

1622. November 30. MURRAY against DURHAM, and the LADY WINTON.

SIR JAMES DURHAM being general tackfman of the teinds of the kirk of Selkirk, sets a tack to Sir John Murray of Philiphaugh, of some teinds of certain lands pertaining to him, within that Paroch, for payment of twenty pounds of duty yearly; thereafter Sir James makes the Lady Winton assignee to his whole tack of the whole kirk, and also specially to Sir John Murray's tack-duty, in whose tack there was a clause irritant, that if Sir John suffered two years duty to run in the third unpaid, the tack should be null. Sir John raises a summons of double pointing, *alleging* him to be distressed by Sir James Durham, and the Lady Winton, for his tack-duty, and desires that the same may be given to any who shall be found to have best right thereto; and in respect he made offer of his duty to Sir James, to whom he was *specific* bound in payment thereof, before the expiring of two years, therefore he desires, in that same letters of double pointing, that the same may be found, by the LORDS, to be sufficient to liberate him at all parties hands, and free him of the danger of the clause irritant. This cause being called, Sir James compeared not, only the Lady Winton compeared, and *alleged*, that the offer made to Sir James could not purge the clause irritant, seeing he was not the right party to whom the same should have been offered, he being denuded, as said is, before the offer, in favours of the Lady Winton. And whereas it was *alleged*, by Sir John Murray, that his denuding could not put him *in mala fide*, to make the offer to that person to whom he was bound, there being no intimation thereof made to him, before the offer: The Lady Winton *answered*, that, before that offer, she had intentit pursuit of spulzie, upon this same right made to her by Sir James, against the same party, viz. Sir John Murray, for spulzie of teinds of other lands which were not comprehended in Sir John's tack. In the which action of spulzie he had compeared, and saw the same right made to her by Sir James which was the title of that pursuit, and so he could not pretend ignorance of her right, nor to misken her, by making of any offer thereafter to that person whom he saw and knew to be denuded in her favours, and so the offer not being made to her cannot be sustained, her right being more than lawfully intimate to him by that pursuit founded thereupon; wherein he compeared, and saw the same before his offer. It was *answered*, that albeit that pursuit was founded upon that title, and that he compeared therein, and saw the same; yet seeing that pursuit was moved for teinds of other lands, whereof he had no tack, and that no mention was made in that cause of the teinds contained in this tack, he had no necessity to take any notice of the right, but so far as the same instructed the pursuit for the teinds then contraverted; neither can that pursuit be respected as an intimation for any other part of her right, but allenary concerning the subject then acclaimed: for although he should grant, that he knew that the right extended to the whole, yet intimation ought to have been legally and orderly made to him of the whole right, without which had been done, he cannot

No 56.

The tackfman of the whole teinds of a parish sublet a part of them; and afterwards assigned his principal tack. The assignee called the subtenant in an action relative to other teinds than those sublet to him. Although the assignation was founded on as the title to pursue the action, it was not held to be equivalent to intimation, as the subtenant was not obliged to consult the title, farther than regarded the immediate cause of producing it.

No 56. be put *in mala fide* to have made this offer, but the same ought to liberate him of the danger of the clause irritant. It was *answered*, seeing the pursuit was founded upon that title, which comprehended all the teinds, albeit thir teinds were not then contraverted, yet he compearing, and seeing that title, which was contained all in one body, he could not misken it for one part, and take notice of it for another part; but that pursuit ought to found a sufficient intimation for all which was comprehended within the body of that writ, so far as concerned him who was then party in that pursuit; for if he had been making a specific intimation thereof, there was nothing requisite but to deliver the same to the party to be read and considered by him, which was done in the pursuit foresaid by him at length. THE LORDS sustained the offer foresaid; albeit made after the pursuit founded upon the Lady Winton's right, which pursuit they found only to serve for an intimation of the Lady's right, so far as concerned these teinds, which were then contraverted by that pursuit, and would not allow the pursuit as a sufficient intimation of the foresaid right for any other thing therein contained, which was not pursued for by that action, albeit the title of that action contained all in one body of one writ; for if a party had intimate his right *pro parte*, and had kept it unintimate *pro reliquo*, the intimation could not have been respected, but so far as it was intimate; so in this pursuit ought the like respect to be had, specially where the falling of the tack was urged by the irritant clause, which was an odious pursuit.

Aff. Nicolson & Scot.

Alt. Hope & Stuart.

Clerk, Gibson.

*Durie, p. 36.*

Haddington reports the same case thus:

SIR JOHN MURRAY of Philiphaugh raised a triple poinding against Sir James Durham, the Countess of Winton, and George Whythead, to know who should be answered of the duty of his tack of certain teinds of his lands within the parish of Selkirk, set to him by Sir James Durham, principal tackfman of the teinds of the parish of Selkirk. In which cause the Countess of Winton, as assignee to the said Sir James Durham's tack of the said parochin, was ordained to be answered and obeyed. In that same summons, he pursued the said parties to hear and see that he had lawfully offered the duty of his tack, for the year 1620, to Sir James Durham; and, upon his refusal, had lawfully consigned it; and, in respect thereof, desired the party found to have best right thereto, to be ordained to take up the consigned money, and give him a discharge for eschewing the danger of the clause irritant, contained in his tack; likeas he libelled that he had paid the duty of the year 1619 to Sir James Durham, and reported his acquittance. It was *alleged* for the Countess of Winton, that neither the acquittance of the year 1619, nor the offer and consignment of the duty of the year 1620, could be law-

ful, because the acquittance of the year 1619 wanted date, and so was null in respect of the Countess of Winton, since it proved not that the discharge was anterior to the assignation; neither will the offer and consignation for the year 1620 be lawful, because it was made to Sir James Durham, not only long after her assignation, but after she had found inhibition upon her assignation, and had pursued Sir John Murray for spulzie of certain teinds of the said parish; in which cause he had accepted upon his offer of teinding, according to the act of Parliament, which was taken away by a reply, that, after the offer of \_\_\_\_\_, he had intromitted with the teinds, which being referred to his oath, and denied by him, he was assolzied, which was a judicial and lawful intimation of his assignation, after which he could never have made lawful offer for payment to Sir James Durham his cedent. It was *answered*, that the pursuit not being for any teinds contained in Sir John Murray's tack, the same could not be thought an intimation of any right the Countess had to the duty of his tack. Next, his tack bound him to pay the duty thereof to Sir James Durham during his lifetime, *personaliter et nominatim*, and not to his heirs and assignees; and so he was in *bona fide* to pay, or offer to him, specially to eschew the clause irritant, which he only contended by this pursuit. The Countess replied, that since her assignation, which was the title of her pursuit of spulzie, was an absolute and full assignation to Sir James Durham's whole tack of the church of Selkirk, containing an assignation to the duty of Sir John Murray's tack, he could not milknow her right; and her pursuit before-mentioned behoved to be reputed a lawful intimation of her right. THE LORDS, in respect that the pursuit tended not to prejudice the Countess of Winton of the duty of the tack, whereof she was ordained to be answered and obeyed, but only to eschew the rigour of the clause irritant, they found that the quality of Sir John Murray's tack, binding him to pay his duty *personaliter* to Sir James Durham, to whom he had made payment of one year, and lawful offer of another, that it was sufficient to relieve him of the clause irritant, and that the pursuit against him for other teinds was not a sufficient intimation to make him incur the clause irritant for the teinds contained in his tack; but prejudice to the parties having right to pursue for payment of the ordinary duty contained in the tack, not only since December 1619, which was the date of the tack, but also for all years since the entry of the tack, which was appointed to have been in *anno* 1613 years. In this cause the LORDS remembered, that a party's subscribing an assignation as witness was not reputed to be a valid intimation, and that knowledge supplied not the necessary solemnity of intimation, as was practised betwixt \_\_\_\_\_ :  
 And also found, that the want of date in a writ might be supplied, and proved by the witnesses inserted, as was practised betwixt Samelston and his mother.

*Fol. Dic. v. 1. p. 64. Haddington, MS. No 2680.*