a right to teinds if he have it not before, &c. "The Lords found the defence founded on the rental, tack, and prorogation thereof made to the defender, with the exception from the clause of warrandice, contained in the disposition made by the Earl of Winton to Hopetoun, and that the defender has been in use to pay, and the Earl of Winton to receive, the duty contained in the rental and tack, relevant to be proved by the defender." No. 105.

Fountainhall, v. 1. *p.* 8.

1684. *March* 11. TULLIALLAN *against* CULROSS.

No. 106.

In the debate between the two kirks of Tulliallan and Culross, whether *decimæ inclusæ* could be burdened to make up a Minister's stipend, where there was no free teinds in the parish *aliunde;* the Lords ordained the allocation and mortification to be produced, and declared they would hear the point in their own presence. Sir George Lockhart affirmed they might as well burden the stock, for such teinds were in effect stock. But it may be queried, if, at least the tenth penny mail paid out of these *decimæ inclusæ* by the 29th act Parl. 1587, annexing Kirklands to the Crown, Art. 16th, may not be burdened with Ministers' stipends; See 10th January, 1662, Renton against Ker, No. 20. p. 15632.

Fountainhall, v. 1. *p.* 281.

1708. *January* 20. MAJOR CHIESLY *against* SIR ALEXANDER BRAND.

No. 107.
Nature of a tack of teinds.

The deceased Major Chiesly having sold his lands of Dalry to Sir Alexander Brand, and having submitted to the deceased Duke of Argyle what right he should accept of for the teinds of the lands; his Lordship, by his decreet-arbitral, decerned, That after the tack now running, let by the Lord Bellenden, either a new one should be procured from his heirs-male for three nineteen years, or a prorogation from the commission of the kirk for the same term of years. When the rights came to be searched, they found the tack expired, which was then thought current, and no heir-male could be condescended on, so the right could not be completed in the precise specific terms of the decreet-arbitral; therefore this method was fallen on. They belonged to the Bishop of Edinburgh during the standing of Episcopacy, and since its abolition to the Queen, from whom a tack is obtained to the said Sir Alexander Brand for four nineteen years; and this being offered as better than what he was to have got by the decreet-arbitral, he objected, 1*mo*, That seeing the decreet-arbitral was now found imprestable, et nemo tenetur ad impossibile, res nunc devenit in eum casum, that the minute of sale betwixt the Major and him must be the rule, by which he is to give the same price, viz. twenty years purchase for the teind, that he did for the stock; and seeing

No. 107. now an heritable right was not offered, but only a temporary, uncertain and very exceptionable right, he is either not bound to accept of it, or at least he must have deduction out of the price *quanti minoris*, he would have given if this had occurred at the time of making the bargain. Answered, If the performing of the decreet-arbitral be now imprestable *in forma specifica*, that is so far from dissolving the bargain, that it only makes room for an equipollent implement, the rule of law being *loco facti imprœstabilis succedit damnum et interesse*. Now, this tack offered is better than the conveyance provided by the decreet-arbitral, for it contains nineteen years more; and he can seek no abatement of the price *eo nomine*, seeing he was to get none if three nineteen years had been obtained; and in all such cases the rule is *caveat emptor;* he should not have stipulated the same price for the teind which he gave for the stock. The Lords found the tack now offered was an equipollent implement of the obligement in the decreet-arbitral, and more, and nowise contrary to, or interfering with the said decreet-arbitral, and so he was bound to accept of it. Then Sir Alexander alleged, That this right offered was not so good as a prorogation would have been; for this supposes these teinds to have belonged to the bishoprick of Edinburgh, whereas, the old tacks make it appear, they were a part of the revenue and patrimony of the convent and abbacy of Holyroodhouse, and then of the Barons of Broughton, and Lord Holyroodhouse. *2do*, *Esto* they were erected into that bishoprick, the Queen, as come in their place, can set no longer tacks than the Bishops her authors could have done, and that was only for one nineteen years, *3tio*, Secretary Johnston, by a gift from King William, has a right for a sum of money out of the teinds, and he is not consenting. Answered to the *first*, King Charles I. purchased these teinds from the Lord of erection of Holyroodhouse, and erected them into the bishoprick of Edinburgh; and, among the rest, the teinds of the parish of St. Cuthbert's are *nominatim* mortified and expressed. *2do*, The Bishops were most justly limited from dilapidation of their benefices by longer tacks than nineteen years, else they might have left their successors in office nothing but the bare bones of a small elusory tack-duty; but this reason does not militate against the Queen. *3tio*, They acknowledge Mr. Johnston's right is prior to the tack offered, but they have obtained his consent. Replied, *Esto* they had been mortified to the bishoprick of Edinburgh, which was dismembered from the diocese of St. Andrew's, yet *non constat* the Bishops of Edinburgh were ever in possession of these teinds, and *quoad* several heritors of this parish they were not; whereas this argument would make them all liable, et quod nimium probat nihil probat. *2do*, This tack stands on a very sandy foundation; for, upon a revolution of church-government, the Bishops would recover these teinds again, if theirs; and he has no warrandice to recur upon. Duplied, The Bishop could not be in possession of these teinds of Dalry, because they were then under tack, and he had right to nothing but the tack-duty; but that being expired, the Queen *pleno jure* confers. To the *second*, there can be no security against revolutions and overturnings of government; and if that should happen, a prorogation, which was the right he was willing to accept of, would run the

same hazard and risk of being quarrelled by the Bishops. The Lords repelled the objections, and sustained the tack offered. No. 107.

Fountainhall, v. 2. p. 421.

*** See Forbes's report of this case, No. 49. p. 15650.

1737. *June* 15. MINISTER of BARRIE *against* GAIRDEN of Lawton. No. 108.

In a process of augmentation, a defence was made by one of the heritors, That his lands were teind free, in respect they did anciently belong to the abbey of Balmerino, a convent of the Cistertian order; and, in the year 1539, were feued out to the defender's authors by the abbot and convent *cum decimis garbalibus earundem;* that the Cistertians were one of the four privileged orders by the law of Scotland, whose lands were teind free, and that the defender, as deriving right from them while this privilege subsisted, was entitled to the same privilege; and for this Lord Stair was appealed to, Lib. 4. Tit. 24. § 9. and Sir George M'Kenzie, Book 2. Tit. 10. § 7. Answered, 1*mo*, The Cistertians had no privilege as to their teinds, except as to lands acquired before 1120, the date of Pope Innocent the Third's canon, which excludes the privilege of the four orders as to *acquirenda;* and, though this will exclude the privilege entirely with regard to Scotland, where the Cistertian order had no property for a century thereafter, it only shows the inaccuracy of our writers, who, in laying down the doctrine in general, have not adverted, that it would not apply to Scotland. 2*do*, The canon law, which introduced that privilege, makes it purely personal in favour of the Cistertian monks, and not communicable to their singular successors; and this is Sir George M'Kenzie's opinion in his observations on the act of annexation 1587. The Lords repelled the defence founded on the charter produced for the defender.

Fol. Dic. v. 2. p. 437, 438.

1746. *July* 2. MUIR *against* CUNINGHAM. No. 109.

An heritor having a tack of his teinds, and feuing out the lands, reserving the teinds, it was contended by the other heritors that the teinds of those feued lands should be burdened as free teinds. The Lords found that these teinds were liable to be allocated with those of other heritors who had tacks, as if no feu had been granted.

Rem. Dec. D. Falconer.

*** This case is No. 100. p. 10820. *voce* PRESCRIPTION.