

1700. June 25. The LORD SALTON *against* JAMES CLUB.

SALTON having set his lands of Over and Nether Bogheads to one Fraser, he subsets one of these rooms to James Club; and Fraser failing in payment of his tack-duty, and Club removing to Pitsligo's lands, Salton pursues Club both upon the right of hypothecation in the fruits of the ground for his year's rent, and on arrestment. *Alleged*, The hypothec can go no farther than the tack-duty payable by Club, the sub-tenant, to Fraser, the principal tenant. *Answered*, The Master may distress any part or room of his ground for the rent as far as the corns or fruits thereof will pay him; and he is not concerned what is Club's tack-duty, whether it be adequate or elusory, unless he hath homologate his tack, or acknowledged him as his tenant, by accepting rent from him; but he may poid or distress any part of his ground for his year's rent; and it would not be a good defence for a lodger in a house to say, you can only poid the trunks and cabinets in my chamber for the mail it pays, but not for the whole house rent; certainly the landlord may take the plenishing of any one room for the whole, *omnia invecta et illata* are hypothecate. THE LORDS found it would diminish exceedingly the Master's privilege of hypothec, if his tenant, subsetting a part, he had only access to compel the sub-tenant to pay no more than his tack-duty amounted to; but found the hail fruits growing on the ground subset were impignorate to him for the rent, as well as the fruits and goods on the rest of his ground, unless he had accepted him as subtacksman. See Anderson *contra* Provand and the Town of Edinburgh, Stair, v. 1. p. 260. *voce* TACK.

In the same process, the LORDS thought, where a tenant steals off his corns, as soon as shorn, to another heritor's ground, the Master may shear the rest, and stack them for conservation only, but may neither cast them in, nor dispose on them, without a decret and formal poiding, and appretiation of the same.

1701. November 11.—In advising the concluded cause, Lord Salton *contra* Club, his tenant, mentioned 25th June 1700, the LORDS found the offering of caution for the year's rent did not take away the master's hypothec in the fruits, so as to warrant or authorise the tenant to carry away the corns at his own hand, off the ground; for though it may be rigid severity in a master to refuse caution, yet *tutius est incumbere rei quam personæ; nec satisfactio illius fraudulentum et malevolum propositum mutat*.

1704. November 18.—In the action pursued by the Lord Salton against Club and others, mentioned 25th of June 1700, it came to be debated, if these accomplices who assisted Club to carry his goods and corns off the ground, to the prejudice of his master's hypothec, could be liable *in solidum*, or only *pro rata* for the damage, where violent away-taking was not proven? But the LORDS considered the intromission as unwarrantable; and though the benefit did not

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The Lords thought, that when a tenant steals off his corns, as soon as reapt, to another heritor's grounds, the master may reap the rest, and stack them, but may not cast them in, or dispose of them, without decree and poiding.

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redound to them, yet it was a delinquency *in suo genere et mali exempli*; and, if allowed, would encourage tenants to help their neighbours to defraud their masters, by clandestine conveying their goods and corns off the ground; and if a master can vindicate his corns from a third party *bona fide* bargaining for them, *multo magis* may he pursue those who assisted in abstracting them; therefore they found all the assistants liable *in solidum* in this circumstantiated case. Stair, book 1. tit. 9. thinks, though strict law makes all concurrers in a delinquency liable *in solidum* for reparation of the damage done, yet in equity they are only bound *pro virili parte*, and for making up the insolvent parties their share: But the LORDS decided *ut supra* against them, as they who could not be ignorant they were *versantes et co-operantes in actu illicito*; and that the tenant's intrusion and away-taking, was either clandestine or violent, and in either of the two cases unwarrantable; and if they passed unnoticed, such combinations would be frequent among tenants, to assist one another in defrauding their masters. Some thought the decision rigorous. See HYPOTHEC.—SOLIDUM ET PRO RATA.

*Fol. Dic. v. 1. p. 116. Fountainhall, v. 2. p. 99. 123. 240.*

\* \* \* If a master can dispossess his tenant *brevi manu*, where he has agreed to remove without warning. See REMOVING.

See APPENDIX.