No 35.
A purchaser from a tenant is not liable for the current year's rent, if enough was left at the time of the bargain to answer the rent, but which the landlord thereafter poinded for former arrears.

1736. *June* 29.

SIR JOHN RUTHERFORD of that Ilk *against* WALTER SCOTT.

SIR JOHN set his lands of Arks to Thomas Thomson for 1250 merks yearly, payable at Martinmas and Whitsunday, by equal proportions. At Martinmas 1733, the tenant having fallen in an arrear of L. 71 Sterling, payable at the Whitsunday preceding, Sir John took a decreet against him in his own baron-court upon 28th November that year, not only for the L. 71, but likewise for the rent due at Martinmas then past, and Whitsunday ensuing, the last of these being first come and bygone.

In the March thereafter, the tenant sold 280 sheep to Walter Scott, &c. Soon after which Sir John poinded Thomson's effects; and having imputed the same in payment of the arrears, he insisted in an action against the purchasers of the sheep, for the year's rent betwixt Whitsunday 1733 and Whitsunday 1734, upon this medium, That they were hypothecated for that year's rent; concluding, the defenders ought either to restore them, or pay the rent.

For the defenders it was *pleaded*, that, when they purchased the sheep from the tenant, and paid the price, there were sufficient goods upon the ground to pay that year's rent, which the pursuer had carried off in virtue of his poinding; and though, by the common law, there was a great variety of legal hypothecs, yet these were in a great measure superseded by modern custom, being inconsistent with trade or commerce: As they are therefore so little favoured at present, it follows, that, as the hypothec of an *universitas* was, by the Roman law, extinguished by alienation, where it was done without fraud, *multo magis* behoved it to be so in our general hypothec of *invecta et illata*. Neither is it any objection to this doctrine, that corn and other fruits of the ground could be recovered from a purchaser; seeing these are reckoned, when growing, as part of the lands, and become the tenant's only by reaping them, with consent of the master, which is understood to be given conditionally, upon payment of a certain *quota* thereof to him. But the *invecta et illata* stand upon a different footing, not being considered as belonging to the master, nor the rent payable out of them, but allenarly in money that is supposed to be raised out of the price thereof when sold.

2*do*, *et separatim*, General hypothecs go no farther than is necessary for that end; so that, if a part remains with the tenant, the purchaser of the other part is only liable *in subsidium*, in so far as the remaining goods are insufficient to answer the debt; which is founded upon the *L.* 47. *De jure fisci.* 4. *novel. cap.* 2.; hence it follows, that a purchaser from a tenant, as he is only liable *subsidiarie*, has a legal right, upon payment of the rent, to demand an assignation of the action competent to the master, against the possessors

of the goods he left with the tenant, even though it should be prejudicial to himself; a demand, which, it is acknowledged, would not be competent, was it only founded on equity; nay, even without such an assignation, the defender has a right of relief, which is no more than a consequence of the benefit of discussion. No 35.

*Answered* for Sir John; That there was nothing to hinder a master to poind for the rents of former years, and likewise use his right of hypothec; so that both of them might be available to him for their respective purposes, agreeable to Stair's opinion, *L.* 4. *tit.* 25. § 2.; where it is observed, that it is not enough there were sufficient goods on the ground at the time of the poinding, because poinders might carry off these goods; and likewise the master of the ground might poind the same for prior rents; but still there should remain a sufficiency for a year's rent at the term of payment, though he himself, before that time, poinded the goods for payment of former year's rents. And, to maintain the pursuer could not recover the sheep after they were sold to a purchaser, is arguing in direct contradiction to the constant course of decisions, 3d February 1624, Hays, No 2. p. 6188.; 11th December 1672, Crichton, No 8. p. 6203.; 9th February 1676, Park, No 9. p. 6203.

And, if the distinction betwixt the fruits of the ground and the *invecta et illata* was to take place, there would be no subject to fall under the hypothec in all the south country or Highland rooms in Scotland, as they produce nothing but grass to feed cattle or sheep, which, as they are the standing stocking on these farms, must be considered as the fruits thereof. Nor does it make any difference, that the rent is not paid in the goods themselves, but out of the price; since that is now the case with most of the corn farms; and yet the hypothec in these is as strong for the money rent, as if it were payable in kind.

To the *second* defence it was *answered*, That one is not bound to assign a debt to his own prejudice, whether the demand is founded in law or equity; and, if there was any right to demand it in this case, it could only arise from equity. Neither is the doctrine of assigning to be restricted to what obtains with respect to cautioners, that being an accessory obligation, whereby the cautioner is not properly bound for the debt, but for the debtor; so that the present case is very different; as all intromitters with the tenant's goods are equally and principally liable for payment of the year's rent. The *subsidium* therefore now in dispute is of a quite different nature, and relates only to the order in which the principal debtors may be attacked; as Sand observes in his treatise *De actionum cessione*, cap. 5. § 35. and 36.; where a general rule is laid down, that one is not bound to assign when it is to his own prejudice; hence it is, that a creditor, who has a pledge for two sums, is not bound to assign it to a cautioner in one of the debts, unless he pay both; because such assignation would be to his own prejudice.

No 35. THE LORDS found, that the defenders, as lawful and onerous creditors to Thomas Thomson the tenant, having *bona fide* received the sheep in payment of their just debts, are not obliged to restore the sheep, or their values, to the pursuer, by virtue of his hypothec; in regard it appeared, that goods sufficient to pay the current year's rent were left upon the ground, which afterwards were intromitted with by the pursuer; and repelled the allegeance, that the same were poinded for former arrears, in regard the hypothec does extend to no more than the current year's rent; and, therefore, that the pursuer could plead no preference for former years against other lawful creditors, but according to his diligence.

*C. Home, No 28. p. 52.*

*** See Pringle against Scot, No 20. p. 6216.

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No 36. 1744. *February.* A. *against* B.

THE heritor having a hypothec, and after the term is past, detaining the tenant's goods against a poinder, was thought not bound to assign, but only to discharge on payment; nor will the master be found fault with, should his servants, upon general order, stop the poinding, although payment be offered; because the heritor is not bound to be always present to grant a discharge, and it is the creditor's business to apply to the heritor and offer payment of his rent before he proceed to poind; and, therefore, the heritor pursued, as having unlawfully stopped a poinding on pretence of his hypothec, notwithstanding payment was offered to those, who, in the heritor's absence, stopped the poinding, on their giving a discharge, " was assoilzied, and the pursuer condemned in expenses."

*Fol. Dic. v. 3. p. 292. Kilkerran,* (HYPOTHEC.) *No 3. p. 273.*

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No 37. 1748. *June 2.* SIR JOHN HALL *against* NISBET.

IN an action at the instance of Sir John Hall of Dunglass *contra* Mr Nisbet of Dirleton, for payment of the debt in his horning, on this ground, that Dirleton had stopped his poinding in the month of January, notwithstanding an offer made of caution for payment of his rent, the LORDS found, November 20. 1747, " That the rent being barley, payable in kind, the offer of a responsible man as cautioner for payment of the farm-duty (or victual rent) *currente termino*, was not sufficient to entitle the pursuer to proceed in his poinding of the barley hypothecated for the defender's rent; nor to debar