

principal lessee. The special power to sublet, which here occurred, and the long and uninterrupted use of payment by the sub-tenants, seemed to have considerable weight with some of the Judges.

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Lord Ordinary, *Eskgrove.*

Act. Lord Advocate, *Geo. Fergusson.*

Alt. Blair, *Corbet, W. Miller.*

Clerk, *Home.*

C.

Fol. Dic. v. 3. p. 294. Fac. Col. No 206. p. 321.

SECT. V.

Customs of a Burgh. Hypothec on Goods for the Price. On Cloth or Manufactures. Fishings. Extent of British Statute relative to Hypothec. Builder's Hypothec on the House.

1665. *January 31.*

The TOWN of EDINBURGH *against* The CREDITORS of one PROVAN a Customer.

In a competition betwixt the Creditors of one Provan, who was customer of the Netherbow Port, on the one part, and the Town of Edinburgh on the other part, the LORDS found the Town of Edinburgh ought to be preferred to all the other creditors, whether arresters or assignees, for the tack-duty, in so far as concerned the same allenary, *eodem modo* as a master may pursue his sub-tenant; and the LORDS declared they would judge so in all time coming; this being the first time that this question hath been so decided *in terminis*.

Fol. Dic. v. 1. p. 418. Newbyth, MS. p. 24.

. Gilmour reports the same case:

ALEXANDER PROVAN, customer at the Nether Bow, being debtor to William Anderson merchant, in a sum of money, William arrests in the hands of William Gairdner all sums due by him to Provan, and thereupon gets a decret before the Commissaries of Edinburgh, to make forthcoming; whilk decret is suspended by Gairdner, as being distress by Anderson on the one part, and by Donaldson, Provan's assignee on the other part. In this double pouding compares the Town of Edinburgh, and *alleges*, They must be preferred to both parties; because, Provan being their customer for payment of a tack-duty, and Gairdner being no otherwise debtor to Provan but as his sub-tacksman of the same customs, the Town, for these customs, has a tacit hypothec in the duties owing by the sub-tacksman to the principal tacksman, and upon that account are preferable to the other creditors who have no such privilege.—It was *answer-*

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The right of hypothec in a town over their customs, preferred to arrestments used in the hands of debtors of their collector, although the town had a sufficient cautioner.

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ed, That this is not the case of a master or landlord, who has an hypothee in his tenants goods upon the ground, the debt owing by the tacksman being only a personal debt consisting in obligation, and not *in rebus*.—*Replied*, That a master has not only an hypothee in his tenant's goods, but if his tenant set any part of his lands to a sub-tenant, for a duty payable to the principal tenant, the master will be preferred to the duty payable by the sub-tenant, to all creditors-arresters, for the principal tenant's debt.—And it was further *alleged* for the arrester, That the Town of Edinburgh was secured by a responsal cautioner, viz. Andrew Donaldson, who was bound to them for the principal tacksman; whereas this arrester has no other way for payment of his debt due by Provan.—*Answered*, That though it were so, yet they were not obliged to distress a cautioner where they may otherwise find themselves secured by any thing owing to the principal; and they had good reason to do so, even for the cautioner's relief.

THE LORDS preferred the Town of Edinburgh:

And thereafter it being *pleaded*, That the Town of Edinburgh was satisfied by the cautioner to whom they had assigned the tack for his relief,

THE LORDS found, That the cautioner-assignee, by his assignation, had the same privilege competent to him that the cedent had, and therefore preferred the assignee.

Gilmour, No 130. p. 94.

* * * This case is also reported by Stair :

ANDERSON being creditor to Provan, arrests in the hands of Gairdner all sums due by him to Provan, and thereupon pursues before the Commissaries of Edinburgh. Gairdner gives his oath, that he is debtor to Provan noway but for the tack-duty of the customs of Edinburgh, whereunto he was sub-tacksman to Provan, conform to his bond produced; whereupon the Commissaries decerned. Gairdner suspends upon double pointing.—It was *alleged* for the Town of Edinburgh, That the sum in question being a sub-tack duty, they had the common privilege of all masters against their tenants and sub-tenants, that they might pursue either of them as they pleased, without an arrestment, or any diligence, and were always preferable for their tack-duty to any other creditor of the principal tacksman.—It was *answered*, That custom was not in the case of rents of lands, wherein there is *tacita hypotheca*, and that the principal tacksman only was their direct debtor; and the sub-tacksman paying to the principal tacksman, or, which is equivalent, to his creditor, is for ever free; and the Town of Edinburgh hath secured themselves by taking caution of the sub-tacksman.

THE LORDS found the Town of Edinburgh preferable for their tack-duty, and that they had immediate action against the sub tacksman, unless he had made payment *bona fide* before, that they might exclude any other creditor of the principal tacksman for their tack-duty. See TACK.

Stair, v. 1. p. 260.