

was conditioned to be paid in England, they might prove the payment thereof by witnesses, according to the custom of England. The pursuer replied, The parties, contractors, being all Scotsmen, and the debt being pursued in Scotland, could not be proven paid but by writ or oath of party, conform to our law. The Lords found the allegiance relevant to be proven by witnesses, the custom of England being proven. Page 71.

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1633. *March 19.* GEORGE HOME *against* the LAIRD of BLACKADER.

GEORGE Home, brother to the Laird of Renton, as donator to John Stuart of Coldingham's escheat and liferent, and thereby having right to the liferent-escheat of the Laird of Wedderburn, who was John's vassal, pursued for the mails and duties of certain lands pertaining to Wedderburn. Compeared the Laird of Blackader, and Alleged, The pursuer, as donator foresaid, could not be answered of the mails and duties libelled, because he was infest in the lands libelled long before Wedderburn's rebellion. Replied, His infestment was but base, never clothed with possession, and so could not prejudge the superior nor his donator *post jus acquisitum*. Duplied, His infestment was for an onerous cause, *viz.* for relief of cautionary for Wedderburn, in case it should happen him to be distressed; and, as long as he was not distressed, he had no necessity to apprehend possession, but suffered Wedderburn to possess his own lands, and pay the annual-rent of the sums for which he was cautioner; In respect whereof, his not possessing cannot be obtruded to him. Triplied, A base infestment, without possession, can never maintain one against another pretending right. The Lords repelled the exception, in respect of the reply.

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1633. *March 21.* ALEXANDER KEITH, Parson of Strabrock, *against* JAMES GRAY and THOMAS CARMICHAEL.

The Lords, in many causes, have found that the teinds are hypothecated for payment of the minister's stipends, in such sort that action will be sustained, at their instances, against any intromitters therewith, ever till they be paid. Conform hereunto, Mr Alexander Keith, parson of Strabrock, upon his provision and decret conform, charged Mr James Gray and Thomas Carmichael, as intromitters with his teinds, for payment of twenty-eight bolls victual, and £100 in money, as a part of his stipend. They suspended upon these reasons. *Imo*, They were not intromitters with the teinds; but the right they had, both to lands and teinds within Strabrock, was only a wadset from Mr William Oliphant, redeemable upon the payment of their sums, containing back-tacks for payment of the ordinary annual-rents of their money: And so, they being only in use to uplift the back-tack-duty from Mr William, which is but their annual-rent, they cannot be charged by the minister for the teinds, but only Mr William and his tenants, who were in possession both of lands and teinds.

Answered, They, by their wadset, having right both to stock and teind, and receiving the duty contained in the back-tack, both for stock and teind, it was in the charger's option to seek his stipend either from the tenants, Mr William, or yet from the wadsetters. The 2d reason given was, That the suspenders brooked the teinds, yet their right proceeds from Mr William Oliphant, who is tacksman to the charger, of the whole teinds of the barony of Strabrock, for payment of a tack-duty, and who has been still in use of payment of it; and so he could not charge the suspenders upon his provision, but should have pursued for the tack-duty, for which the suspenders are not liable, but only his tacksman against whom he may have personal execution for the same, but not against the intromitters. Answered, The tack-duty being a part of his stipend, he might charge either the tacksman or intromitters for the same. The 3d reason was, Albeit the suspenders were liable to the tack-duty, yet they can be no further subject thereunto, but to a proportional part thereof, according to the proportion of the land contained in their security of the said barony of Strabrock. Answered, They must be subject all that their teinds are worth, aye and while the tack-duty charged for be satisfied; and it were no reason to put the minister to seek the same from each one within the barony, according to the proportion of land he brooked; but let the suspenders, if they please, seek their relief off the tacksman, or yet off the rest of the possessors, as they may best. The Lords found the letters orderly proceeded, notwithstanding of all these reasons.

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1633. March 31. JOHN CHISHOLM *against* JOHN PRINGLE.

JOHN Chisholm having pursued John Pringle of Blindlie, and certain others, for spoliation of some sheep from him, the summons being admitted to probation, the spuilie was proven against the said John and the rest of the defenders, being some of them his servants, and others gentlemen of his name and friends that were in company with him; so that, by the ordinary form, the decret should have divided against the whole defenders. Yet the Lords, in respect that there were none of them *solvendo*, except Blindlie, found the libel proven to infer payment *in solidum* against him.

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1633. July 6. The LAIRD of WAUCHTON *against* The LAIRD of AITKIN.

THE Laird of Wauchton having set a tack of some lands to the Laird of Aitkin, he pursued him for finding caution for payment of the tack-duty, or else to remove. The defender being absent, the question was, Whether the summons should abide continuation or not? The advocate for the pursuer maintained stiffly that it needed not be continued, seeing he proved all by production of the contract betwixt the parties; and this action was of the same nature with a re-