

1642. June 29.

L. POLWARTH *against* ———

THE L. of Polwarth pursuing one who had intromitted with certain nolt, and other goods, being upon his lands of ———, which were set by him to a tenant for payment of the farm-duty in victual, for which the said lands were set to that tenant, of that crop which came last off the ground, shortly after the terms of payment were past;—and the defender *alleging*, That she had poinded the said goods, by virtue of a sentence recovered against this tenant, for debt owing by the tenant to her; and that, at the time of the poinding, she had left the tenant in that case, that the room was fully sown, and the corns growing thereon, which corns, thereafter in the harvest, were led and stacked by the tenant in his barn-yard, upon the said lands, whereby the pursuer had within the room as many corns as might have paid him, both of that crop whereof the corns grew, and for the farms of the crop preceding, which is now controverted; so that she ought not to be compelled to render back again the said goods, lawfully poinded for a just debt, seeing the master might have been otherwise satisfied by the foresaid subsequent crop;—THE LORDS having heard the parties reasons on either side, they found, that the master of the ground had a preference for his farms of all the tenant's goods, being upon that ground; and albeit the corns be *primo loco* hypothecated to the master for his farms, yet they found the same hypothecation did also extend to any other goods belonging to the tenant, being upon that ground; in respect of which privilege, they found, that the master ought to be preferred to any other creditor of the tenant's for that year's farm, and therefore repelled the allegiance founded upon the poinding, seeing the poinder did not allege, that, at the time of the poinding, she left as many corns, and other goods, upon the ground of the lands, as might have been sufficient to have paid the master his farms for that year; for they found the sowing of the subsequent crop was not a sufficient cause to have staid the master to seek payment of the immediate preceding crop, whereof the terms were then past, against any who had meddled with the tenants goods. And so the LORDS found, that the master had a tacit hypothecation for the tenant's farms of the immediate bygone year, not only in the corns which grew upon the ground that year, but also in the tenant's other goods, against any other intromitters therewith, whether creditor, or other whatsoever.

Act. ———

Act. Lawrence Oliphant.

*Fol. Dic. v. i. p. 418. Durie, p. 897.*

1667. February 2.

COUNTESS OF TRAQUAIR *against* GRANSTON.

THE Countess of Traquair being infest in liferent in the lands of Shillinglaw, and others, and having right to the Whitsunday's duty 1666, obtaining a de-

No 27.

Tho' corn is the principal subject of hypothec, the other goods are also subjected to the hypothec *secundo loco*; and therefore a poinder of cattle was found liable as intromitter, not having left, at the time of the poinding, corns and other goods sufficient to satisfy the hypothec.

No 28.

Found, that a subtenant's stocking is

No 28.  
liable to the  
landlord's  
hypothec, as  
well as the  
tenant's.

creet in her own baron court against Marion Howatson, and the relict and bairns of Andrew Johnston, for payment of the sum of 4000 merks proportionally; and that, for the Whitsunday's mails 1666, there is a pursuit to make furthcoming against Cranstoun of Olea, in whose hands the sums due to them were appraised;—it was *alleged*, There could be no process to make furthcoming; because it is offered to be proved; that the said Marion Howatson having only a subtack from Andrew Johnston her son, who was tacksman, she made payment of the term's duty to him, and obtained his discharge. To which it was *replied*, Not relevant, except it were alleged that she was subtacksman to the said Andrew, she made payment of the said term's duty to him, after the same pursuit at the Countess's instance against her; and as to the deceased Andrew his discharge of the said term's duty from the deceast Earl of Traquair, it is noways relevant, being before the term of payment, especially in prejudice of the pursuer, who is a singular successor, and who doth not represent the said Earl, and who unquestionably hath right to the teind-duty.—THE LORDS found, that a subtenant's goods were liable *codem modo* to the master, for a year's duty, as the tenant's goods are.

*Fol. Dic. v. 1. p. 417. Newbyth, MS. p. 91.*

\* \* \* See Stair's report of this case, *voce* TACK.

1673. December 18.

FRANCIS RUTHVEN of Redcastle *against* ROBERT ARBUTHNOT Merchant.

No 29.  
Found that  
the goods of  
a tenant of  
any one year  
cannot be  
pounded, till  
the rent for  
that year be  
paid, or as  
much left as  
will satisfy it.

REDCASTLE having pursued the said Robert, for his wrongous intromission with eighteen bolls of victual, belonging to one of his tenants, and carrying the same off the ground before the pursuer was paid for his year's rent, it was *alleged* for the defender, That his intromission was *auctore pretore* by virtue of letters of pouding directed against the tenant for not paying of his debt, which was greater than the avail of his goods pouded, and which corns being long since *bona fide percepti et consumpti*, he is not in law obliged to restore the price thereof. It was *replied*, That, by our law, all masters have *jus tacitæ hypothecæ* to all their tenant's corns or goods, for payment of that year's duty that the corns did grow, which being a real right, affects the same, and any singular successor, albeit they were pouded, or comprised, or sold in a public market, ought to make good the same.—THE LORDS did repel the defence, in respect of the reply, and found, that all tenant's goods, or corns, were hypothecated to their masters for one year's duty; and that the same could not be pouded, nor disposed of, unless they would offer to prove, that they left as much upon the ground as will satisfy the master.

*Fol. Dic. v. 1. p. 418. Gosford, MS. No 652. p. 380.*