

No 45. being publickly infeft; so that though the decret was obtained at umquhile Wolmet's insiance, 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 decret of valuation, and abide by it as a true deed.

THE LORDS sustained the defence upon the decret 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 propounded against Mowat of Redcloak, an incident was used against Marischal, the principal debtor, whereby that allegiance 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 prejudice the cautioner.

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

1676. January 27. The BISHOP of CAITHNESS *against* INNES (OF 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