

No 37. ter Yule, and therefore he could lay hold of the corns as his property, and was not bound to accept any caution.

' Found, that upon the interposition of the defender's chamberlain to stop the pointing, till his master's rent, which was payable in victual, was satisfied and paid, the offer of a responsal man as caution for payment of the said rent, without offering to set aside as much of the victual as would satisfy the rent, was not sufficient to entitle the pursuer to proceed in his pointing, nor to debar the defender's chamberlain, upon the right of hypothec, to stop the pointing.'

Rem. Dec. v. 2. No 90. p. 149.

1785. March 8. ANDREW BLANE *against* DAVID MORISON, and Others.

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A landlord having granted to a tenant power to subset, found to have no hypothec over the effects of the sub-tenants. But there were particular circumstances in the case.

DAVID MORISON and others possessed the estate of Kerse under Ronald Chalmers, the tenant, who had powers to subset; and to him for many years they paid their rents, without any challenge from the landlord.

Their tack-duties for the year 1782, which were due at Martinmas, had in this manner been paid to the principal tacksman before 23d January 1783, at which period, Mr Blane, the factor on this estate, applied to the Sheriff-depute for a sequestration of their crop and stocking, in security and payment of the hypothec-rent due to the landlord.

The question thence arising having been brought into the Court of Session by bill of advocacy, Mr Blane, the factor,

Pleaded; The fruits or yearly produce of a farm, as well as the effects which have been brought into it, are viewed by the law of Scotland, as the property of the landlord, and unalienable, until the stipulated rent has been paid to him. He is accordingly provided with an action, while these are extant, for converting them into money for his payment, to the exclusion of every other person; and when they are no longer to be found, he is warranted to pursue the intruders, for their value; Kame's Law Tracts, 4. p. 151, 152; Erskine, b. 2. tit. 6. § 56; Voet, *In quibus causis pignus tacite contrahitur*; Dict. voce HYPOTHEC; Durie, 5th March 1630, Fowler *contra* Cant, No 25. p. 6219.

Nor are sub-tenants exempted from this general rule. Where, indeed, a landlord has signed as consenter to the sub-lease, or where he has accepted from the sub-tacksman the rents specified in it, there might be some reason for holding effectual against him the performance of an agreement he has so explicitly recognised; and to such cases any authorities which can be quoted for the sub-tenants are alone applicable. But a mere liberty to subset, whether particularly expressed, or implied from the endurance of the principal lease, cannot be attended with the same consequences. A landlord is thereby debarred from insisting on the personal residence of the principal tacksman; but in every other

respect, the rights belonging to him, and his preference in virtue of the hypothec, remain in their former extent.

Hence it is, that a sub-tacksman is not personally bound to the landlord, which would be a necessary consequence of supposing an implied agreement between them; Stair, b. 2. tit. 9. § 2. In the form of removing too, prescribed by the act of sederunt, the summoning of subtenants is not required, 14th December 1756, § 3; from which it is plain, that a regular payment of rent to the principal tacksman will not secure them from an irritancy incurred by him, *ob non solutum canonem*. So also, where a farm has been divided among many sub-tacksmen, the landlord may attach the fruits of any one field for the tack-duties of the whole, Fountainhall, 1700, Salton *contra* Club, No 13. p. 1821; a determination, which seems quite decisive of the present question, since no payment by a sub-tenant, of the rent corresponding to his possession, ought to be more effectual than what is made in virtue of legal diligence to the landlord himself.

Answered for the sub-tenants; The right of hypothec may be limited, not only by express covenant, but also in consequence of the implied will of the landlord; Erskine, b. 2. tit. 6. § 63; Dict. *voce* *HYΠΟΤΗΚΗ*; Edgar, November and December 1724, Brown *contra* Sir John Sinclair, No 10. p. 6204. Such a restriction then must unavoidably take place, when, by giving authority to subset, the landlord has delegated the same powers to the tenant for recovery of the subtack-duties, as belong to himself with regard to the rents stipulated in the principal lease. After the sub-tenants have duly delivered their rents to the person empowered by him, he surely cannot be heard to insist, that they shall be compelled to make a second payment to himself. No instance accordingly can be given, in which, for rents due by a tenant having special powers to subset, the effects of a sub-tacksman who had paid his promised tack-duties, have been found attachable by the landlord. And the opinions of our lawyers strongly support the contrary doctrine; Erskine, b. 2. tit. 6. § 34; Bankton, b. 2. tit. 9. § 2. Par. 17; 5th February 1667, Lady Traquair *contra* Cranston and Howatson, No 28. p. 6221., and *voce* TACK.

The situation of subtenants would otherwise be intolerably grievous. The crops reared by each, so long as they were unconsumed, would remain impignorated for the rents of the whole farm, however extensive. And the sub-tenant might afterwards be sued as an introritter, thus being rendered *subsidiarie* liable, during 40 years, not only for the principal tenant, but also for the other sub-tacksman, against whom, at the same time, he is not, by any form of law hitherto known, provided with the means of securing his relief. Nor could any hardship accrue to landlords from a more equitable construction of the agreement in question. For although payments by sub-tenants, when made without any previous interpellation on the part of the landlord, were to be sustained, it would not follow that his legal preference was altogether dereliquish-

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ed, or that, by anticipating the payment of the sub-rents, by stipulating elu-
sory tack-duties, or by any other similar device, it could be unreasonably dimi-
nished.

It was farther *contended* for several of the sub-tenants, That the sums paid by
them had been delivered by the principal tacksman to the factor ; from which
they derived an additional argument, why the landlord's hypothec with respect
to them should be considered as discharged.

The LORD ORDINARY's interlocutor was in these terms :

“ Finds, That the heritor's real right and security of hypothec for his prin-
cipal tack-duty or rent, so long as it continued in force, did extend to, and af-
fect the whole crop and stocking, upon all and every part of the land let by
him in the principal tack thereof, whether such crop or stocking belonged to
the principal tacksman himself, or to the defenders and others his sub-tenants,
and was neither excluded nor restricted in its effect by the principal tack's bear-
ing a power or licence to the tacksman to subset the said lands : Finds, That it
was not necessary, for preserving the said heritor's hypothec, that he should,
either before or after the term, interpel the defenders, whom he had not ac-
cepted of as his tenants, from paying their sub-rents to the principal tacksman
under whom they possessed ; but that the said sub-tenants, when making such
payments, did it at the hazard of their crop and stocking being still affected by
the heritor's legal right of hypothec, in case the principal tacksman should fail
to pay up to him the whole of the principal tack-duty, for security of which
that hypothec was still subsisting ; and that the defenders allegation, that the
sums of money paid by them, to account of the sub-rents soon after Martin-
mas 1782, were paid over by him to the pursuer, in part of the principal tack-
duty due at the said term, is neither instructed, nor relevant for supporting
their objection to the sequestration : And therefore finds, that as the pursuer
obtained a sequestration of the whole crop and stocking on the lands contained
in the principal tack, within less than three months after the said term of Mar-
tinmas 1782, when the principal tack-duty in question fell due, the intermedi-
ate payments made by the defenders to the principal tacksman, or discharges
of the sub-rents granted by him to them, could be no bar to the said seques-
tration and that the sequestration must still subsist accordingly, &c.”

The sub-tenants having brought the question under review of the Court, by
a reclaiming petition, which was followed with answers, a hearing was appoint-
ed. Memorials were afterwards given in for the parties, upon advising which
the LORDS altered the Lord Ordinary's judgment ; thus sustaining the objec-
tions urged in behalf of the subtenants, to the awarding of the sequestration.

There was a great diversity of opinion among the Judges ; and it was *observ-
ed* on the Bench, That this decision was not to be viewed as determining in ge-
neral, that the landlord's hypothec, when subsetting was not prohibited, could
be excluded in consequence of payments made, after the legal term, to the

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 pointing 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.