No 45. being publickly infeft; so that though the decreet was obtained at umquhile Wolmet's instance, yet he being denuded of the property by a public infeftment of wadset, with his wife's liferent reserved therein, they could not be miskenned, and their right taken away by a process against Wolmet's apparent heir, who was denuded of the property, and who did not produce the decreet of valuation, and abide by it as a true deed.

The Lords sustained the defence upon the decreet of valuation; and found the certification could not take away the liferenter's interest in the valuation, she not being called; and found the articles to infer no homologation; but found the third member of the reply relevant, that tacks were taken by the defenders, and duty paid of a greater quantity since the valuation. See Tack.

Fol. Dic. v. 2. p. 350. Stair, v. 1. p. 696.

1673. *December* 11. Earl of Kinghorn *against* The Earl of Winton.

No 46.
A cautioner entitled to propone a defence which was sustained for the principal debtor, and he succumbed therein, the cautioner not having been called in the process.

The Earl of Kinghorn pursues the Earl of Winton as heir to his goodsire, who was cautioner for the Earl of Marischal, in the contract of sale of the barony of Urie, sold by the Earl of Errol to Marischal; in which contract, Marischal and Winton were obliged to pay 2000 merks, as a part of the price to Mowat of Redcloak, whereunto Kinghorn hath now right. It was *alleged* for the Earl of Winton, That he had a competent defence, viz. that the sum was satisfied by Redcloak's intromission, or at least the lands sold were affected with a tack, the burden whereof was equivalent to the sum. It was *replied* for Kinghorn, That this defence was not competent, because payment being proponed against Mowat of Redcloak, an incident was used against Marischal, the principal debtor, whereby that allegeance being intimated to him, and he failing in probation, there was no necessity to intimate it to the cautioner, who runs the hazard with the principal.

The Lords found the cautioner might make use of this defence, seeing there was no intimation made to him, lest the negligence or collusion of the principal might prejudge the cautioner.

Fol. Dic. v. 2. p. 351. Stair, v. 2. p. 238.

1676. *January* 27. The Bishop of Caithness *against* Innes (or Sinclair.)

No 47.
Whether certification against the immediate vassals is sufficient against the sub-vas-

The Bishop of Caithness having obtained certification against several of his vassals' rights, pursues Innes to remove from certain lands which he held of one of the Bishops' vassals; who *alleged*, That the certification could not work against him, because he was not called to the improbation, and his infeftment

No 47.
sals, whose rights fall of consequence?

Observe Gosford's report of this case.

was a standing right sufficient to defend him. It was *answered* for the pursuer, 1*mo*, That he was obliged to call none but his immediate vassals, and need neither know nor own sub-vassals, whose rights fall in consequence. The defender *answered*, That he could not misken him who was in actual possession before his improbation; 2*do*, Albeit there had been no need to call him in the first instance, yet he hath raised reduction of the certification, as proceeding by collusion of the Bishops' immediate vassal his superior; and doth now produce his infeftment holden of the Bishop, which would have satisfied the production, and excluded the improbation and reduction. It was *replied* for the pursuer, that the defender's right fell in consequence, neither was there any collusion; 2*do*, The charter produced is in anno 1634, long after the act of Parliament 1606, prohibiting Bishops to dispone their benefices, or grant pensions thereof, longer than the incumbents' life; and the charter produced bears it to be an original right after a former improbation; so that it is a manifest dilapidation of the benefice, seeing the Bishop should have continued in the property. It was *duplied*, That it is clear by the act of Parliament, that the dilapadition prohibited, is only by granting feus or tacks with diminution of the rental the lands paid formerly to the Bishop; but this charter in 1634 was no diminution of the rental, because it is offered to be proven, that the feu-duty therein is as great as the feu-duties in the old charter of these lands, preceding the act of Parliament; and if certifications by church-men were sustained, which are frequent amongst such a multitude of vassals, it would be of very evil consequence.

THE LORDS found that the certification was valid, and the sub-vassal needed not be called in the improbation, but his right fell in consequence; but found that the sub-vassal in the second instance by reduction, producing his superior's infeftment, ought to be reponed against the certification; and found that it was no dilapidation, and no unwarrantable deed, for the Bishop to pass from the certification, and to give a new infeftment, without diminution of the old feu-duty payable before the act of Parliament.

Fol. Dic. v. 2. *p.* 350. *Stair, v.* 2. *p.* 406.

*** Gosford reports this case:

IN an action for mails and duties, pursued at the Bishop's instance, against Sinclair of Sandisyde, it was *alleged*, That he stood heritably infeft in the said lands upon a right flowing from the Laird of Mey, and by virtue thereof had been seven years in possession. It was *answered*, That the defence could not be sustained upon the Laird of Mey's right, because the pursuer had obtained a decreet of improbation against the defender's author, who was only vassal to the Bishop, and Sandisyde's right was never confirmed. It was *replied*, That the defender being sub-vassal, and in possession, ought to have been called in the improba-

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tion, and so it could not militate against him; for if he had been called, he would have produced his author's right; likeas now he is content to produce the same. THE LORDS did find that the sub-vassal, being in possession as heritor, ought to have been called; and that the improbation could not militate against him, albeit his right was not confirmed; and if it were otherwise, it were easy to superiors, upon collusion or default of their immediate vassals, to take away the sub-vassals' right, albeit they had the principal rights, and were ready to produce the same, and so they reponed him against the improbation.

Gosford, MS. No 844. *p.* 534.

No 48. 1685. *March* 12. Captain ANDREW DICK *against* CRAIGIE of Gairsey.

CAPTAIN Andrew Dick against Craige of Gairsey, being reported by Pitmedden, the LORDS found, seeing Gairsey was but cautioner for Oversandy his uncle, in the suspension, it was competent for him to propone any defences, though omitted by the principal party; and they did not stint him to prove them *instanter*, but allowed him terms for that effect.——This has been formerly so decided, as appears from Stair.

Fol. Dic. v. 2. *p.* 351. *Fountainhall, v.* 1. *p.* 352.

No 49. 1709. *December* 20. HAMILTON *against* CALDER.

A decree having been taken out by the tacksman of the customs against his cashier, for a balance in his hands, without calling the cashier's cautioner, the LORDS, in a suspension, allowed the cautioner to be heard against the accounts, as if he were yet *in libello*, and found the decree not to be *res judicata*, either as to relevancy or probation.

Fol. Dic. v. 2. *p.* 351. *Forbes.*

*** This case is No 24. p. 2092, *voco* CAUTIONER.

No 50. 1738. *July* 28. ELIZABETH WALKER *against* CHATTO.

Where a Bailie had fined for a riot, the Commissary's sentence fining of new for opprobrious expressions sustained.

WHERE a person had been guilty of a riot, and of giving opprobrious language, at one and the same time, in one continued act, which commonly happens, and had been convened before the Bailies of Kelso for the riot, which the libel bore to be aggravated by the opprobrious language, and fined for the offence; it was notwithstanding found, that he might thereafter be pursued before the Commissary for the opprobrious language, as a distinct crime from the