff-clerk, on the same day.

Upon the 16th of June, the Earl recovered decree for the rents; and, upon Ranken's death, which happened soon after, brought an action of forthcoming, in which he called his representatives.

Afterwards, he obtained a warrant from the sheriff for selling the corns by auction, which was carried into execution upon the 30th of August, the corns

No 5. being actually sold, and the prices paid in to the sheriff-clerk, notwithstanding a protest taken by Sommerville, that these steps should not hurt his poinding, or prevent him from ascertaining the quantity, by threshing and measuring the corns when they should be cut down.

In the forthcoming, the sheriff preferred the Earl of Morton; and Sommerville advocated the cause.

Pleaded for Sommerville: To found a sequestration, it is necessary that the subject be in court, and affected by different claimants; but the Earl of Morton had used no diligence for affecting the growing corns; and, therefore, the sheriff ought not to have sequestrated them, especially as the current rent was fully secured by the hypothec.

But allowing the proceeding to have been regular, the sequestration could go no farther than to secure the effects from embezzlement, for the benefit of all parties having interest; it could not transfer the property, or bar the diligence of creditors. And the arrestment, an inchoated diligence, could not compete with a poinding.

Answered for the Earl: Originally, the tenant's corns could be taken in execution for the debt of the master, who still retains his interest, so far as that they are hypothecated for his rent; sequestration is a summary remedy, intended to enable the master to operate his payment, and must have the effect to exclude all others from using diligence.

Whatever might be the effect of a poinding in competition with an arrestment, no preference can be pleaded on the poindings in the present case, because they are irregular in several respects.

For, 1*mo*, Poinding could not be executed with effect, after the sequestration.

2*do*, Though it is now established, that growing corns may be poinded, yet that is only to be understood of corns come to such a degree of maturity, as that a judgment may be formed of their value; else the two apprisements would be elusory, and the debtor exposed to have effects disposed of, far above the amount of the debt.

3*tio*, The poindings never were completed, the common debtor having died before the corns were cut down; and consequently before they could be threshed out or measured.

And, upon this head, it was observed, that poinding is a judicial sale for payment of the debt, in which several regulations are laid down to secure against the rapacity of creditors: Thus, it is required that the goods be valued two different times, and by different appretiators: That the poinding shall not proceed to a greater extent than the amount of the debt, at least that the surplus be restored: That the goods be offered back to the debtor at the apprised value; and only adjudged to the creditor upon his refusing to take them at that rate.

No 5.

But none of these regulations can take place in the poinding of growing corns, if it shall be held to be completed before they are threshed and measured. In that view, the second appretiation is no check upon the first; for no man can form a judgment upon a handful of unripe stalks carried to the market-place: The messenger cannot proportion the goods poinded to the debt, because the value cannot be known with any degree of certainty; nor can the debtor redeem at the apprised value, since he can neither foresee the quantity which will be produced, nor ascertain the value of it.

Hence it follows, that a poinding of growing corns is not complete and consequently does not transfer the property, till after the threshing and measurement; and so the court seems to have viewed the matter in the case, 24th Nov. 1677, Lord Hatton supplicant, *voce* POINDING, where, in laying down the rules to be followed in poindings of this kind, they in particular directed the threshing and measuring of the corns as a necessary step; and, in the case, November 1688, Skene *contra* Ld Carlourie, *voce* POINDING, they expressly found a poinding incomplete, where that solemnity had been omitted.

Since then, the property was not transferred while the common debtor lived, the diligence cannot be completed after his death; and things must remain in the situation he left them, till titles be made up by the heir or by a creditor.

Replied for Sommerville; The form used in poindings, and which is the same in poinding growing corns, as in other cases, necessarily implies that the property is transferred before the measurement is practicable. The messenger offers the subject back to the debtor at the apprised value, which would be absurd, unless he had also power to transfer the property to the creditor.

The after measurement is not *de essentia* of the poinding; it is necessary, indeed, for ascertaining the precise quantity; but the property is vested at the begining, by the sentence of the messenger; Bankt. IV. 41. 4.; Forbes, 11th March 1707, Erskine against Boswal, *voce* POINDING.

Upon these principles, the first poinder was preferred, though another had got the start of him in threshing and measuring; 22d Dec. 1698, Cathcart against Paton, *voce* POINDING.; June 1727, M'Whirter against Hamilton, IBIDEM.

It is not a clear point that the debtor could retain the corns upon an offer of the debt, at any time previous to the measurement; as the creditor runs the risk of the fall of the markets, perhaps he might be found intitled to the benefit of their rise. But, whatever may be in that, there is no difficulty in supposing the property to be transferred in the same manner as in an adjudication, during the course of the legal, or in a sale under reversion, while the term is unexpired; indeed, the case is precisely similar to a voluntary sale of growing corns made by a sample, and completed by symbolical delivery.

But, though it should be held that the property is not fully transferred, till

No 5. after the measurement, still the poinding may be completed by that solemnity, even after the death of the common debtor.

An adjudication does not divest the debtor till infeftment be taken; but an adjudger may infeft himself after his debtor's death. An arrestment does not carry the subject, without a decreet of forthcoming; yet forthcoming may be pursued, after the death of the common debtor. An assignation is not effectual without imitation; but the death of the cedent does not preclude the assignee from completing his right.

And there is a material distinction between the case where there is a personal conclusion against the debtor, and where no more is in view than to affect his subjects. An arrestment refers nothing personal against the debtor; and, therefore, forthcoming may be pursued, notwithstanding his death. The same observation may be applied to poindings of the ground; and, as the reason is the same in personal poindings, the law cannot be different.

Duplied for the Earl: There is some degree of impropriety in the messenger's offering back the pointed corns to the debtor, before the value can be ascertained, and, indeed, before he is finally divested of the property; but this practice has been adopted by messengers from the usage in other poindings, without attending to the meaning of it.

It is not unreasonable that a preference should be given to the creditor who has first begun to take the effects of the debtor in execution, by having them appretiated while on the ground, if he be not in any culpable *mora* of completing the poinding by measurement; but it does not follow that the property is transferred by that preliminary step.

And there is a clear fallacy in the examples which are adduced of adjudications completed by infeftment, arrestments followed by forthcoming, and poindings of the ground put in execution after the death of the debtor. In these cases, every thing was complete, so far as respected the debtor. In the first, the sale is completed by the decree of adjudication; the arrestment is a completed diligence *in suo genere*; and the poinding of the ground, when once obtained, is followed out against the lands without regard to the proprietor.

The Lords ' advocated the cause; found the sequestration and arrestment inept, except in so far as concerns the hypothec; repelled the objection to the poinding on account of the immaturity of the corns pointed, at the time of the poinding; and found that the same was competent in the month of June, and the poinding thereby lawfully inchoated.

Memorials were ordered upon the point how far the poindings could be completed after the death of the debtor.

The substance of these memorials has been already stated; and, upon advising them, the Lords found, that George Sommerville can have no preference by his poindings.

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This interlocutor proceeded entirely on the footing, that the poinding was only inchoated in June, and that it could not be completed after the death of the common debtor. *See* POINDING.

Act. *Montgomery.* Alt. *Wight.*

G. F. *Fac. Col. No 9. p. 212.*

1784. *March* 10. SIR ARCHIBALD GRANT *against* WILLIAM SHERRIS.

No 6.
A landlord may, *currente termino*, not only sequestrate, but likewise roup the hypothecated effects of his tenant, if insolvent.

SHERRIS, the tenant of a farm belonging to Sir Archibald Grant, had been, in an action founded on the act of sederunt 1756, decerned to remove from his possession at Whitsunday 1783; but having previously sown his own corn, he became entitled to reap the crop of that year, for which one half of the rent was payable at the ensuing term of Martinmas, and the other at Whitsunday 1784.

In November 1783, the landlord presented a petition to the sheriff of the county, setting forth, That the tenant had already sent part of his corn off the farm, and craving warrant "for immediate sequestrating, and also rouping as much of the crop as would pay the rents claimed, credit of the roup price being given to Whitsunday next, the last conventional term of payment."

The sheriff ordered the petition to be served on the tenant, who failed to make any appearance; upon which he awarded the sequestration, but confined his warrant for rouping to such part of the corn as was equivalent to the rent "already due and payable."

The landlord brought the sheriff's judgment under review by bill of advocation; when the following interlocutor was pronounced by tho Lord Ordinary on the bills: "Having considered this bill of advocation, the LORD ORDINARY is of opinion, that the sheriff of Aberdeen has committed no iniquity; and therefore refuses the bill."

The landlord reclaimed to the Court; but no answers to his petition were given in, the tenant having still declined to appear.

The Court desired, of the sheriff's-depute of the several counties, information concerning the practice in such cases. From their reports it appeared, that, in general, it was not customary to grant warrant for selling the subjects of the hypothec before the term of payment, though in some counties this had been done. The interlocutor of the Court, which did not seem to have been influenced by these reports, was the following:

"THE LORDS remit to the Lord Elliock, Ordinary, to remit the cause to the sheriff, with this instruction, That he grant warrant to roup as much of the corns sequestrated as shall be sufficient to pay the whole hypothecated