

## S E C T. II.

## Extent of hypothec upon stocking.

1672. December 11. CRICHTON against EARL of QUEENSBERRY.

WILLIAM CRICHTON pursues the Earl of Queensberry for spuilzie of a flock of sheep, who *alleged* absolvitor, because the sheep having been pastured upon lands which the pursuer had in tack of the Earl, and he having removed his goods off the ground before Whitsunday, without paying the Whitsunday's rent, and having driven the same to another room that he hath wadset of the Earl, he did *de recenti* within 24 hours, upon the first notice of the removal, cause drive the goods back to the ground again, which he might lawfully do, by the privilege of all masters of the ground who have a hypothec on the crop and stock of the ground for the rent. It was *answered*, That this hypothec, albeit it might allow the master of the ground to detain the goods on the ground, yet not to drive them back off another ground, which ought to have been done, not *via facti*, but by some sentence or authority.

THE LORDS found the defence relevant, for they considered that the power of retention without recent recovery, would be of no use, unless the master kept a watch upon his tenants, which were impossible.

*Fol. Dic. v. 1. p. 417. Stair, v. 2. p. 132.*

No 8.

Hypothec of the goods on the ground, for the proprietor's rent, was found to give him right not only to retain the goods there, but to bring them back, if carried away.

1676. February 9. PARK against COCKBURN of Ryslaw.

A TENANT having sold nine score of sheep, and the same being carried off the room where he was tenant; the master of the ground, by warrant of the sheriff, as having therein the right and interest of a tacit hypothec, did seize upon the same.

THE LORDS found, That neither the master nor the sheriff, without citing the party, could seize upon the said goods, not being upon the master's ground, nor give warrant to that purpose; and yet seeing *quævis causa excusat a spolio*, they restricted the pursuit to wrongous intromission, and allowed to the master his defence for retention of the goods, until he should be paid of his year's duty.

No 9.

Reporter, *Newbyth.*

Clerk, *Hamilton.*

*Fol. Dic. v. 1. p. 417. Dirleton, No 329. p. 158.*

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