

S E C T. IV.

Process against Sub-Tacksmen and Intromitters, with Subjects hypothecated.—What if caution or payment has been offered by the Intromitters, or if sufficiency has been left to answer the rent.

1624. Feb. 3.

HAYS *against* KEITH.

No 22.

A DONATAR of single escheat, recovering by a special declarator the price of a tenant's corn from the intromitter, found liable to the landlord for the rent of that crop; and it was found that the landlord had his option to insist against his tenant, or the intromitter, or the donatar who received the price, and that none of them were entitled to the benefit of discussion.

Fol. Dic. v. 1. p. 418. Durie.

. See this case, No 2. p. 6188.

1624. March 31.

Lady DUN and her HUSBAND, *against* Lord DUN.

No 23.

IN an action pursued by the Lady Dun, and Sir John Carnegie, her spouse, against the Laird of Dun, as intromitter with the corns growing upon the lands of , pertaining to the Lady, pursuer, in liferent, which lands were possessed by a tenant, to whom the same was set for a certain farm yearly, and from the which tenant the defender had received all the corns growing upon the said liferent lands; and therefore he was pursued for payment of the farm, addebted to her therefor by the tenant; the defender alleging that the tenant foresaid, as he occupied the pursuer's lands, the crop libelled, so also he was the defender's tenant in other lands, the corns growing upon both the lands being led, as they were wont of before, to the barn and barn-yard, upon the ground of the excipient's lands; and at the term of payment he received from the tenant foresaid, delivery of his own farms by peck and boll, which he might very lawfully do, and had no necessity to know where the corns received grew, whether on the pursuer's liferent lands, or not;—this allegiance was repelled; for the LORDS found, that the corns growing upon the pursuer's lands, were hypothecated to her for her own farm; and that therefore, according to the quantity of the corns growing upon that ground, intromitted with by the defender, he should be answerable for the farm *pro tanto*; and where the defender further alleged, that at the time of his intromission, the tenant had as many horse, nolt, kine and sheep, as would have paid the pursuer her farm,

Intromitters with a tenant's corn are liable to the landlord *in valorem* for the rent of that crop; though they acquire the same for an onerous cause, and *bona fide*, not knowing it to be the corn of that farm.

The defence, that at the time of the intromission, with the corns, the tenant had as many cattle on the farm as would pay the rent, was

No 23.
repelled, be-
cause corn is
in the first
place liable
to the hypo-
thec.

and so that he ought not to give back the foresaid corns received by him *bona fide*, as said is, this was also repelled; for the LORDS found, That the corn growing on the ground was first and principally hypothecated to the master for his farm, in the which he was preferred to all others; and that he had his first election of the corns before any other goods pertaining to the tenant, if the master pleased to ask the corns, rather than any of the tenant's other goods, wherein the master had his preference and election before others.

A&C. Aiton.

Alt. Hope & Fletcher.

Gibson, Clerk.

Fol. Dic. v. 1. p. 418. Durie, p. 126.

* * * Haddington reports the same case.

If any man transport to his barn-yard corns that grew upon my conjunct-fee lands, for any debt or duty auctand to him by the tenant, I will be preferred to the corns, *tanquam debitum fundi*, and I will not be put to seek my payment by pointing of nolt, sheep, horse, or goods of that kind, but the corns that grew upon my ground are *tacite* hypothecated to me for my duty; but if I supersede the tenant till the next crop, and a lawful creditor who has pointed or intromitted with this year's corns for his just debt, will not be compelled to pay back to me the corns that he has received, or prices thereof.

Haddington, MS. No 3116.

1627. July 19.

SWINTON against SETON and OTHERS.

No 24.
Action sus-
tained at the
instance of a
landlord a-
gainst the
purchaser of
his tenant's
corn, though
the purchaser
alleged, that
as much re-
mained on
the ground
at the time of
the purchase
as would pay
the rent.

ROBERT SWINTON, as heritor of certain acres of land beside Haddington, by the King's letters, arrests in the hands and barn of James Harlaw, certain corns which grew upon the said acres in *anno* 1622, pertaining to Patrick Harlaw tenant to Robert, for his duty of that year. He raises summons thereon against James and against Walter Seton, who had intromitted with the corns, to make the same furthcoming for that year's duty. *Alleged*, That Walter pointed them upon a registered bond of Patrick's, long before the arrestment. *Replied*, The corns were affected with a tacit hypothecation to the master of the ground, so that whoever intromitted therewith, albeit creditor, the master has privilege of repetition, and craving the same to be made furthcoming, while his duty be paid, seeing he offers to prove the corns arrested grew that year on his ground. —Repell the exception, and admit the reply, that they grew on the ground. *Duplied*, The time of the arrestment the tenant had corns on the ground, which the pursuer might have retained for his duty. *Triplied*, The master had in his option, to choose any corns which grew on his ground, to arrest for his duty, and the defender might have pointed the rest.

Act. Cunningham & Cockburn.

Alt. ———

Clerk, Hay.

Fol. Dic. v. 1. p. 418. Nicolson, MS. No 412. p. 287.