

1756. July 20. DUKE of ATHOLE *against* DUCHESS DOWAGER.

No 17.
A proprietor
obtaining a
tack of his
teinds from
the Exche-
quer is bound
to communi-
cate it to the
licenter.

In the year 1710, the late Duke of Athole, in his contract of marriage with Mrs Mary Ross, daughter to Lord Ross, became bound to infeft her in the lands of Huntingtower for her jointure, with a clause of warrandice in common style. The teinds of the lands of Huntingtower, as well as of several other parcels of the estate of Athole, belonging to the Crown, as in the right of the Bishop of Dunkeld, the family of Athole obtained tacks of these teinds from the Barons of Exchequer, from 19 years to 19 years. In the 1710, the late Duke obtained a tack. The present Duke obtained a tack in the 1731, and another in the 1752. The tack-duties payable for the different parcels are distinguished in the tacks; and, in particular, the tack-duty for the lands of Huntingtower is L.60 Scots yearly. Upon the death of her husband, the Duchess of Athole entered into possession of the lands of Huntingtower, *anno* 1725, uplifted the mails and duties thereof, stock and teind, and paid regularly to the collector of the Bishops rents the teind tack-duty of these lands, being L.60 Scots as aforesaid. Thus matters continued till the 1756, when the present Duke thought proper to bring a process against his stepmother, the Duchess, for the surplus teinds over and above the teind tack-duty.

“ THE LORDS assoilzied, but found the Duchess liable for a proportion of the expense laid out in obtaining the tacks from the Exchequer.”

The ground of the judgment was as follows: The lands of Huntingtower were set to tenants, stock and teind; and though the teinds were not disposed to the Duchess in her contract of marriage, yet she, as proprietor for life, would, in a competition with the present Duke, be entitled to a tack of the teinds of these lands, according to the rule in Exchequer, by which the proprietor is always preferred. *Ergo*, When the Duke obtained from the Exchequer a tack of the teinds of his whole estate, it must be understood that, with respect to the lands of Huntingtower, the tack was demanded by him and granted by the Crown, for behoof of the Duchess, as liferentrix, and of himself, as proprietor after her death; and for this reason he is bound to communicate to her the benefit of the tack. And that this was the sense of the parties, is evident from the subsequent proceedings. The Duchess, from the 1725 downward, paid the tack-duty to the Crown, and the Duke made no demand for the teinds. Similar to this is a gift of ward to the ward-vassal himself. He is bound to communicate this gift to his sub-vassal, though he is not bound to warrant the sub-vassal against the casualty of ward.

Sel. Dec. No III. p. 157.

* * This case is reported in the Faculty Collection :

1756. July 24.—The late Duke of Athole became bound by marriage-contract to infeft the Duchess in the liferent of the lands of Huntingtower, with absolute warrandice.

The teinds of Huntingtower belong to the Crown, and have been possessed under lease from it by the family of Athole; in consideration whereof, there is paid a yearly rent, and a composition at the renewal of each lease. On the demise of the Duke, the Duchess entered to the possession of her jointure lands, and paid duly to the Crown the teind-duty aforesaid.

The Duke of Athole, as tacksman of the teinds of Huntingtower, brought an action against the Duchess for payment of the full teinds since the time of her entry to her jointure-lands; and, in support of this action, he *pleaded*, That if a third party were tacksman of the teinds, he might exact them from the Duchess; nor would she have recourse against the pursuer, as representing the late Duke, his father, upon the warrandice in her marriage-contract, which contains no disposition of teinds: and as the right to the teinds is distinct from the right to the lands, the Duke is, with respect to the teinds, in the same condition as any other tacksman would be. Had the Duke made an absolute sale of the lands, he might still have levied the teinds from the purchaser; so also may he levy the teinds in this case where the lands are not disposed absolutely, but in liferent.

The Duchess Dowager *answered*, That had she apprehended that a demand for the full teinds would ever have been made, she might have obtained a lease of them from the Crown, upon payment of that composition which the Duke paid; the tacks have been granted for the benefit of the proprietor, that is, of the Duchess, during the subsistence of her liferent-right, and of the Duke at its expiry; the Duke must, therefore, communicate to the Duchess the benefit accruing from such tacks, in the same manner as he who procures a gift of his own ward must communicate the benefit thereof to his sub-vassals.

“THE LORDS found the defender entitled to the benefit of the Duke’s tacks, but that she must pay for her proportion of the composition paid in Exchequer, and the expenses of obtaining the said tacks corresponding to the rent of her liferent-lands included in the said tacks.”

Act. *A. Pringle, Ferguson.*
R-porter, *Woodhall.*

Alt. *Sir Da. Dairymple, Lockhart.*
Clerk, *Gibson.*

D.

Fac. Col. No 209. p. 306.

1792. November 14. KEITH against GRANT, &c.

No 18.

A PROPRIETOR of two estates, in one of which he was infest, in the other not, granted an heritable bond over both, in which the creditor was infest. On the debtor’s death, his heir entered *cum beneficio*, and thereupon took infestment in both estates. It was afterwards *objected* to the heritable bond, that *quoad* the estate in which the granter died not infest, the bond and infestment were inept, as flowing *a non habente potestatem*. *Answered*; This defect was removed by the