

of July, 1677, found the intermediate annuals ought to be restored as well as the principal; only that they were due *ut damnum et interesse*. For the case of *condictio indebiti*, see at great length, *supra*, in February, 1673, Ramsay and Robertsons, No. 385.

*In lege 15, D. de Conditione indebiti, etiam accessiones veniunt.*

*Advocates' MS. No. 585, folio 290.*

1676 and 1677. The MINISTER of NIG *against* his PARISHIONERS.

1676. December 13.—MR RICHARD MAITLAND, minister at Nig, pursues Sir Jo. Forbes of Monymusk, Meinzie of Pitfoddells, &c. his parishioners, before the commission for kirks, for an augmentation of his stipend, the length of the act of Parliament. They say, the Bishop of Aberdeen had ordered all the ministers in his diocess whose stipends were under eight chalders of victual to pursue to get them made up. Among sundry defences, which see in the Information, this was one, That Monymusk's teinds could not be affected or burdened with any augmentation, because he had bought his teinds, and obtained them, on the resignation of the Marquis of Hamilton, (who was lord of erection of the abbacy of Arbroath, to which thir teinds belonged,) in 1618, heritably and irredeemably disposed to him, *cum decimis inclusis*; and therefore, having so onerously acquired them, they could not be clogged or destined so long as there was other free teinds unbought, and not in so favourable a case, in the parish. *2do*, They could not be affected at all, because we offered to prove that the lands of Monymusk, stock and teind, were an ecclesiastical feu of the said abbacy of Aberbrothick; (to which religious house they were vowed by King David, that sair saint to the Crown, when he went against Donald of the Isles, if he should return prosperous;) who being monks of the Cistercian order, their teinds, both by the canon law, cap. 10 and 34, *extra, de decimis*, and our law, (see Haddington's Index of Practicks, *verbo* Teinds, No. 17; see Stair's System, *Tit. Of Teinds*, § ; see Craig, *Feudorum*, p. 101, *in margine*; see Mornacii *Observationes ad L. 16, D. de Legibus*, p. 22,) are declared free of all burden. If that cloister were *Cistercians*, I cannot tell; some say, in their foundation they are so called; but in the list I have of all the monasteries in Scotland, they are called *Turonenses* or *Tironenses*, *quasi Tirones novitii*; see *Rosse's View of all Religions*. But if there be no other teinds, it were hard on this to defraud the church of that which is naturally their patrimony, as the teinds are called, act 10, Parliament 1567; but if there be any other teinds, they should be free and exemed.

I find now Arbroath was a convent of Benedictine monks, from the charters of Torric; see a Compend of them. They are called *Turonenses* from the Benedictine Abbey of Marmoustier at Tours, which I saw.

*Advocates' MS. No. 523, folio 270.*

1677. June.—IN the action pursued before the Commission for Plantation of Kirks, mentioned *supra*, December 13, 1676, No. 523, at the instance of Mr Richard Maitland, minister of Nig, against Monymusk and others, for an augmentation of his stipend; I ALLEGED, It was none of the best characters of a minister to endanger Christian charity, and the breach of that spiritual union between him

and his flock, for 100 merks more stipend; that augmentations and prorogations were *correlata*; went *pari passu*; *uno posito ponitur et alterum, sublato uno tollitur et alterum*; that they were like the thing and its price; (see this enlarged in my Observations on the Act of Parliament in 1672, giving a new commission for valuation of teinds;) and, therefore, where prorogation could not take place, neither could an augmentation, because they could not remunerate and recompense; but here no prorogation was prestatable, because they had the heritable and perpetual right of their teind; *ergo*, they could not be burdened with an augmentation.

2do, *Decimæ inclusæ*,\* by the law of Scotland, have ever been freed from all burden of stipend, because they are not reputed to be teinds, but a part of the stock. See Craig, p. 102, who calls them *decimas garbales*; though that word also signifies parsonage teinds. See Stair's System, Titulo *Of Teinds*, § . And for proving the allegiance, I produced a charter granted by the Abbot and Convent of Arbroath in 1544, granting *feudum perpetuum decimarum garbalium* of the half-lands of Torry. See a summary of the said charter, *alibi*.

Pitfoddels produced, for proving that his teinds were included also, a charter both of stock and teind, wherein his teinds were expressly designed *decimæ inclusæ*.

ALLEGED, *Imo*, against Monymusk's charter, that it did not prove his teinds to be truly *decimæ inclusæ*, which are only such as were *nunquam antea a solo separata*, and are presumed to have been feued out before the Council of Lateran. But Monymusk's were not such; for in the narrative it was confessed they had been formerly under tack, *quæ locari prius solitæ sunt*. Next, they were actually separate from the stock, in so far as he had a separate charter for them. 3tio, They were not designed *inclusæ*, but only *garbales*. 4to, They were separate, in so far as they paid a distinct reddendo and duty, viz. 28 bolls of victual for them, which was an evident demonstration that they had been separately valued. And there was no other objection against Pitfoddell's charter *cum decimis inclusis*, for evincing that his teinds were not truly of the nature of these *decimæ inclusæ*, to which the law hath given such a special privilege and exemption,† but only this last. Monymusk's charter lay open to all the foresaid exceptions.

After many reasonings, the Commission, on the 25th of July, 1677, gave him 270 merks of augmentation, and imposed it all upon Monymusk and Kirkhill, conform to their rentals in process: viz. 250 merks *per annum* on Monymusk, and 30 merks yearly on Kirkhill, reserving always to discuss the point of right before the Judge Ordinary, (*id est*, the Lords of Session;) at the discussing whereof, if it appear that Pitfoddell's right to his teinds is not truly of the nature of *decimæ inclusæ*, then he is to relieve them, *pro tanto*, and to bear a proportionable part of the augmentation, conform to the rental of his lands in that parish produced in process.

This was a strange and extraordinary reservation, and reflected extremely on the knowledge of the members of the Commission, as not of that reach to determine what were truly *decimæ inclusæ* and what not, as the fifteen Lords can. It was the President's cue to suggestate the Bishops and to cut Commissary Monro, its clerk, short of all the benefit he could; and he seemed in his own opinion not to be con-

\* Lands *cum decimis inclusis*, since the act of annexation in 1587, are not esteemed valid *decimæ inclusæ*, unless they were given out as *decimæ inclusæ* before the said act of annexation. See February 20, 1611, *Murray contra Maxwell*. See Sir George Lockhart's resolution anent the *decimæ inclusæ* beside me, upon the occasion of this debate. *Infra*, No. 593, [July 7, 1677,] *Minister of Prestonhaugh*.

† Anent the reasons of this exemption and freedom from teinds given to the Cistercian order, and the limitations thereof, see neatly set down by Thomas Fuller, in his *Church History of Britain*, in that part of it called *The History of the Abbeys in England*, p. 283.

vinced either that Pitfoddell's charter did truly contain *decimas inclusas*. It is not usual to bring decreets of the Commission to be recanvassed before the Session : though this is rather a reference of a hard kernel in law to them that are most used in breaking them. Yet I remember, on the 27th of January, 1670, (*Vide it supra*, No. 111,) *M'Keinzie* contra *M'Keinzie*, Gosfuird sustained himself judge competent to a reduction of a decret of the Lords of the Plat for Kirks, though the Advocate declined it. The truth is, it being a committee of Parliament, it is at least coördinate with the Session. See *M'Keinzie's* Criminals, part 2, titulo 3, Of the Jurisdiction of the Parliament, p. 366.

There are no *decimæ inclusæ* with us, but such as were so possessed, and holden, and reputed, before the 29th act, in 1587, annexing all the kirk-lands to the crown.\*

As for the rights of kirk-lands, granted after March, 1558 ; (because then the Reformation prevailing, churchmen did wilfully delapidate their rents and benefices,) they are null, *ipso jure*, by the 88th act, Parliament 1564, and 7th act in 1584, unless they were confirmed by the King, who came in place of the Pope. See Craig, Feud. page 108.

In prosecution of the foresaid reservation, Monymusk has raised his process of declarator before the Session, against Pitfoddells, for bearing a proportional part of the augmentation, his teinds not being the privileged *decimæ inclusæ*. See the 12th of July 1678, [*Dictionary*, p. 15718,] where it is decided they are not *inclusæ*.

*Advocates' MS. No. 586, folio 290.*

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1677. June 29. The ARCHBISHOP of GLASGOW against TWO COMMISSARY CLERKS of PEEBLES.

DOCTOR BURNET, now Archbishop of Glasgow, pursues two commissary clerks of Peebles, for putting them from their place.

ALLEGED, They cannot be removed, because they possess by virtue of a gift from Robert Leighton, when he governed that diocess.

REPLIED, That gift could not defend them, because it was *a non habente potestatem*, he never being Archbishop of Glasgow, in so far as he was never legally translated from Dumblaine to Glasgow, as the canons require. (See the form of the translation marked by me *alibi* from the service book, in June 1677, on the translating of Mr Murdoch *M'Keinzie*, from Moray to Orkney.) *2do*, the conjoining of two in one office, and to the longest liver, is unlawful, and not to be permitted in any but proprietors ; else administrators of bishoprics may, by such tailyies, survivances, and reversions, forestal all the profit of places for an age to come, and pre-judge his successor in the place : which is most unreasonable, for if he may conjoin two, then he may put in six, viz. the father, son, and grandchild, or brother, and so enhance all for fifty or sixty years to come.

DUPLIED, By our law translations are not absolutely necessary ; see act 1, in 1617 ; that it is but a Popish nicety, which can never be obtruded against so material equity, where they are invested in a place by one who had a putative title, and

\* Fishings, in many places, pay no teind ; for *decimæ minores sunt locales, et debentur tantum secundem consuetudinem*. Multures have also been found free of teind ; and in a late debate anent the teinds of Tulloch-mill, the Lords sustained the whole rental of the mill thereof to be free of teind, without respect to the mill-lands or mill-croft.