

It was REPLIED,—*Posteriora derogant prioribus*. And it happens very often, that clauses in contracts which are very express, are qualified, and sometimes quite altered by posterior clauses. And here the words are very express, that if the pursuer be not pleased to keep the tack, he is bound to name an arbiter; and the defenders are willing to name on their part: so the import of the clause is, that the tack shall indeed continue, but the tacksmen shall be liable to such a farther tack-duty as equity may require, which is not inconsistent with the former; and though it were, yet the words being express, the Lords are to judge accordingly. *2do*, It is very ordinary to allow a freedom to the tacksmen when the setter is bound; and sometimes the tacksmen will be bound, and the setter free, at a period of the tack. *3tio*, The submission will not be elusory; for the Lords, *ex nobili officio*, may limit a time betwixt and which both parties shall name arbiters, with power to choose an oversman, and may limit a time in which they shall pronounce their decreet-arbitral; or the Lords may come in place of arbiters, and determine *secundum arbitrium boni viri*. *4to*, The clause will not bear the sense that is put upon it, viz. that the pursuer may take the tack in his own hand; for the words run thus:—"That if the said Sir Thomas shall not incline to keep "the tack upon the terms above mentioned," &c. The terms above mentioned are the terms of the tack; and in that case he cannot remove, but must submit what further tack-duty shall be payable.

The Lords found, that the defenders could not be removed by virtue of the said first clause of the tack, but that the defenders being willing to submit to a further tack-duty, and name an arbiter, the pursuer was also bound to name another; and the Lords did limit a time for the parties to name their arbiters, and a further time to pronounce their decreet-arbitral; and superseded to determine in the removing, till both terms were elapsed.

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1716. December 5. The MINISTER OF LETHINDIE, *against* The OFFICERS OF STATE.

THE minister of Lethindie pursues a modification and locality; and insists that certain feu-duties, whereof he and his predecessors had been in possession for many years, may be a part of his locality.

It was ANSWERED for the Officers of State,—That these feu-duties, whereof the minister alleges he was in possession, do not belong to the minister of Lethindie as minister; but, in time of episcopacy, the minister of Lethindie was chancellor of the bishoprick of Dunkeld, and enjoyed these feu-duties as such; which appears by a presentation granted to Mr. Young, his predecessor, some time before the abolition of episcopacy; and the said feu-duties pass under the designation of chancery-duties to this day.

It was ANSWERED,—That the pursuer and his predecessors were *decennales et triennales possessores*, and, as such, had right to the chancery-duties, in as far as, by the 23d Act Parl. 1690, concerning patronages, whereby, in lieu of the right of presentation, the patron got the superplus benefit of the teinds of the parish more

said superiorities, until redemption by the crown; but that right of the patrons again, was under this exception, in favours of ministers, viz. except where the said feu-farms are a part of the minister's modified stipend, or where the minister is, or has been, in the possession thereof for the space of ten years, which is the pursuer's case; and thereby he has right to what he has so long possessed. And as to the presentation by the Bishop of Dunkeld, supposing that it had been accepted, yet it is granted to Mr Young, as minister of Lethindie, and so is a natural and legal consequence of the minister's serving the cure there, and, accordingly, has ever since been enjoined by the minister as minister of Lethindie.

It was REPLIED,—That during episcopacy, the minister of Lethindie was of course chancellor of the bishopric; and, in many other cases, dignities of the church were annexed to the charge of ministers in particular parishes: nevertheless the parish and chancellor had different patrons,—the bishop was patron of the chancellor, and the parish was of a laic patronage. But, by the abolition of episcopacy, and all dignities of the church, the right of the minister to the chancellor ceased; and the feu-duties belonging thereto fell to the crown, *2do*, It is true, *decennalis et triennalis possessor* has a presumptive right; but that presumption may be elided by a contrary probation, that the right is in another, as it is made evident in this case. *3tio*, As to the act of Parl. 1690, it does not at all concern this case; for the clause in the act runs in these terms:—"Whereas there are certain lands and annual-rents holden of the said benefices, and benefited persons, from which patrons might have some benefit arising to them." Then the act proceeds to declare, that these superiorities shall belong to the crown, but reserving the feu-farms and feu-mails to the patron, till redemption, with an exception in favours of the ministers who have been ten years in possession of these feu-farms. So that the subject of that whole clause is concerning the superiorities of lands or annual-rents, which were formerly held of benefices, or benefited persons: whereas the feu-duties which are the subject of the present question, never did hold of the minister of Lethindie, but was a separate benefice, by a different presentation. The act of Parliament did only respect such benefices as had superiorities or annual-rents holding of them, whereof there are several in Scotland. And, for further clearing this point, suppose the church of Lethindie were vacant, the laic patron would lead no claim to the chancellor-duties during the vacancy; or, suppose the minister had not been ten years in possession, the patron would have had no right to these feu-duties, by virtue of that act of Parliament.

The Lords found, That the office of chancellor did not belong to the laic patron of Lethindie, but to the bishop of Dunkeld, during episcopacy; and that the chancellor-duties do now belong to the crown, and ought not to be allocated as any part of the pursuer's stipend.

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1717. *November 20.* PATRICK LYON *against* The JUSTICES of the PEACE of the Shire of Fife.

MR. PATRICK LYON, late episcopal minister at Kinghorn, being deposed by the Presbytery, set up a meeting-house in the same parish; and, upon application, by