

than a personal action for restitution of the value at the expiry of the tack, an end would be put to the practice of setting in steelbow.

No 13.

“ THE LORDS preferred Mr M'Vicar.”

For Butter, *Lockhart*.

Ad. Hay Campbell.

J. M.

Fol. Dic. v. 3. p. 293. Fac. Col. No 144. p. 339.

1766. June 19. WILLIAM RORISON against JAMES SHAW.

WILLIAM RORISON, in August 1763, was appointed factor upon the sequestered estate of Barscob ; and, upon looking into the situation of said estate, he found William M'Lurg, one of the tenants, in arrear of three years rent at Whitsunday 1763, and he discovered that James Shaw and others had, in May 1763, without any legal warrant, carried off M'Lurg's cattle ; and, therefore, he brought a process against him, before the Stewart-depute of Kirkcudbright, for payment of the rent in 1763 ; in which the Stewart found Shaw and the others liable.

No 14.
Persons carrying off a tenant's cattle while subject to the hypothec, not liable to the landlord, who had done no diligence within three months.

Shaw suspended and *pleaded*, That, in the end of the year 1762, or beginning of the 1763, M'Lurg the tenant was indebted to Shaw and others in sundry bills, of which payment being then demanded, M'Lurg not having cash, sold them a parcel of cattle, the price of which was to be imputed in extinction of the bills ; and it was agreed, that the cattle should continue to pasture upon M'Lurg's grounds till the month of May 1763, as the purchasers had not grass for them sooner ; and that it was in consequence of this transaction that Shaw carried off the cattle ; in doing which, he was not interrupted by the landlord, and M'Lurg was credited with their value.

That, in this way, Shaw became proprietor of the cattle in a legal and proper manner, and for a just and onerous cause ; that a right of hypothec and a right of property are totally different, the landlord's right of hypothec not constituting him proprietor of the subject over which it extends, but the property still remaining in the tenant. That, in rural tenements, the hypothec over the fruits of the ground is held to be the principal security, that over the stocking being considered only as a secondary or subsidiary right. The hypothec on the crop is held to be perpetual, every crop being hypothecated for the rent of the year in which it is produced, till payment is actually recovered ; whereas, the hypothec on cattle is limited to three months after the last conventional term of payment ; and the landlord must lose his right, if he does not use it within that time ; Lord Bankton, B. 1. Tit. 17. Par. 8. Erskine, b. 2. tit. 6. § 62. ; Hepburn against Richardson, No 11. p. 6205.

That, in the present case, the landlord's right was not exercised, or any challenge brought against the defenders within the three months ; and, to continue this hypothec for a longer period, would be tying up the tenant's hands from selling or disposing upon his stock altogether ; and although the landlord's claim might have been made effectual, had it been brought within the competent time, it cannot now be listened to ; and as no reason occurs for extending

No 14.

the extraordinary privileges competent to a landlord by the hypothec, to the prejudice of onerous creditors, the landlord's claim ought to be strictly interpreted.

Answered for Rorison; It may be true, that, where the cattle are allowed to remain upon the farm for three months after the last term of payment, and the landlord takes no measures for securing himself within that time, he loses his right of hypothec. But that is not the case here; the cattle were in this case driven off the farm two days after Whitsunday, the term of payment, when they were unquestionably hypothecated for that year's rent; and, whoever intromitted with them at that time, must of course be liable to the landlord; so that the question comes to be, at what period does the landlord lose his claim against the intromitters with the cattle?

The suspenders argue as if the landlord was obliged to bring his action against the intromitters within three months. The charger contends he is not.

Originally, the whole crop and stocking on a farm was considered as the landlord's property, and might have been seized by his creditors. This was remedied by the act 1469; and afterwards, by the decisions of the Court, the hypothec upon the stocking was limited to three months after the last term of payment: But, before such limitation took place, whoever carried off the tenant's stocking at any time became liable for the rents; and, although the stocking may now safely be intromitted with after the lapse of three months; yet, within that period, it cannot be seized by any person to the prejudice of the landlord's preferable right; and no person will venture to intromit with the stocking within that period, unless the value of the cattle exceed the year's rent, in which case the intromitter will no doubt have right to the surplus.

The charger can discover no authorities for obliging the landlord to bring his action against the intromitters within three months; and, as persons intromitting within that time must lay their account with paying the year's rent, there appears no good reason for freeing them of the obligation they bring upon themselves with their eyes open, by their intromitting within that period. The law has limited no particular time of the three months for the landlord's attaching the stocking: He may do it upon the last as well as the first day, and, therefore, ought to have the stocking in his power during that whole period; and, if he is deprived of that security, the person who intromits must be himself liable for the rent.—' THE LORDS sustained the defence, and assoilzied.'

For Rorison, *Pat. Murray.* For Shaw, *Geo. Wallace.*

A. E.

Fol. Dic. v. 3. p. 292. Fac. Col. No 40. p. 69.

1775. July 26. Sir JOHN CATHCART *against* HUGH MITCHELL and Others.

No 15.
A landlord
not having
brought an

THE question occurred between certain creditors of the tenant, who had executed a pointing of some cattle, the only stock belonging to him upon the farm, in the month of July 1770, and the landlord, whose action against them