

No 12.

The next day after the pointing, William Crawford factor on the estate carried back the pointed goods from off the possession of the pointer, who brought against him an action of spuilzie.

The LORD ORDINARY, 14th February 1744, 'sustained the defence of hypothec, and assolizied.'

A reclaiming bill was presented, and answered, in which several things were pleaded on both sides; but the point argued amongst the Lords was, whether the pointing being complete, an heritor could at his own hand carry back the pointed goods?

Urged for the defender, That an heritor had undoubted right of retention, which would be of small use to him, if he could not *de recenti* recover; and so was decided 11th December 1672, Crichton against The Earl of Queensberry, No 9. p. 6203.

For the pursuer, That an heritor could have no stronger right in virtue of his hypothec than an owner by his right of property, who could not at his own hand seize his own goods pointed, as belonging to another; and there was this difference betwixt the present case and that of the decision, that there the goods were not pointed, but carried off by the tenant from one possession to another. "THE LORDS repelled the defence."

Act. A. Macdouall.

Alt. H. Home.

Clerk, Gibson.

D. Falconer, v. I. p. 107.

1764. July 27.

HENRY BUTTER of Pitlochrie, and Others, Creditors of the deceased GEORGE CUMMING, Sub-tenant of the lands of Colpach and Kilmorie, *against* DUNCAN M'VICAR, Collector of the Customs at Fort-William, principal Tenant of these Lands.

No 13.

The landlord found preferable to creditors on the steel-bow-stock of a tenant who died bankrupt.

COLLECTOR M'VICAR having obtained from the Barons of Exchequer a tack of the lands of Colpach and Kilmorie, part of the annexed estate of Lochiel, subset them in May 1758, to George Cumming; and, by the subtack, M'Vicar lets, and in steelbow-tack and assedation sets, to Cumming, 30 milk-cows, 30 yeld cows, 15 stirks, &c. at a certain value; as also, 25 bolls white oats, 5 bolls bear, &c. to be delivered to him under comprisement, at a certain value, of the present standing crop on the ground, immediately before it be cut down; and delivering to him all the labouring utensils now at Colpach, conform to an inventory, and comprised at a certain value; and Cumming was obliged to re-deliver to M'Vicar, at the expiry of the tack, the said number of cattle, of the different kinds, species and qualities, of equal value as he now receives them, or the said agreed price of them; it being optional to M'Vicar to accept of the cattle under comprisement, or the agreed price, upon giving notice of his

election, nine months previous to the term of removal; and to deliver back all the labouring utensils under a comprisement, or their value, as in the inventory; as also, the said number of 25 bolls white oats, &c. or the sum of ten merks Scots, for every undelivered boll of each kind, under the comprisement of the standing crop the year of removal; and it was agreed, that, in case one year's rent shall run into two, or that Cumming should be distressed by legal diligence, or his means and effects any how endangered, so as to prevent him from being in a capacity to perform the articles and conditions of the contract, then, and in that case, it should be in the power of M'Vicar to seize on the said cattle and corn *brevi manu*, and to apply the same to his own use, for extinction of all claims and demands whatever.

Cumming having died bankrupt in March 1762, Butter, and some of his other creditors, took out an edict, in order to get themselves decerned executors *qua* creditors to him, that they might affect his steelbow-stock; upon which M'Vicar appeared, and insisted, that he was preferable to them thereon; But the Creditors insisted, that he had no right of hypothec or preference upon it, but could only come in *pari passu* along with Cumming's Creditors.

The Commissary, in December 1752, found M'Vicar a preferable creditor to the extent of the sums claimed as the value of the steelbow-stock; upon which the cause was brought by bill of advocation before the Court of Session.

Pleaded for the Creditors; Steelbow corresponds to the *contractus mutui* in the civil law. The property of it is transferred to the tenant. It is upon his risk, he has the free disposal of it, and the heritor has only a personal action against the tenant for re-delivery of a like number and quantity, or payment of the agreed value; consequently it is poindable for his debts during his life, and must be confirmable by his creditors, as *in bonis* of him, after his death.

Lord Stair, lib. 1. tit. 11. § 4. considers steelbow a *mutuum*. 'Things cannot fall,' says he, 'under *mutuum*, which cannot be alienated, and which are not properly fungible; and I doubt not but oxen, kine, and sheep, are mutuabie, as is ordinary in steelbow goods, which are delivered to the tenant with the land for the like number in kind at his removal.' In the same way Lord Bankton, lib. 1. tit. 12. par. 2. 'In the case of steelbow, the property is transferred to the tenant, and the goods, after delivery, perish to him, or may be distrained or poinded for his debt.' And that the Court viewed steelbow in the same light, appears from several decisions; 4th November 1609, Boyd against Russell, observed by Haddington, *voce* STEELBOW; 24th November 1624, Turnbull against Ker, *IBIDEM*; 4th December 1638, Lady Westmoreland against Lady Home, *IBIDEM*; and 28th January 1642, Dundas against Brown, *IBIDEM*, all observed by Durie.

Pleaded for M'Vicar; The property of moveable goods may belong to one person, when the use and administration of them is committed to another; and particularly, in the case of an *universitas* or *grex*. An instance of this in the

No 13. Roman law was the *dos*, the individuals of which were under the use and administration of the husband ; but the property of the *universitas* remained in the wife ; *l. 30. Cod. de jure dotium ; Voet. lib. 23. tit. 3. § 19.*

A steelbow contract is when an heritor or tenant lets lands to his tenant or sub-tenant, with a stocking of cattle, and sometimes corn, straw, and other articles, for a joint rent, to be paid for the lands and the use of the goods ; and the tenant is bound to restore the whole in equal good condition, or of equal value, at the expiry of the lease. Such contract is not a sale of these goods, but only a location of them for a certain time, and for a certain use. The tenant has a reasonable power of administration, by which, if he find it necessary, he may sell a horse or a cow, and put another in its place ; but he must use his right *tanquam bonus paterfamilias* ; and, if he was to sell unnecessarily, with a view of dilapidating the *universitas*, it is thought the master, even during the tack, might strike in, and prevent such alienation ; and likewise, for the same reason, he might interpose to prevent the steelbow goods from being evicted by a creditor.

The contract of steelbow was not a *mutuum*, but a location of moveable goods to be possessed along with the lands let. Such goods are not ordinarily fungibles ; cattle and utensils evidently are not ; and though the corn, considered in itself, may be reckoned a fungible ; yet, when considered as part of the *universitas* set in tack, it remains in so far the property of the master, that the tenant is obliged constantly to replace it, as much as he is obliged to replace the individuals of the other part of the stocking.

It is an established opinion, that, when lands are sold, especially by a rental, the property of the steelbow goes to the purchaser, though not mentioned in the disposition, which shows, that the property is understood to be in the master. Upon the same principle, it has been often found, that steelbow goods go to the master's executor, and fall in his single escheat ; and, in one case, it was expressly found, that they did not fall under the tenant's escheat, but the heritor's, *Dict. voce Steelbow*. Nor was there ever an instance of the tenant's executors claiming these goods, nor would such claim be competent ; *Stewart's Answer to Dirleton's Doubts, voce Steelbow*.

Whether the master falls to be considered as proprietor of the steelbow goods during the currency of the tack or not, it is established in practice, that he has a right to these goods preferable to the creditors of the tenant, as appears from a number of certificates from Highland gentlemen and tenants produced, in consequence of an interlocutor of the Court, allowing parties to adduce evidence by certificates, or otherways, of the practice of the country. The method of setting land with a steelbow-stocking is attended with many advantages, particularly in the Highlands and northern counties, where the tenants are generally poor ; but, if it were to be found that the steelbow-stocking might be carried off by the tenant's creditors, and that the master had no more

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 sequestrated 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