no difference; because, as any other creditor using greater diligence, could not be staid to poind the goods, being upon the master's ground for respect of any farm auchtand to the master for preceding years; so if the master used not his diligence to be paid of the last year's duty within that year, his privilege expired, and thereafter any creditor preventing him by diligence should be preferred to him who had neglected to use his privilege within the year appointed for his privilege; otherwise, if the master claim without timely diligence, should be a stay of commerce, because it should hinder a man to buy the tenant's gear, and if he had paid for it, he should be compelled to pay the price once again to the master if he should pursue him to that effect, after many years quiet and lawful possession by virtue of a lawful bargain; as likewise, another lawful creditor having pursued the tenant, and obtained decreet and payment by virtue thereof, should be convened *ex post facto* by the master of the ground, and compelled to pay that which he had lawfully poinded or obtained paid to him; which inconveniences being considered by the Lords, they abstained from decision of that question, and the rest proponed by the defender, and having moved the parties to submit, decerned amicably.

No 2.

Haddington, MS. No 2990. & 2999.

1737. *January* 21.

PATRICK CRAWFURD of Auchnames, *against* SIR JOHN STEWART of Allanbank, &c.

No 3.
The crop of one year is not hypothecated for the rent of the preceding one, where the conventional terms of payment are postponed after the year's possession.

SIR JOHN STEWART, *&c.* having taken a lease of the estate of Lanton from the Lords of Session, subset the same to Sir Alexander Cockburn and his son, for pament of 30,000 merks of yearly tack-duty, payable at Candlemas and Lammas 1732, for crop 1731; and so on, during the currency of the sub-tack, which commenced at Martinmas 1730.

On the 9th October 1736, Mr Crawfurd being creditor to Sir Alexander in the sum of L. 1600 Sterling, sent a messenger to poind crop 1736, belonging to him; but, before proceeding to execute the diligence, a bond was offered to Bailie Cockburn, doer for the tacksmen, subscribed by Mr Crawfurd and other two sufficient cautioners; wherein they oblige themselves to pay the current year's rent, or any other sum that should be found due for the hypothec of that crop; and, in further security thereof, an offer was made to consign banknotes, to the extent of the tack-duty, in the hands of the Sheriff-depute or his clerk.

But the tacksmen, having intelligence that such poinding was to be attempted, wrote a letter to the Bailie, requiring him to oppose and resist all attempts to poind Sir Alexander's effects, until the obligations prestable by him to them were fulfilled; in virtue whereof, so soon as the messenger proceeded to poind, the Bailie stopped him, and produced the above letter as his warrant for so do-

No 3. ing; whereupon Mr Crawfurd brought a process against the tacksmen, concluding, That they should be liable in payment of the debt due by Sir Alexander to him, as having stopped his poinding.

The defence was; That the tacksmen were authorised, as masters of the ground, and in right of the hypothec competent to them, for the year's rent, crop 1735, to stop the said diligence; since the pursuer had not offered to make payment of the tack-duty, the terms of payment, which were Candlemas and Lammas 1736, being then elapsed; over and above which terms, the defenders had three months space to make their rent effectual, conform to the decision in January 1726, Hepburn, No 12. p. 6206.

Answered for the pursuer; That a master cannot have a right of hypothec for more than one year at a time; hence it follows, that it can only subsist for the current crop, and not for the rent at the conventional terms, where these are postponed after the year's possession; were it otherwise, that a master and tenant had it in their power to continue the hypothec for years and terms thereafter, many inconveniences to commerce might ensue. And, as to the decision in Mr Hepburn's case, it does not apply; because the hypothec that he insisted for, was on account of the year's possession, which ended at the Whitsunday, when the rent became payable; in which case, the LORDS found, That he had a right of hypothec three months immediately after the current year was out. But here there is not the same reason for giving a quarter of a year of grace, after the conventional terms, considering how long they are postponed after the year's possession was at an end. If indeed the terms of this sub-tack had been, that the rent, for crop 1735, was payable at Martinmas 1735, when the year's possession ended, the defenders, no doubt, in terms of that decision, would have had an hypothec current for crop 1735, until Candlemas 1736; but, when the rents of Sir Alexander's possession, ending at Martinmas 1735, are not payable till Candlemas and Lammas thereafter, it would be attended with several bad consequences to creditors, if it were found, that a master and tenant had power to prorogate the hypothec for three quarters of a year; and, when that is done, the Judge should still continue the same for three months longer, whereby this privilege, which is limited to one year, would in reality become a hypothec for two.

But, in the *next* place, granting this diligence could have been stopped for three months after the term of Lammas, on account of the hypothec, it is certain, that, if as much as would have been sufficient to pay the year's rent had been left on the ground, they could not lawfully oppose the poinding, seeing both the conventional terms were then past; consequently, their resisting the first step of diligence, before it could appear whether a sufficiency would be left or not, was unwarrantable, and, of course, must subject them to the payment of the pursuer's debt.

The tacksmen *replied;* That the hypothec competent to heritors, does not expire at the lapse of the year, or the crop for which the rent is payable, but

continues in its full extent, until the terms of payment of the rent, as has been often adjudged, 29th March 1639, Hay, No 26. p. 6219.; 29th June 1642, Polwort, No 27. p. 6221.; Lord Stair likewise, book 1. tit. 13. § 15. lays down the same doctrine, That the heritor has action against all intromitters, unless they prove that there was sufficiency of goods upon the ground at the term of payment. And indeed, if the hypothec should be supposed to expire at the legal terms of Whitsunday and Martinmas, though before the conventional terms of payment of the rent, it would be but a name, giving in most cases no real security to the heritors; seeing, generally speaking, rents are made payable long after the legal terms. But it would seem unnecessary to insist in this point, as it was so lately determined in Mr Hepburn's case, that the hypothec did not expire until three months after the term of payment of the rent. No 3.

If, therefore, the defender's hypothec, for crop 1735, was still subsisting on the 9th October 1736, it follows, that, unless actual payment of that year's rent had been tendered to them, they cannot be liable in this action; neither is there any thing in this doctrine that appears contrary to the principles of law, or hurtful to commerce; as the hypothec for the succeeding year does not commence until the expiration of the hypothec for the preceding one; and, when that ends, the same goods that were hypothecated for that year, became, of course, liable for the succeeding one.

But, granting it expired at Martinmas 1735, and that, at the date of this attempt to poind, the defenders had only an hypothec for their rent 1736; yet, even upon that supposition, they are at a loss to discover upon what ground in law they can be liable; seeing no creditor is bound to part with a real security upon offer of caution or consignation, without actual payment; which more especially must hold in the present question, as the bond of caution offered is expressly qualified with the condition, that the tacksmen assigned their right of hypothec to the pursuer, which they were not bound to comply with; for all that could have been demanded of them, was, to assign the rents, upon condition that they were paid by Mr Crawfurd, when these became due; but, without conveying the hypothec, which might have excluded themselves from poinding for the arrears of former years. Neither can the offer to consign the bank-notes in the Sheriff-depute's hands influence the question; because nobody is obliged to take these in payment; and, at any rate, such consignation cannot be deemed equivalent to payment, as no action was competent at their instance, against the Sheriff or his clerk, to make the same forthcoming.

THE LORDS found the crop 1736 was not hypothecated for the rent 1735, and sustained the security or consignation offered as sufficient.

THERE was another defence *insisted* on for the tacksmen, viz. that, together with the sub-tack, they delivered to Sir Alexander the whole oxen, horses, &c. on the estate, in the way of steelbow, under condition, that, if two terms

No 3. should run in the third unpaid, he should forthwith cede the possession of the tack and goods, without any process of law, so as they might enter to the same; notwithstanding whereof, he had incurred the irritancy, and, in consequence of which, they had so far resumed the possession, as to contract with some officers for pasturing several troops of dragoons; of course, these goods could not be poinded for Sir Alexander's debts.

To enforce this, it was *urged;* That a master might set a flock of sheep to a tenant for one or more years, so as he shall reap the advantage thereof for payment of a certain sum of money yearly, under condition that the same be restored at the issue of the tack; nay, it is an ordinary practice, particularly in Caithness, to set, alongst with the farm, a parcel of cattle for payment of a yearly rent, the tenant reaping the profits arising therefrom during the lease, and returning them when the tack expires. But, in neither of these cases, it is believed, a creditor of the tenant's could poind the same, notwithstanding his possession; since it is not possession alone which creditors should trust to, it being their duty likewise to enquire upon what terms the tenant is in possession; which is plain from this, that goods sent to a tenant to grass, cannot be poinded for his debts, on account of their being in his possession.

It is true, the case of steelbow may be attended with some inconveniences; but they are none other or greater than the master's hypothec is liable to, which, however, takes place with us, without statute, in prejudice of creditors. If indeed part of such a stocking is sold off *bona fide*, a purchaser may be safe. But this noways impugns the doctrine now pleaded for; because, if the subjects are still extant, the master, when he sees incumbrances coming upon the same, may resume possession (as was done in this case), if not acting collusively to protect the tenant's goods.

Answered for the pursuer; That the rights themselves produced for the tacksmen, plainly showed the steelbow was no other than a screen to protect Sir Alexander's moveables; for, when they entered into the tack of the estate, *anno* 1710, they soon thereafter subset the same to him, disponing, at the same time, the whole stocking to be enjoyed by him as his own property for ever; which, beyond all question, shows, that the moveables then upon the ground became the sub-tenant's property; nevertheless, by the subset *anno* 1730, the stocking on the ground, belonging to Sir Alexander, was then subset to him in steelbow; whereby it is evident, the whole was a contrivance to cover his effects. But, supposing such a contract had been truly or really entered into, the nature thereof is no other than that the goods should be replaced at the issue of the tack; which, though it imports a personal obligation upon the tenant, yet does not create any real right in the moveables, the property whereof, as they belong to the tenant, of course may be poinded for his debt. And to establish a contrary doctrine, would be destructive of commerce, seeing possession presumes property; more especially as moveables pass from hand to hand without being liable to such burdens as take place in real rights. See Stair, b. 1.

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