

1670. June 8.

DOCTOR HAY *against* JAMIESON.

No 44.

A SINGULAR successor, though not infest, was allowed to produce his author's infestment, against which certification had been extracted, and to be reponed against the same, he, the singular successor, not having been called in the reduction and improbation.

Fol. Dic. v. 2. p. 350. Stair.

* * * This case in No 7. p. 6796, *voc* INDEFINITE INTROMISSION.

1670. July 15. Major BIGGAR *against* DAVID CUNNINGHAM of Dankeith.

No 45.

Certification against the reverser found not to militate against a proper wadsetter publicly infest.

MAJOR BIGGAR having right to the teinds of Wolmet from the Earl of Lauderdale, pursues David Cunningham of Dankeith, and Jean Douglas, relict of Wolmet, his spouse, for spuilzie of the teinds, restricted to wrongous intromission, and insists for the fifth of the rent. The defenders *allege*, Absolvitor, because they produce a valuation of the teinds of Wolmet, obtained at the instance of umquhile Patrick Edmonston of Wolmet, before the commission for valuation *in anno* 1636. The pursuer *answered*, That the defence ought to be repelled; *1mo*, Because Swinton standing then in the right of these teinds, had raised reduction and improbation of this decret of valuation, against James Edmonston, as heir to Wolmet, and thereupon had obtained a decret of certification, which is now produced; *2do*, By articles betwixt Dankeith and Major Biggar produced, Dankeith accounts for a greater duty than this valuation, and so passes therefrom, and homologates the Major's right; *3tio*, The decret of valuation never took effect, there never having been payment made conform thereto, but tacks accepted by the same defenders, and duties paid by them of a greater quantity. The defender *answered*, That the certification could have no effect against the defenders, because it was only obtained against Wolmet's apparent heir, who had only the right of reversion, the wadsetter who was proprietor publicly infest, and the said Jean Douglas liferenter by a public infestment, never being called, who do now produce the decret of valuation quarrelled; and as to the articles, they can import no homologation, because the article anent the teind bears only such a sum, without relating to the fifth of the rent, or to the price of the valued bolls. The pursuer *replied*, That the valuation having been obtained at the instance of Wolmet, and not of his wife, he might reduce the same by calling only Wolmet's heir, who had not only the reversion, but a back-tack, and he was obliged to call no other, especially seeing they had no right to the teinds. The defender *duplied*, That the heritor has undoubtedly interest in the valuation, though he had no right to the teind, because it liquidates the teind, and liberates the stock of any further, and so hath the liferenter for the liferent right, especially she

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.

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.

1673. December 11. EARL OF KINGHORN *against* The EARL OF WINTON.

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 proponed 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.

No 47.

Whether certification against the immediate vassals is sufficient against the sub-vas-

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

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