that the bill was granted for services. This, according to her latest assertions, is altogether false.

KAIMES. There is some difficulty in holding the acknowledgment of the procurator, that the bill was gratuitous, to be equivalent to the pursuer's own acknowledgment; but this difficulty is removed when her vacillancy, during the whole process, is considered.

GARDENSTON. The allegation of Drew's incapacity is nothing; for the only evidence of his being incapable arises from his being capable to grant a factory. There is no evidence that the bill is false. Services performed by a relation is an onerous cause.

COALSTON. The bill bears for value: the objector must prove the contrary. But here the difficulty lies, that the holder of the bill has given different and inconsistent accounts of the cause of granting.

PRESIDENT. Those decisions are good which found that bills debording from their proper form are not probative. The plea of services not relevant, as was determined 11*th February* 1761, *Wright.* The whole circumstances of the fact bear against the pursuer. The *onus probandi* lies on her to make out her last allegation that the bill was granted for value actually received by Drew.

1766. *June* 19. WILLIAM RORISON, Factor on the Sequestrated Estate of Barscob, *against* JAMES SHAW, servant to Patrick Heron, of Heron, Esq., and OTHERS.

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.

[*Faculty Collection, IV.* 69 ; *Dictionary*, 6211.]

ROBERT M'LELLAN, of Barscob, granted a lease of the mains of Barscob and others, to William M'Clurg, for the yearly rent of L.40 sterling. The lease commenced with the year 1759, and ended with the year 1763. M'Clurg, the tenant, was a dealer in cattle, and, by bargains of that nature, became debtor to James Shaw and others. He granted bills to them in 1761, 1762, and 1763, for the sums in which he had thus become indebted. About the beginning of the year 1763, they demanded payment, as it is said, and he told them it was more convenient for him to pay them by the delivery of some cattle which he had to sell, than by payment in money. To this proposal of sale, Shaw and the other creditors agreed; they bought from him cows, sheep, &c., and it was agreed, as the creditors contend, that the cattle should be pastured on M'Clurg's grounds until the month of May 1763. Accordingly, M'Clurg kept the cattle till May 1763. On the 17th of that month, Shaw and the other creditors openly took possession of the cattle, drove them off M'Clurg's grounds without challenge, and gave him credit for their prices, by marking payment to that amount on the back of their bills. On the 2d August 1763, the Court of Session se-

questrated the estate of Barscob, and appointed William Rorison their factor thereon. On the 6th September 1763, William Rorison executed a summons against Shaw and the other possessors of the cattle, setting forth, that they had carried off, from the mains of Barscob, black cattle, sheep, and lambs, to the value of L.60 sterling; that no proper stock or subject had been left upon the lands for payment or security of the rent then due by the tenant; and therefore concluding for payment of certain arrears of rent due by M'Clurg preceding Whitsunday 1763, with L.10 sterling more, as the rent due from Whitsunday to the August 1763, or at least of L.60 sterling, as the value of the said cattle.

The Steward of Kirkcudbright found the defenders liable in the sum of L.40 sterling, with interest from the 17th May 1763, the date of the delivery, proportionally to the sums respectively discounted on their bills, in respect that the proprietor had a right of hypothec subsisting upon the said stock, to the amount of one year's rent, at the time the said cattle and sheep were intromitted with by the defenders. The defenders removed their cause into the Court of Session by advocation. On the 29th January 1765, the Lord Stonefield, Ordinary, " remitted the process, with this instruction, that the Steward-depute inquire into the quantity of corns, cattle, and other stocking left on M'Clurg's farm at the time the cattle and sheep were taken away by the defenders."

On the 18th December 1765, the Lord Ordinary, having advised representation and answers, pronounced the following interlocutor: " In respect that the right of hypothec, competent to the pursuer, was not insisted in within three months of the term of payment of the rents libelled; alters his former interlocutor, advocates the cause, assoilyies the defenders, and decerns."

The pursuer reclaimed to the Court: the petition was remitted to the Ordinary. Having heard parties, he took the debate to report.

Argument for the Pursuer :—

Anciently, by the law of Scotland, the whole corn and cattle upon a farm were held to be the property of the landlord, and accordingly were attachable for his debt. This was considered as a grievance, and therefore the statute 1469 provided, " That the poor tenant shall not be distressed for the lord's debt, farther than to the extent of a term's maill." Even this provision has gone into desuetude: the right of property in the landlord has worn out by degrees, and nothing remains to him but his right of hypothec upon the fruits and stocking for one year's rent. The full exercise of this right of hypothec, as respecting cattle, was found to be adverse to commerce between man and man; it therefore became necessary to fix a period at which such right of hypothec in cattle was to determine. This was done by the decisions of the Court, particularly in that, — *January* 1726, *Hepburn* against *Richardson*, observed by Lord Kaimes in his first collection. By it, the hypothec was limited to three months after the last term of payment. After the lapse of three months, the cattle are freed from the hypothec, and are attachable by creditors; but, before, they are attachable by the masters. A creditor, who carries off the cattle before the lapse of three months, must be liable in a year's rent to the master, if such year's rent be due by the tenant. Thus, then, the creditors of M'Clurg, by carrying off the cattle, became liable to the landlord, or his creditors, in the year's rent. The question is, at what time they became

liberated from this obligation to which they were once liable? There are no authorities in law, nor is there any reason for limiting this obligation to the term of three months after the last term of payment. Were it held as law, that a landlord loses his right of hypothec unless he bring his action for payment of his rent within three months after the last term of payment, the right of hypothec would become elusory. Thus, suppose a landlord should send his officer to poind for his rent, the day before the three months were expired, and that, before the officer arrived, a creditor of the tenant's had carried off the whole stocking on the farm; in such case, it would be too late for the landlord to pursue, on the day following, either the tenant or his creditor. The only solid ground upon which the determination of the present question can rest, is this, that, as the hypothec lasts for three months, so, during the currency of that term, the cattle must remain upon the ground for rendering the hypothec effectual. No law requires that the master should attach the hypothec on the first day after the last term of payment, or at any time before the expiry of three months from that period. The cattle, therefore, during all that period, must be subject to the preferable right in the landlord; and if they are abstracted from his diligence, they, or their value, must be replaced. In this case there was no undue delay on the part of the pursuer: his commission was not dated till the 2d August 1763: before his commission could be read in the minute-book, extracted, and sent into the country, the three months from the last term of payment were elapsed. On the other hand, the defenders are not strangers who had recently contracted with M'Clurg, but his creditors by bill, endeavouring to elude the hypothec.

Argument for the Defenders:—

A right of property and a right of hypothec are wholly distinct. *Pignus* is *jus in re*, as well as *dominium*, yet still *pignus* and *dominium* are separate rights. Hence a landlord, having a hypothec over the moveables of his tenant, or a creditor over those of his debtor, is not thereby proprietor of such moveables. The *jus pignoris* is in the landlord or creditor, the *jus dominii* in the tenant or debtor. The right of the *creditor hypothecarius* is a real security affecting the things hypothecated, and this right may be made *subsidiarie* effectual *adversus quemcunque possessorem*. Many hypothecs were allowed by the civil law, which, from the necessities of commerce, have been rejected by modern nations, and particularly in Scotland. The law of Scotland has, however, allowed the hypothec upon fruits, in favour of the landlord; and, being feudal in its principles, has extended this hypothec to cattle, which the Roman law did not. The principal security is that over the fruits; that over the cattle is secondary. Stair, b. 1., tit. 13., § 15:—"With us there remains the tacit hypothecation of the fruits on the ground, in the first place, and, they not satisfying, of the other goods." Hence the hypothec over the fruits has been held to be stronger than that over the cattle on the ground. The former is perpetual, whereby each crop always remains hypothecated for the rent of that crop; the latter is only temporary, and practice has limited its endurance to a precise period. If the landlord does not use his right within three months after the last conventional term, at which the rent becomes payable, he loses his right altogether. Bankton, vol. 1., p. 386; Erskine, b. 2., tit. 6., § 28. And thus it was found, *January* 1726, *Hepburn* against *Richardson*:—"That the master has three months after the term of payment to do diligence upon his hypothec, against his tenant

and stocking." When the Court found that the hypothec expired in three months, it meant that in three months the landlord loses his real right of attaching or recovering the goods, unless he takes some document thereon before the expiry of three months: that therefore he cannot detain cattle remaining upon the farm, nor reclaim those taken off, for a longer period than three months. The obligation on the intromitters cannot last longer than the hypothec itself, and this hypothec is limited to three months. Many are the methods by which the landlord may secure payment during that period. He may hinder the cattle from being carried off, unless payment or security for the rent be offered; he may bring them back *de recenti;* he may commence a process for restitution; he may obtain a sequestration; he may poind them for the [rent;] but he cannot, after the lapse of the three months, detain the cattle, prevent their sale, or hinder them from being attached; and, of consequence, he cannot, after the lapse of the three months, insist in an action against the intromitters with them. The action upon a real right cannot subsist longer than the real right itself. It will not vary the case that the factor had it not in his power to bring the action within three months from the last term of payment. This may show that he was guilty of no neglect, but it will not extend the right of his constituents. The real action was lost by the fault of the creditors, who did not apply for a sequestration at a more early period, whereby the factor appointed might have done diligence within the three months. The creditors of a tenant are in a more favourable situation than the landlord is: they claim no more than the common right of parties contracting; but he claims upon an extraordinary privilege.

"The Lords adhered to the last interlocutor of the Lord Ordinary."

Act. P. Murray. *Alt.* G. Wallace. *Reporter*, Stonefield.

OPINIONS.

Pitfour. The action at the instance of the master expires in three months. The hypothec is a security to the master; it only affects the same goods for the same year: two hypothecs cannot subsist together: Easy to apply this to corn. One may purchase if he sees the master's discharge for that year: this leads to an ambiguity with respect to goods,—for to what year are they to be applied? The rule is, that the master has an hypothec for the goods at Whitsunday 1760, for the crop 1759 payable in 1760. There is an error in the pursuer's argument, as if the Lords prorogated the hypothec for the three months: This is not done; and it is impossible that it can be done, for a hypothec can only be for one year's rent, whereas, if the hypothec subsisted for crop 1759, after Whitsunday 1760, or the last term of payment for that year's rent, then the hypothec between Whitsunday 1760 and the term of three months from that date would be a hypothec both for the crop 1759 and the crop 1760, at one and the same time. What the Lords did was this: they granted a reasonable time for recovering the hypothec, but they did not grant any new hypothec.

Coalstown. I always imagined that the goods must remain on the ground, for three months, otherwise that action lay *quandocunque* against intromitters. In the case *Hepburn* against *Richardson*, the Court extended the hypothec for three months, whereby the hypothec was good for one year and also for three months after that year.

KAIMES. I deny that the hypothec ceased at Whitsunday; for, if it did, how could the master attach the cattle at all. If the hypothec right expires after three months, then it expires by prescription, and this prescription not good against the factor, who was *non valens agere*, until the 2d August, the date of his commission, (*vellem indictum*; for how could one be *non valens agere* before the existence of a right.)

AUCHINLECK. After the three months, every one is at liberty to buy: if one buys within the three months, and no challenge is brought within the three months, he is safe.

GARDENSTOUN. The right of hypothec is limited to the year; the right of action is limited to three months after the year.

PRESIDENT. The factor insists for the hypothec of the former year. The Court allowed three months for that diligence, and no diligence has been done during that space.

ALEMORE. Corn farms and grass farms will then be in a different situation: the first will have a substantial, the second, an elusory hypothec. Why should not the cattle be perpetually liable for the rent of the year? Says analogy, they should; expediency says otherwise. Three months are allowed to the master for making good his hypothec on account of rent due, suppose at Whitsunday: if new cattle are brought in after Whitsunday, how can they be hypothecated? therefore, the hypothec itself rests, and every intromitter is liable.

HAILES. If the landlord may, after the three months, sue intromitters with the cattle of his tenant, then his right of action on the hypothec may subsist as long as his right of action for the rent. Here the master is in no worse situation than if the cattle had been suffered to remain on the ground until the expiry of three months. It is admitted that he did no diligence during the three months: if he did no diligence against the tenant after the cattle were carried off, it is impossible to suppose that he would have done diligence if the cattle had remained on the ground.

Dissent. Alemore, Coalston, Elliock, Barjarg.

1766. *June* 23. SIR THOMAS GORDON of Earlstown *against* JAMES MURRAY of Broughton.

[*Faculty Collection, IV.* 216; *Dictionary*, 16,818.]

TAILYIE.

A. possessed an Estate under an Entail, not Recorded nor completed by Infeftment. He paid certain debts of the Entailer, on which Adjudications had been led, and acquired right to the adjudications. *Found*, 1*mo*, That the Entail was effectual against the Creditors of A. 2*do*, That the Entail could not be defeated in favour either of A or his Creditors by the Adjudications to which he had acquired right, and which were founded on as a separate title of property.

FOR understanding the question between those parties, it is necessary to state the genealogy of the family of Gordon of Earlston.