

to take decret; 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 decret, 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 infestment. Creditors cannot force payment of principal, unless

when there is a bankruptcy; all that he can get is payment of interest by an action of mails and duties. That would be lost if the king were to be preferred to the creditor by infestment.

DREGHORN. *Repetitio nulla est ubi quis suum recipit.* An effectual hold is much the same as actual payment. Mr Wood lays down a principle one way, but he does not insist in it. Property is not altered by pledge, but still it is a lien on the subject. Our hypothec arises from L. 7. D. *in quibus causis pignus contrahitur*: this is a natural notion, occurring as well to the savage as to the sage. Here there is not a general pledge, but a special over certain subjects. A sequestration is not an execution: it is rather a count and reckoning in consequence of an antecedent lien.

ESKGROVE. The act of Union says nothing on this subject; but immediately after, there followed another act establishing the exchequer: this was not a new treaty, but only an explication of the treaty of Union. I consider the right of the landlord to give, what is called in England, a special property. A landlord in England has a certain right, but that right has varied, and I think that most of his rights have been introduced since the union: they are, however, still different from those of a landlord in Scotland.

PRESIDENT. I am well pleased that the Court should determine in favour of the landlord, but I cannot bring myself altogether to that opinion. We must judge according to the statute of Queen Anne, passed just after the Union, and which is a British statute binding us. I cannot find in it that exception on which the judges seem to rest. If the goods were really impignorated, I should admit that, by the law of England, and consequently by that law which is to be observed by us, the landlord ought to be preferred. That the rights of the landlord in the one nation and in the other were essentially different in their nature and consequences, I do not see. The mode indeed may have been altered, and the laws of the two countries may have diverged, as in the case of mortgages and wadsets, administration and confirmation. By the 9th of Henry III. c. 18, an executor must pay the king's debt first. [This it is presumed is still the law of England;—Blackstone, ii. 492. If so, we are bound by the Act of Queen Anne to receive it here. What preference the king had with us before the Union is not clearly ascertained: probably he stood upon the same footing with the Roman fisk. With us certain debts were held privileged: See Instructions to Commissaries, Act of Sederunt 1666; *among them duties of lands for a year.* Funeral expenses and physicians' fees seem omitted, yet have been found preferable to landlord. Kilk. p. 138, no mention made of the king; but if he be preferable to creditors *chyrographarii*, such as furnishers to burials, &c. he must *a fortiori* be preferable to the landlord, who is a creditor by special contract only, though with us said to be *hypothecarius*.]* A poiding of the ground arises from this, that the superior or master was entitled to resume possession. This was the effect of legal diligence, and held to be preferable to any common poiding. As to growing corns, there would be a preference to the landlord by the statute of Queen Anne, because the subject is still part of

* N. B. The words within crotchets, from Lord President's notes, communicated.

the ground. In Bacon's Abridgment, the right of the landlord is considered as an hypothecation; and in the statute of king William mention is made of a pledge as being the right of the landlord; and yet the king is, by the law of England, preferable to the landlord. In some particulars the landlord's right is greater with us than in England, in others less; yet I still doubt whether such shades of difference should make the king's right less efficient in one part of the united kingdoms than in the other.

HENDERLAND. The right of the landlord in England is old, and obscure in its origin. It has received many alterations, and some of them since the Act of Queen Anne, and has been brought nearer the right of a landlord in Scotland. I incline to follow the course pointed out by Lord Justice-Clerk. Should the Crown be preferred, our heritable rights will be affected; a superior for his feu-duties, an heritable creditor in a pointing of the ground. A pledge cannot be attached by the Crown; and so also is the case as to *special property*. That does not exclude the same sort of thing, passing under another name; for hypothec is a pledge without possession. What has the same effect in the law of Scotland as a pledge may be called a pledge.

On the 29th June 1790, "The Lords preferred the landlord."

Act. R. Dundas. *Alt.* H. Erskine.

Hearing in presence.

Diss. President. *Non liquet*, Gardenston, Monboddoo, Rockville.

1790. July 10. MARGARET DALZIEL *against* JOHN RICHMOND.

WITNESS.

The evidence of the mother and sister of a pursuer, in a declarator of marriage, inadmissible.

Fac. Coll. X. 288; *Dictionary*, 16,780.

JUSTICE-CLERK. When there is a *penuria testium* as to a fact, the nearest relations may be admitted as witnesses; not so in contracts. Why were there no other witnesses? Indeed there were; but they did not know Richmond. [This simple unadorned sentence is highly rhetorical, and the more so because unadorned.] In such critical cases, parents and near relations are under strong inducements to deviate from truth.

ESK GROVE. In a clandestine marriage there is more occasion for witnesses