

No 34.

THE LORDS, 21st December 1750, repelled the defence for the Town of Linlithgow ; but, on bill and answers, sustained it.

Act. *Ferguson & Lockhart.*Alt. *R. Craigie.*Clerk, *Kirkpatrick.**D. Falconer, v. 2. No 196. p. 235.*

S E C T. II.

Feus granted by Churchmen.

1566. *April 26.*DAVID ERSKINE, Archdean of Brechin, *against* DAVID PITCAIRN.

No 35.

Kirk lands were sold by the Chapter, with consent of the vicar-general, there being at the time no bishop. The sale was reduced, as the vicar-general could only, *sede vacante*, authorise necessary, not voluntary deeds.

DAVID ERSKINE, Archdean of Brechin, intented a reduction of David Pitcairn's infeftment of the lands of Drummies, because they were set in feu to him without consent of the Bishop. *Excepted*, There was no bishop the time of the giving the said infeftment, and the Vicar-general consented thereto, with the most part of the Chapter, who by law might have given any benefice vacant, there not being a bishop. *Replied*, It is true that benefices vacant might be given by the Vicar-general, *sede vacante*, and the Chapter, sicklike as sages of lands vacant by decease, and other things *quæ necessaria sunt jurisdictionis, quia alias coacte datur possessio vel beneficium*; yet selling of lands, as in this case, being voluntary, could not be; *quia nemo cogitur alienare (ut in C. ne sede vacante al. innov.)*—THE LORDS found the infeftment null, and reducible for the cause foresaid. Further *alleged*, That the defender's infeftment was confirmed by the Queen, who was both in the Bishop's place and the Pope's, by the act of Parliament, whereby the want of the Bishop's consent was supplied. *Answered*, That the Queen's confirmation was only *in communi forma*, not making mention of supplying of the said defect, and also it was given after the intending of the pursuer's action of reduction; so that it ought to be esteemed purchased surreptitiously, *super re litigiosa, et in præjudicium tertii interesse habentis non vocati*, and so could not *supplere defectum consensus Episcopalis*.—THE LORDS found the reason of reduction relevant, notwithstanding of this last allegation also.

Fol. Dic. v. 1. p. 529. Spottiswood, p. 187.