seems erroneous: the rule is, that there be no delay. Lord Mansfield, in the case of Hodgson and Donaldson, said that there was no such rule as that of three posts. As to the 14 days, the clause in the Act 1772 is not carefully drawn. Fourteen days may be too much, or it may be too little; and the clause ought to have been in the words of the English statute of William and Mary. The present case, however, goes upon different principles. There was no delay in the indorsers. The plea of the defender is ungracious. [Soon after, Harper applied for a sequestration, and the President observed that that accounted for the defence which he made.]

On the 23d June 1790, "The Lords found recourse due;" altering the interlocutor of the Lord Justice Clerk.

Act. R. Blair. *Alt.* A. Wight.

1790. *June 25.* CHARLES and JAMES BROWN and COMPANY *against* WILLIAM WILSON.

CAUTIO JUDICIO SISTI ET JUDICATUM SOLVI.

The security of a cautioner *judicio sisti*, is not entirely at an end by the obtaining of decree, without requiring the cautioner to produce the person of the debtor. Such requisition may be made at any time before the lapse of the period allowed for extracting decree.

[*Dict.* 2059.]

ESKGROVE. Messrs Brown ought not to have extracted the decree: it was their business to secure the body of the debtor: now an extract put the cause out of Court. They probably expected payment, or a surrender by the debtor; but, finding he had absconded, they brought another action before the Sheriff: it ought to have been brought before the magistrates; but this was within the six months.

HENDERLAND. A caution *judicio sisti* is, that the debtor shall be presented *usque ad sententiam.* The next claim ought to have been for caution *judicatum solvi.*

PRESIDENT. The bail-bond was to present at any time during six months. An action is brought: the action would have continued even during six years: it went on, and a judgment was given. Had the cautioner been called, he must have presented the debtor. Even at the moment of the sentence pronounced, he might have required the cautioner to prolong caution until there was an opportunity of putting the debtor in prison. Instead of that, he hung up his cause, suffered the debtor to escape, and then went into another Court.

JUSTICE-CLERK. Six months do not terminate the action against the cautioner. The bond relates to all the diets of Court. The debtor must be presented whenever the pursuer requires the cautioner so to do. The cautioner, by presenting, is free; but the pursuer ought to have intimated thus, "I am

to take decreet; bring the debtor by next Court day." If action be concluded without the requiring the cautioner to present, the cautioner is free. Were he not free after decreet, he would not be free in less than forty years; which is absurd.

On the 25th June 1790, "The Lords sustained the defences."

Act. David Cathcart. *Alt.* Wm. Robertson.

Reporter, Dreghorn.

Diss. Eskgrove, Swinton.

1791. *June* 29. JAMES OGILVIE *against* THOMAS WINGATE.

KING—HYPOTHEC.

Found that a landlord's right of hypothec over his tenant's stocking, &c. could not be defeated by a decree obtained against the tenant, at the instance of the Crown, prior to sequestration sued by the landlord.—Reversed on appeal.

[*Fac. Coll. X.* 385; *Dict.* 7884.]

JUSTICE-CLERK. It is always a matter of difficulty to apply English law to Scotch subjects. It is admitted that, in England, the king has a preference to the landlord, not only as to rents but even as to heritable subjects. If the right of a landlord be just the same in Scotland as in England, the matter is of easy discussion. But, after all that I have heard, I do not well understand what the law of England is. Let us see what the case is in other rights. A mortgage is a real right, vested in a third party, and so preferable to the Crown. A pledge cannot be affected by the Crown to the prejudice of the *creditor pignoratitius.* Let me compare the right of a landlord in Scotland with that of one who has a pledge or mortgage. I do not inquire how the law was established; it is enough to know what the law is. I think that the landlord's right is a real right; it is not a tacit hypothec, but a pledge. Every man bargaining with the tenant is presumed to know the law, and so to purchase with the burden of the landlord's right. [But this might be inverted. "Every man agreeing to let a lease is presumed to know the law, and so to bargain, with the burden of the Crown's right."] If a right of pledge be preferable, by the law of England, to the Crown, so also must the right of the landlord in Scotland. I do not know that there is any tacit pledge in the law of England, except in the furnishings to ships; and that is not by the agreement of parties, but by the act of the law. Were it by agreement of parties, the furnisher must keep possession, which would be destructive of such right; for the very purpose of it is, to leave the subject in the hands of the person who hypothecates. The Act of Queen Anne mentions *real* estate. It would infringe on the spirit of the law to give the Crown a preference: this would infringe upon the rights of creditors by infeftment. Creditors cannot force payment of principal, unless