

No 16.

1625. *July 28.*—IN an action betwixt Walwood and the Earl of Dunfermline, a tack set by the Earl of Dunfermline of a coal, to one called Taylor, which tack was subscribed by Walwood as witness; it being controverted, and *alleged*, That Walwood, who pretended right to the said coal, set by the fore-said written tack, by the Earl of Dunfermline, as said is, could not come against any thing contained in that tack, so subscribed by him, as witness, specially also, seeing in that tack there was a clause contained in his favours.—THE LORDS found, that the said Walwood's subscribing that tack as witness, was not of that force to prejudge him of any right he had to that coal, which was set in tack, as said is, notwithstanding of any clause therein contained; and that his subscription, as witness thereto, was not obligatory against him, neither induced any consent of his to that tack.

Act. *Stuart.*Alt. *Hope et Belshes.*Clerk, *Hay.**Fol. Dic. v. 1. p. 378. Durie, p. 179, & 183.*1631. *July 26.* BISHOP of the Isles *against* SCHAW and Others.

No 17.  
A member of a chapter having subscribed a tack let by the bishop, not as co-senter, but as witness; this was found equivalent to his consent.

IN a reduction of a tack of the teind-fishes of the Isles, set to the defenders by umquhile Thomas Bishop of the Isles, upon these two reasons, viz. *First*, because the Bishop, setter of the tack, had no power to set the same, in so far as the Bishop of the Isles, immediate predecessor to the Bishop, setter of the tack controverted, had set another tack of the same teind-fishes to other persons, which tack was not yet expired the time of the setting of the tack libelled, neither is yet expired, and so the tack is set *a non habente potestatem*, and ought therefore to be reduced; it being *alleged*, That this reason was not relevant at this Bishop's instance, and that he had no interest upon this reason to reduce the tack libelled, seeing the same was clothed, and is yet clothed with present and continual possession, since the setting thereof; and that the prior *alleged*-tacksman to the other Bishop, who only might have interest to quarrel the defender's tack upon that reason, compeared not to quarrel the same;—THE LORDS found nevertheless that this Bishop had interest upon this reason to quarrel the tack, and found this reason relevant, and sustained his interest; and so it was found by this decision, that the succeeding Bishop could not set a tack of any thing, whereof his predecessor had set a tack of before, which was standing then unexpired; and that the successor, albeit the party quarrelled not the same, had interest to reduce upon such reasons. The *second* reason of reduction, was diminution of the rental, because by the said prior tack, the Bishop had set the same for payment of a merk for ilk last of teind-fishes that should be taken; and this tack bore only the duty of 100 merks for all. This was found no diminution, seeing there was no constant rental libelled, ever to have been of these teind-fishes, which had taken effect; for this uncertainty

of duty in the first tack, viz. of a merk for ilk last that should happen to be taken, was not such a definite special rentalled duty, as might make it appear to be a diminution, when the duty should be thereafter appointed to be 100 merks; for it might have happened, that there should not have been 100 last of fishes taken, *quo casu* it could not be a diminution of the rentalled duty, seeing there was no special certain determined duty, for which the said fishes were rentalled before. And the tack being further quarrelled, because the same wanted a sufficient number of the chapter prescribed by the act of Parliament, to the bishoprick of the Isles, (which is an unprinted act) for one of the chapter had not subscribed as a consenter, but as a witness, and some others were not of the chapter, albeit they had subscribed as of the chapter; for some others had served the cures and charges of those kirks, the ministers whereof by the said act of Parliament were appointed to be of the chapter, and these consenters had not served that charge, and so were not to be respected as of the chapter;—THE LORDS assoilzied from this reason, and found that the subscription of that person as witness, who was of the chapter, was as sufficient as if he had expressly consented; and also sustained the consent of the rest, seeing the defenders offered to prove, that they were ever reputed to be of the chapter, and that they had these many years by-past consented to tacks, and other deeds done of the bishoprick, as those persons who had the charge of these benefices, required by the act of Parliament; and as of the chapter of that bishoprick; and albeit others served the cure, yet seeing the pursuer offered not to prove, that others were provided to these benefices, by lawful provisions, therefore the exception against the reason was sustained to maintain the tacks. See KIRK PATRIMONY.

Act. David Stuart.

Alt. Nicolson &amp; Mowat.

Clerk, Gibson.

Ful. Dic. v. 1. p. 378. Durie, p. 601.

1661. June 29. TELFER against MAXTON and CUNNINGHAM.

JOHN KER, merchant in Edinburgh, having a wadset-right of some tenements in Edinburgh, William Clerk his creditor comprised the wadset-right from him, and obtained decree of removing against the tenants of the tenements: James Telfer having right to the reversion of the said wadset, consigned the sum for which the wadset was granted, in the hands of the clerk of the bills, and thereupon obtained a suspension of the decret of removing; and thereafter having obtained right from William Clerk to his apprising, did, by supplication, desire the sum consigned by him to be given up to himself; 1<sup>st</sup>, because the consignation was not orderly made, conform to the reversion; and, 2<sup>d</sup>, though it had been orderly, yet before declarator he might pass from the consignation and take up his money, whereby the wadset right would remain unprejudged;

No 18.

A bond drawn in name of several apprisers, and subscribed by some, was found not homologated by one who did not subscribe, although *de facto* he concurred in pursuits with the apprisers to