

No 47.

might poid. And this defender finding that he wanted a warrant, might stay that unorderly pointing, and for doing whereof cannot be convened as a deforcer. THE LORDS found, no pointing could be executed, while the officer had recovered a warrant to make open doors; *item*, the LORDS found, the landlord of the house might stay the pointing, while he were satisfied of a year's mail, owing for the house, in doing whereof he committed no deforcement; but that he could not stay the pointing upon pretence that any more terms were owing to him; and albeit he at the pointing stayed the same, upon allegiance, that three terms mail were owing to him, yet the Lords found no deforcement thereby, albeit he might not stay the pointing in law, for any more terms mail but a year only, seeing the party pointer offered not security to him, for that year's mail, for which he might have stayed the same; and the offer to pay a term's mail by the pointer was not found enough. See LETTERS OF OPEN DOORS.

Clerk, *Gibson*.*Durie, p. 545.*

No 48.

*Omnia invecata et illata stand hypothecated to the landlord for his rent in urban tenements, nor can the tenant remove his furniture, unless he find caution for a year's rent.*

1702. June 12. COUNTESS of CALLANDER against CAMPBELL.

THE Countess of Callander having set a lodging in Edinburgh to Sir George Campbell of Cesnock, and he dying within the year, his lady possessed the house till the Whitsunday thereafter, with her family, and offering then to remove her plenishing, the Countess obtained a warrant from the bailies to arrest and sequestrate the same till the year's rent were paid; but on application made by the Lady Cesnock, the bailies took off the sequestration, and ordained the household furniture to be delivered up to her, she finding caution to pay the year's rent, in case she should be found liable to do the same in law. Of this ordinance the Countess gave in a bill of suspension as iniquous, seeing it tended to loose the security of all masters and landlords, and to enervate their tacit hypothec upon the *invecata et illata*; and whatever might be said if caution had been simply offered for the house-mail, yet this conditional and qualified offer to pay, if she were liable in law, was wholly elusory, and would engage the Countess in a tedious and expensive plea to prove the passive titles, &c. *Answered* for the Lady Cesnock, she was neither the taker of the house, nor liable for the rent; that being a debt upon her husband, and his representatives, who were solvent, and that the plenishing was her own in property by a disposition; *2do*, The defunct had given his ticket for the rent, which was a sort of novation, and passing from the legal hypothec, and a relying on his personal security; *3tio*, Some of the goods arrested are a part of her daughter Captain Gordon's Lady's wearing-clothes, who coming only for a visit to her mother, *et non animo remanendi*, her clothes could not be a subject affectable by the hypothec. *Replied*; It is an uncon-

troverted principle, both in the common law and ours, that all goods brought into houses within burgh are under a tacit hypothec to the heritor for security of his rent, as appears from *l. 4. D. De pactis*, and observed by Dury to have been so decided, Dick against Lands, No 47. p. 6243.; otherwise landlords would be very insecure, it being on the faith of the *invecta et illata*, that they set their houses, without examining whose property they are; yea, in grass rooms, it has been extended to goods put in only for pasture; but here the plenishing belonged to Sir George, who took the house, and his disposing it to his Lady cannot take away the hypothec; and as for his ticket, it was no innovation, but only a liquidation of the rent. THE LORDS inclined to find the sequestration of the plenishing could not be loosed without caution for the rent simply, without any such quality and condition as was annexed here, and that the furniture *et omnia invecta* stood hypothecated for the house-mail; but in regard it was thought hard to detain the daughter's wearing-clothes on that ground, the LORDS superseded to give answer to that point, till it were tried, if the plenishing besides would be sufficient to pay the rent, without the wearing-clothes.

*Fol. Dic. v. 1. p. 419. Fountainhall, v. 2. p. 183.*

1745. July 9. JACKSON against LIND of GORGIE and FALA.

DAVID JACKSON sadler in Edinburgh being creditor to Helen Ready, a poor woman there, poinded her household goods; when compearance was made for William Fala taylor there, setter of the house, who insisted to detain the furniture for his hypothec, notwithstanding whereof the poinding proceeded and was compleated.

Fala gave in a complaint to the Sheriff, who found, 'that the defenders could not poind the goods and effects out of the house libelled, in prejudice of the pursuer's right of hypothec, unless actual payment had been made of the rent for which the goods stood hypothecated, or the same told down; and therefore found the defender liable instantly to restore the goods poinded, or make payment to the pursuer of the year's rent; and granted warrant to apprehend and incarcerate the defender until he should obtemper the sentence.'

Jackson being imprisoned, pursued the Sheriff and private party; and an enquiry being made into the practice of the Sheriff and Town Courts, and certificates returned by the respective clerks, the Lord Ordinary, 17th July 1744, 'having considered the certificates produced by Thomas Belshes, and George Lindsay, the one bearing, that when a complaint is entered before the Sheriffs of Edinburgh against any person for carrying off goods, in prejudice of the landlord's hypothec, the Court is always in use to grant summar warrant for replacing the goods, or paying the rent; and the other certifying, that it is the practice of the Magistrates of Edinburgh, when any person is

No 48.

No 49.

A poinder of household goods, in prejudice of landlord's hypothec, may be incarcerated till he replace them.