

1630. *March 5.* FOWLER *against* CANT, GRAY, and LADY LAWRIESTON.

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MR JOHN CANT, Alexander Gray, and the Lady Lawrieston being complained upon, in a double pointing, raised by Alexander Fowler tenant in Lawrieston, who was distressed by both parties for his farms crop 1629, Mr John Cant claiming them as being infest in the land, and so as *dominus fundi*; likeas he had arrested the same in October, before the terms of payment; and the Lady and Gray, (who concurred claiming them,) because Mr John Cant had set a back tack to Sir Alexander Napier, who gave him that heritable right, for payment of a silver duty, and which Sir Alexander had given a factory to the Lady his wife to intromit with the farms, and dispoñe therupon; likeas she had sold the farms the years libelled to the said Alexander Gray, who had paid her therefor, and the said Fowler the tenant had given at her desire his bond to the said Alexander Gray, for delivery of the victual to him, whereby Gray *alleged* he had right to the said victual, seeing his bond preceded the arrestment used by Mr John Cant. THE LORDS found, that the farms of the land were liable to the heritor, notwithstanding of the back-tack set by him, and notwithstanding of the tenant's bond, given to Gray who bought the same; for they found, that by the granting of a back-tack for payment of a silver duty to the granter of his right, at the time of the acquiring of his right, the heritor setter of the tack was not denuded of the right, which he as master of the ground had to the fruits of the ground, but that the same remained ever hypothecated to him for the said back-tack duty, until he were paid thereof, and that he might take himself to the ground, and to the possessors thereof, or any intromitters with the fruits of the same, for payment of the said duty, which he might lawfully do, albeit he had never discussed his own tacksman, nor had ever charged him therefor, and the creditor who had received the tenant's bond, was found to have no right thereto.

In a competition between a landlord and a person who had purchased corns from a sub-tacksman, and had paid the price thereof, the former was preferred.

- Act. *Stuart.*

Alt. ———.

Clerk, *Scot.**Fol. Dic. v. 1. p. 417. Durie, p. 499.*1639. *March 29.*HAY *against* ELLIOT.

DAME Margaret Hay, relict of Sir Michael Preston, pursues one Elliot, who had intromitted with certain corns sold by her tenant to him, which tenant was addebted to her in the farms of her conjunct-fee-lands, of the crop 1638, particularly libelled; and which corns so intromitted with, were of the corns growing upon the said lands the same crop. And the defender *alleging*, that he bought these corns in a public market, after Yuil, and paid the price therefor, which ought to liberate him; for it were a dangerous preparative, to cause parties who had bought corns *bona fide* in a public market, and had paid for the

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Purchaser of corn in a public market, found liable in the landlord's rent, though at the time of the purchase the tenant had as much corn on the farm as would pay the rent, and sow the ground.

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same, to refund over again the price ; for then neither might tenants sell any of their corns for a lawful use, for the help of their labouring, as for payment of furnishing made to their houses, and borrowed from others before, nor for buying of plough-goods, or for changing of their seed, or for any other such lawful and necessary use ; and also it were to take away all trade and commerce among the lieges. And the pursuer *answering*, That all the fruits of the ground were hypothecated to the master for his farms, and that he ought not to be prejudged thereof by any deed of the tenant's ; but if the tenant has made any bargain it is more just that the buyer have his recourse against the tenant with whom he bargained, than that the master of the ground should want his farm. And it being *duplied*, That the master might have staid the tenant, if she had feared him, to transport his corns, but not having so done, her neglect cannot draw the defender under so evident, and so dangerous a preparative, to cause him pay over again the price of that which he had paid for, and bought in a public market. Likeas, he offered to prove, that at the time when he bought the said victual, the tenant had as much victual in the barn-yard, of that same growth, as would have satisfied the pursuer her farm, and also sown the ground, which corns then extant the pursuer pointed thereafter, for other years duties, owing to her of the farms of preceding years, wherein she can have no privilege, more than any other creditor ; and so, she intromitting thereafter, as said is, it must not be in her power, to ascribe that intromission to any other cause, as for pointing for preceding crops, in prejudice of the excipient, who had lawfully bought, as said is ; but that intromission must be ascribed to the payment of the farms of that year, being of that year's corns, and growth ; and if any superplus had been after payment of that year's farms, she might have pointed that superplus for any preceding debt ; but the corns being hypothecated of that year, she behoved to meddle therewith for that cause, before ever she took her to another ground of intromission ; and he contends, that for any action competent to the pursuer, it must be against the tenant's self, and not against this defender. THE LORDS repelled the allegiance, and sustained the action, and found it not relevant to allege, that the time when the corns were bought, which was condescended to be after Yuil, but long before Candlemas, that there was then as many corns extant as would pay the farm, and sow the ground, except that the defender should allege, that there was as many extant, after, or at Candlemas, before which time the master cannot in law meddle with tenant's corns for his farms ; and also they found, that the master's pointing of any corns for the preceding year's debt, ought not to prejudice her of her action against the intromitters for her farm, neither ought she to be compelled to ascribe that pointing first to that year's farms, as if the corns were first hypothecated for that use ; for albeit she might have been preferred to another creditor, if any had pointed, yet it was not so in her own pointing.

Act. *Advocatus*.Alt. *Nicolson, younger*.Clerk, *Scot*.*Fol. Dic. v. 1. p. 417. Durie, p. 886.*