

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

for payment of the year's rent, due at Whitsunday 1770, founded on his right of hypothec, was not instituted sooner than February 1771, and in which the Judge Ordinary had given the following judgment: "That, as it appears from the execution of poinding produced, that the defenders poinded cattle and grass off the farm of Loanhead, within three months after the term at which the rent libelled fell due; they are therefore liable to the pursuer in the value of the effects so poinded by them, in part payment to him of the rent libelled."

Pleaded, in a suspension, that the time during which the hypothec affects the cattle should neither be very long or indefinite, is a matter of very considerable importance. In the case of Hepburn against Richardson, No II. p. 6205., where the point was fixed, 'that the master has three months to do diligence upon his hypothec, against his tenant and stocking;' the master appears to have pursued the poinder immediately upon his intromission with the tenant's cattle, so as to do diligence within the three months; but in the case that is now before the Court, the master did no diligence for upwards of eight months from the time that the rent fell due; and, by the same rule, that he was entitled to do diligence at the end of eight months, he might have done it at the end of eight years, if the cattle had existed so long. Nay, the charger has gone so far as to maintain that the master's neglecting to assert his hypothec within three months, instead of being prejudicial to his interest, secures it; for, if another poinds within the three months, the effect of the hypothec is perpetuated in the way of action against the poinder, whatever becomes of the cattle, or whether they exist or not. This proposition is just reversing the common maxim of law, *jura vigilantibus subveniunt*; for, at this rate, the creditor who attends to his interest, and endeavours to secure payment of his debt by the early use of legal diligence, is frustrated in his end; while the master, who neglects to use the right which the law gave him, and lies by without making any claim against the effects of his tenant for his rent, has those rents made effectual to him by the diligence of another creditor; which, though it is ineffectual to the person who uses it for securing payment of his own debt, actually does secure payment of the rent of the master who uses no diligence at all.

Answered; It is of no moment that the landlord did not commence his action against the poinders till after the three months after the term of payment of the rent were expired. The law has allowed to the landlord three months, within which time he may either recover payment of his rent from the tenant, or attach the goods on the ground for his security. But where such goods are carried off by a third party, such person, as intromitting with the goods hypothecated, and which stand really affected at the time with the master's rent, becomes *eo ipso* liable in payment of the rent to the amount of his intromissions; and this claim the landlord must be at liberty to make effectual against the intromitter in the common course of law, like any other action of debt. The law has established no prescription against any such action, other than the prescription of forty years.

No 15.

action against his tenant till eight months after the term of payment, was found to be precluded from availing himself of his hypothec; though the Court was of opinion that landlords are not strictly limited to three months.

No 15.

It is a confessed point, that the landlord has a real security upon the stocking for three months after the term of payment ; that security remains till the last hour of the three months. If the landlord should attach the goods upon the last day of the three months, either by a poinding or by a sequestration, he undoubtedly is secured against any creditor pretending to compete with him ; and yet if, a few hours before, the tenant should deliver over the goods to another creditor, and the same are carried off by him, the landlord would be entirely disappointed, if the suspender's doctrine was well founded, and the other creditor would be secure, notwithstanding he got possession of the goods by a fraudulent concert with the tenant, because he did not vindicate his right against the intromitter within the three months, notwithstanding that, under the fore-said circumstances, it was a thing not in his power to effectuate.

Such can never be the law. There is plainly a manifest difference betwixt the landlord's attaching the *ipsa corpora* of the stocking, and securing the same for his payment, and prosecuting his claim against a third party, who may have subjected himself in payment of the rent in consequence of his intromissions with the hypothecated subjects.

The charger knows of no law that would hinder him to bring his action against the poinders in this case, even at the distance of eight years, and they would certainly be much benefited by that delay, because, in place of paying the value now, they would only pay it eight years hence. At the same time, they are in a mistake in supposing that it follows from the charger's doctrine that he is in a better situation by delaying diligence till after the three months, than by insisting in it, contrary to the maxim, that *jura vigilantibus subveniunt*. The very reverse is the case ; because, till the three months are elapsed, the landlord's real security does remain ; so that he will be founded in a *rei vindicatio* against the possessors of the goods ; whereas, by delaying till after the three months, he has no other security than a personal action for payment against the intromitter, and, if he should be insolvent, his rent is lost.

THE COURT considered the case of Rorison against Shaw, No 14. p. 6211. where the point was determined, to be narrower than the present. And, in respect of the long *mora* on the part of the landlord,

“ THE LORDS sustained the reasons of suspension.”

Act. *M^eQueen.*Alt. *Crosbie.*Clerk, *Campbell.**Eol. Dic. v. 3. p. 292. Fac. Cal. No 185. p. 108.*

1780. Dec. 4.

ROSS M'KYE against NABONY.

No 16.
In considering
the value of
the stocking

NABONY possessed a farm belonging to Mr Ross M'Kye, which consisted of several large inclosures laid down in grass, and instead of stocking it with cattle of his own, admitted those of others to pasture on it.