

1775. July 29. SIR JOHN CATHCART *against* HUGH and DAVID MITCHELLS.

### HYPOTHEC.

A landlord, not having brought an 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.

[*Fac. Col. VI.* 108; *Dict.* 6212.]

GARDENSTON. The hypothec of the landlord on cattle is very limited. It is a secondary kind of right, that of detaining cattle within the year. The Court has reasonably enough found that it subsisted during three months, and no more. After the year it would be very dangerous to hold that the hypothec should subsist in the master against the purchaser, when it does not as to the tenant himself.

PRESIDENT. In the case *Rorison against Shaw*, 19th June 1766, the Court pronounced a judgment contrary to that of the Ordinary in this case. The principle is that there is a *mora* on the part of the master.

HAILES. The case of *Rorison* was still narrower than this; for *there* the person in the right of the landlord was a lord's factor, who had not been named till near three months after the expiration of the year, and who lost no time in doing diligence.

MONBODDO. Suppose a purchaser within three months, Can the master reclaim the cattle? I am at a loss to distinguish between a purchaser, and a creditor carrying off poinded goods. The hypothec on fruits is founded better than that on *invecta et illata*, and yet it will not extend beyond three months.

JUSTICE-CLERK. If, after three months, the master has a right, he has a right for forty years. This is a necessary consequence, and would be fatal to commerce. On the other side, if the hypothec is only for three months, the master may be cut short.

KAIMES. The case of *Hepburn* has been followed in practice. The three months are given to the master that he may have time to make his hypothec good. What more would the master have?

COVINGTON. If the master does not bring his action against the purchaser or poinder within three months, I think that he has no further claim.

COALSTON. Should the goods be sold two or three days before the lapse of the three months, the master would be too much limited according to this rule.

KAIMES. The master might protest that the poinder should not carry off the goods.

On the 29th July 1775, "The Lords sustained the reasons of suspension;" altering Lord Stonefield's interlocutor.

*Act. R. M'Queen. Alt. A. Crosbie.*