

No 1.

made to Robert Gray of the arrestment, he could not be pursued for any farther, but to have made the arrested goods furthcoming. They found also, that the master of the ground was only privileged, and to be preferred to other creditors for the farm of the present crop, and not for the farm of any preceding years, for the which he could not poind without decret and liquidation; neither could he hinder the execution of any other man's decret who had prevenit him in diligence, and therefore repelled the defender's allegiance, and admitted the summons and reply to the pursuer's probation.

Fol. Dic. v. 1. p. 416. Haddington, MS. No 2302.

No 2.

The crop and corns growing in any year, remain ever affected and subject to the landlord for that year's rent, for which rent he is preferable to all creditors, though he do no diligence, and many years intervene.

1623. July 25.

HAY against KEITH.

IN an action pursued at the instance of ——— Hay, son to the old Lady Errol, assignee constituted by her to the duties and farms of the lands whereof she was liferentrix, of the crop 1616, against Nathaniel Keith, who having the gift of escheat of the tenant, possessor of that land, by virtue whereof, and of a general declarator obtained thereupon, and of a special declarator thereafter following, was convened, as he who had intromitted with the corns growing upon the said lands, by virtue of the escheat of the said tenant, to make payment to the pursuer, as assignee to the master of the ground, of the farms of that year wherein the tenant was addebted, seeing he had meddled with the tenants whole corn growing that year.—THE LORDS found, that albeit the said donatar had not intromitted with the said crop, and the tenants growing corns, the year foresaid, by his immediate intromission of the ground, but that any intromission which he had was by virtue of a special declarator, obtained against some other persons, who were pursued as intromitters with a special quantity of the rebel's corns, and against whom he had recovered sentence for the prices of the corns so intromitted with by them, that not the less the donatar remained obliged to pay that year's farms to the master of the ground, of the readiest of that which was contained in his sentence; in the farms of the which crop, the master was found to be preferred to the donatar, or to any other creditor of the farmer, albeit he had poinded the same; and notwithstanding that the master of the ground had used and done no diligence against the tenant for his farm, and there had intervened diverse years thereafter, since the crop controverted, and before the obtaining of the donatar's sentence, and payment by virtue thereof, viz. seven or eight years, during the which space the master did nothing to recover payment of the farm, which was not respected by the Lords; for they found, that the crop, and corns growing that year, remained ever affected, and subject to the master for that year's farms, wherein he ought to be preferred to all creditors or donatars.

1624. *February 3.*—In an action pursued at the instance of — Hays, bairns to the umquhile Lady Errol, against Nathaniel Keith, for payment to them of the duty and farm of the lands of Ardstakies, of the crop 1616, which lands pertained to the Lady Errol in liferent, and to the farm thereof addebted to her the said year 1616, by — Hay her tenant, and tacksman to her of the said lands, she had made the said pursuers assignees, and for payment of the which farms the said assignees convened in this pursuit the said Nathaniel Keith, as he who having obtained the gift of escheat of the foresaid tenant, and declarator thereon; and having obtained sentence against the L. Gight for payment, particularly to him as donatar, of a certain quantity of corns and goods intromitted with by Gight, being upon the ground, the said crop for the which the farms were acclaimed, the principal tenant being deceased at that time of his intromission, and consequently the defender being convened, as having received payment of the prices of the corns of that crop, to pay that year and crop's farm to the master of the ground, and his assignee;—THE LORDS found, that the master of the ground had right to pursue this defender for that year's farm, albeit he was not immediate intromitter with the corns of that crop, and albeit he intromitted only with the prices, by virtue of a special declarator, obtained by him as donatar against that person who was immediate intromitter; and found, that the master of the ground had this action competent to him, as well against the receiver of the prices of the corns and goods, being upon the ground, that crop whereof the farms were acclaimed, as against the immediate intromitter with the corns and goods of the same crop, either of which the master hath liberty and right to pursue in his option; and found no necessity, that the master should be holden to pursue the tenant, or his heirs or executors, before that the intromitter, in the second place, could be convened; but that the master might pursue any of them as he pleased, ay and while he were satisfied, seeing whatever was growing upon the ground that year, whereof the farms were sought, was hypothecated for that year's farm to the master *primo loco*, whom the Lords preferred to the King's donatar; albeit the donatar *alleged*, that many of the goods, contained in his special declarator, could not be hypothecated for that year's farm to the master, because, albeit they were, and remained upon the tenant's ground, possess by him that year, yet the same behoved to pertain to the donatar, by reason of the tenant's rebellion, and being at the horn year and day before that crop libelled, whereof the farms were sought, at the time of the which rebellion the rebel had the same goods in his possession, and the remaining of the same still upon the ground, the foresaid year controverted, could not prejudge the King of his right, acquired thereto before; neither ought the same to be repeated from him, who had obtained payment by virtue of a sentence of special declarator, which ought to maintain him, and ought not to be drawn now in question, after it was executed and had taken effect by obedience, especially after so long time, *viz* eight years intervening after the crop controverted, during the which time the master hath done no

No 2. diligence to pursue for his farms, and whose negligence so long cannot produce this action, to cause the King's donatar restore that which he hath recovered by his long and lawful diligence ; which exception was repelled, in respect that the goods excepted upon were in the tenant's possession upon the ground, that year and time when the master's farm might have been craved ; and found, that the prevention and diligence done by the excipient, could not derogate from the privilege of hypothecation competent to the master by the law.

In this same process, the LORDS found, that the tenant's corns and goods of that crop, whereof the farm was addebted to the master, being poinded, or lawfully intromitted with by the tenant's creditors, could not be repeated from the creditor by the master, if the creditor left as many corns and goods beside upon the ground as would satisfy the master's farm ; but the creditor is holden to say, and prove, that there were as many goods extant upon the ground as might satisfy the farm at the term of Candlemas, at which time the master may, by the law, seek his farm ; for, whatever was extant before Candlemas, it was not sufficient, except it had been also extant at Candlemas, seeing, before that time, the master cannot poind for his farms, nor exact the same, albeit he might, at any time before, stay the taking away of the corns, while he got security for his farm. And the LORDS found it not enough to liberate the creditor, poinding and intromitting, as said is, his qualifying that he left as much insight within the tenant's house as might satisfy the master's farm ; but found it necessary to him to say, that he left as many corns or other goods, upon the ground of the lands out-with, and beside the insight of the house, as might satisfy the master's farm.

This decision was thereafter stopped by the LORDS.

Act. *Nicolson & Aiton.*

Alt. *Hope & Mowat.*

Clerk, *Hay.*

Fol. Dic. v. 1: p. 416. Durie, p. 76, & 104.

. Kerse reports the same case :

1623. *July 25.*—*Dominus fundi* has action against whatsoever persons intromitters (*etiam per mille annos*) for the farms of the ground of the last crop, and sicklike has action against him who coaft, and thereafter sold to a third party, for the price received by him.

1624. *February 3.*—Found that the donatar to the escheat meddling with a part of the defunct's gear or prices thereof, obtained by sentence against the intromitters, ought to pay the farms and duties to the master of the ground of the year of the rebel's decease, or of the year of the intromission by the donatar, or by those whom the donatar convened, except it were said, that there were as meikle upon the ground after the Candlemas as the master might have poinded for his farms and duties that year ; and the LORDS found, that the insight and plenishing was not such as the master of the ground might poind, but not-

withstanding thereof, sustained action against the donatar, except he would say as meikle extant of the corns and goods at Candlemas.

No 2.

Item, It was alleged, That the horse meddled with by this donatar fell under escheat, by horning, before the crop controverted, and that thereupon he had obtained sentence, which the LORDS repelled, in respect it was upon the ground the time of the defunct's decease, and that no escheat nor declarator was relevant before the crop controverted.

Kerse, MS. fol. 198. & 199.

* * Haddington also reports the same case :

In an action pursued by George Hay, William Hay, and Margaret Hay, assignees constituted by Dame Agnes Sinclair, Countess of Errol, to all goods, soumes or debts which should pertain or be aucthand to her the time of her decease, persewed Nathaniel Keith, who, as donatar to Francis Hay's escheat, had obtained decret against the Laird of Gicht and others, alleged intromitters with the said umquhile Francis, his goods, to pay and refund the said soums and the prices of other goods pertaining to the said umquhile Francis, recovered from Gicht by sentence, or intromitted with otherwise by Nathaniel, for payment of the farms and duties of the lands, whereof the said umquhile Francis was tenant to the said umquhile Dame Agnes, for the year 1616; it was *excepted*, That no action could be competent against Nathaniel for the goods whereof he recovered decret, and upon his decret payment from Gicht, because he being donatar to the escheat of Francis Hay's escheat, and having obtained declarator, the pursuers, whose action was founded upon the privilege of the law, that the master of ground should, for his mails, farms, and duties, be preferred to all other creditors and parties, while he were paid of his ground-duty, with the goods being upon his land, that action was only competent against the intromitters with such goods, and not against him who had bought them lawfully, or had evicted their prices lawfully; and therefore, the pursuer's action was only *rei vindicatio* against the intromitters, and not competent against Nathaniel; but the pursuer behoved to pursue the first intromitters, and decret being given against them, they might have recourse against Nathaniel as accords of the law. THE LORDS repelled the exception and duply, and sustained the action against Nathaniel, who had obtained decret and payment for the prices of a part of the goods and had intromitted with *ipsa corpora* of the rest, and found that he might be discussed *primarie*. It was thereafter *excepted*, That Nathaniel having intromitted by virtue of his gift of Francis Hay's escheat, and left as many goods upon the ground as would have paid the master's farm, no action could be sustained against him, who, by the gift of escheat, was lord of all the rebel's remanent goods; and, as a creditor who pouds a tenant's goods, and leaves behind as much as may pay the master of the ground's duty, does no wrong and cannot be compelled to restore any part off

No 2. the goods so pould by him, so may the donatar do. It was *answered*, That after Zule the master might have staid poulding, but could not have poulded, and yet might repeat what was poulded in prejudice of the payment of her maills and duties. THE LORDS repelled the exception, and preferred this action intented by the master of the ground's action 1621, to the donatar's diligence done *anno* 1616. It was further *alleged*, That when the donatar intromitted, there were left upon the ground as many utensils as might have paid the farm. THE LORDS repelled the exception, and found not that the master could be troubled to take payment by utensils, but that there behoved as much to be left upon the ground of corns and goods of labour as might pay the master's duty. Further, the defender *excepted*, That the riding-horse libelled could not be ordained to be restored, because he offered him to prove, that Francis Hay being denounced in *anno* 1615, long before the year for the farms whereof this question was moved, this horse then pertained to the said Francis, and so falling under his escheat, disponded to the defender, and declared long before the intenting of this action, the said horse could not be decerned to be made forthcoming, as affected to the payment of the farm controverted; which allegiance was also repelled, whereof, and of some other interlocutors pronounced in the cause, I could not conceive the reason.

1624. February 7.—THE action betwixt George Hay and Nathaniel Keith, which was disputed 3d February, being farther heard upon a bill given in by Nathaniel, containing the reasons to be farther disputed upon thir points, if the privilege of the lord of the ground be to be preferred to all other creditors for the farms of the present crop; and if the master, not having done diligence to arrest, pould, or pursue and obtain decret for his farm within the year, he should be preferred to other creditors having used diligence and obtained decret and payment; and if land be set, stock and teind, for a conjunct yearly duty, the master should be privileged for that part of the farm which was answerable to the teind; and, if any master having warned his tenant, obtained decret of removing, denounced the tenant to the horn, and having action for the violent profits, might take him to the ordinary farm and make his option of violent profits or of the privilege for his ordinary farms;—I reason d against that which was decided by interlocutor in the said cause 3d February, That the matter was of small moment in the present case, but of very weighty consequence, viz. if a master's privilege to be preferred to all other creditors for his farm of the present year might be any farther extended than to the corns of that crop, which I alleged to go no farther; which the most part of the LORDS consented to, but would have made a distinction betwixt the preceding years of the tack and the last year thereof, pretending that so long as the tack lasted, and the tenant bruiked, the master might pould within himself upon his own ground, which he might not do after the tenant was removed and had transported his goods to another ground. I *answered*, That there was

no difference; because, as any other creditor using greater diligence, could not be staid to poind the goods, being upon the master's ground for respect of any farm aughtand to the master for preceding years; so if the master used not his diligence to be paid of the last year's duty within that year, his privilege expired, and thereafter any creditor preventing him by diligence should be preferred to him who had neglected to use his privilege within the year appointed for his privilege; otherwise, if the master claim without timely diligence, should be a stay of commerce, because it should hinder a man to buy the tenant's gear, and if he had paid for it, he should be compelled to pay the price oncé again to the master if he should pursue him to that effect, after many years quiet and lawful possession by virtue of a lawful bargain; as likewise, another lawful creditor having pursued the tenant, and obtained decreet and payment by virtue thereof, should be convened *ex post facto* by the master of the ground, and compelled to pay that which he had lawfully poinded or obtained paid to him; which inconveniences being considered by the Lords, they abstained from decision of that question, and the rest proponed by the defender, and having moved the parties to submit, decerned amicably.

Haddington, MS. No 2990. & 2999.

No 2.

1737. *January 21.*

PATRICK CRAWFURD of Auchnames, *against* SIR JOHN STEWART of Allankbank, &c.

SIR JOHN STEWART, &c. having taken a lease of the estate of Lanton from the Lords of Session, subset the samè to Sir Alexander Cockburn and his son, for pament of 30,000 merks of yearly tack-duty, payable at Candlemas and Lammas 1732, for crop 1731; and so on, during the currency of the sub-tack, which commenced at Martinmas 1730.

On the 9th October 1736, Mr Crawford being creditor to Sir Alexander in the sum of L. 1600 Sterling, sent a messenger to poind crop 1736, belonging to him; but, before proceeding to execute the diligence, a bond was offered to Bailie Cockburn, doer for the tacksmen, subscribed by Mr Crawford and other two sufficient cautioners; wherein they oblige themselves to pay the current year's rent, or any other sum that should be found due for the hypothec of that crop; and, in further security thereof, an offer was made to consign banknotes, to the extent of the tack-duty, in the hands of the Sheriff-depute or his clerk.

But the tacksmen, having intelligence that such poinding was to be attempted, wrote a letter to the Bailie, requiring him to oppose and resist all attempts to poind Sir Alexander's effects, until the obligations prestable by him to them were fulfilled; in virtue whereof, so soon as the messenger proceeded to poind, the Bailie stopped him, and produced the above letter as his warrant for so do-

No 3.

The crop of one year is not hypothecated for the rent of the preceding one, where the conventional terms of payment are postponed after the year's possession.