valuation; which is the only ground of the decree, without either dispute or probation; in which reduction, terms are taken to produce; and being prejudicial to this action, it must be first discussed. The pursuer answered, that there can be here no prejudiciality, which is only betwixt two principal actions; but here *res est judicata*, by a decree, *et stat sententia, et dubius est eventus litis*; neither can reduction, which is a petitory judgment, sist the pursuer's process, which is a possessory judgment, upon pretence of prejudiciality; otherwise possession might still be inverted upon such pretences; nor can the Earl be put from his possession thereby; especially for the years preceding the intenting of the reduction. No. 128.

The Lords repelled the defence, as to the years *ante litem motam*, by the reduction, but sustained it for the years since, in respect the Earl's possession was not clear, and that the valuation was exhorbitant, near as great as the stock,

Stair, p. 67.

1667. *February* 9.

DAME GEILS MONCRIEF *against* TENANTS of NEWTOWN and WILLIAM YOEMAN.

No. 129.
Though the fifth part of the rent is the legal estimation in questions betwixt titular and heritor; in other cases, where the true value is to be considered, the fourth part of the rent payable jointly for stock and teind is the rule.

Dame Geils Moncrief being served to a terce of the lands of Newtoun pursued the tenants for a third part of the duties; who having deponed that they paid so much for stock and teind jointly for yards, parks, and the whole lands possessed by them; compeared William Yeoman, as now having right to the fee, who alleged no terce of the teinds, because they fell not under terce; *2dly*, Nor terce of the yards, because as the mannor-place belonged to the fiar without division, so behoved the close gardens, orchards, yards, &c.

The Lords found the pursuer to have no right to the teind by her terce, unless there had been an infeftment of the teinds by erection, and therefore laid by the fourth part for the teinds; and found that the years in question being possessed by the tenants, and there being nothing alleged nor instructed, that there was a tower, fortalice, or manor-place, having a garden, or orchard for pleasure, rather than profit, they found no necessity to decide what interest a tercer would have in such, but these being set, by appearance, as grass yards, they repelled the allegeance.

Fol. Dic. v. 2. *p.* 441. *Stair, v.* 1. *p.* 440.

1679. *January* 24. WINTON *against* ARCHBISHOP of ST. ANDREW'S.

No. 130.
Consequences of difference between the

In the Earl of Winton's case with the Archbishop of St. Andrew's, claiming the teind of Kirkliston, at least the tack-duty, and refusing to accept of the valued duty, Sir G. Lockhart was positively of opinion, that the valuation led of these

No. 160. valued duty and tack-duty.

teinds *in anno* 1634, could not prejudge the standing tack thereof, albeit the then Abp. of St. Andrew's, to whom the tack-duty was payable, consented to the said decreet of valuation; because he being only administrator of the benefice, he might indeed bind himself, during his own incumbency, and possession, but he could not wrong his successors. For here the valued duty was far below the tack-duty, and so was an evident dilapidation, and diminution of the rental of the benefice, which is prohibited by the 101st act. Parl. 7. 1581. As also he thought the same valuation might yet be quarrelled, and was not prescribed. 1*mo*, The Bishops from 1637 till 1662 were *non valentes agere, contra quos nulla currit præscriptio*. 2*do*, By the restitution of Bishops, in the first act of Parl. 1662, they are restored to all they had right to in 1637; but *ita est*, the said tack-duty was due to them in 1637. He thought also, the Minister's augmentation would not deduct of the said tack-duty, because the said augmentation was not obtained by way of a legal sentence, but only imposed with consent of the heritors. As also, that the annuity would not be allowed to the Earl here, because of the 15th act, 1633, exeeming Bishops' teinds from payment of the King's annuity. As also that the fiall of 80 merks could not be deducted, because by the gift of the fiall, it was allocated, and laid on a special subject, different from their teinds; *viz.* forth of the feu-duties of Winchelburgh, and so it could not affect the teinds of Kirkliston, nor be retained out of the tack-duty thereof. Albeit it is thought commonly, that Bishops are empowered by our acts of Parl. to set liferent tacks, at least 19 years tacks, of their teinds, or other rents of their benefices, (as by 1617. C. 4. and others). Yet now there are sundry who question it, in respect by the Bishops' submission to the King in 1627, and the King's decreeet arbitral thereon in 1628, Church-men seem to be restricted, that they do not prejudge their successors in office. And on this ground, Young, Bishop of Edinburgh, intented a reduction against Ellies of South-side, of a tack of his teinds set to him by Wisehart, the immediate preceding Bishop, for 19 years; and his reason of reduction was, that the teinds were valued before the tack, and that no Bishop can set a tack of valued teinds for a less duty than the valuation. And they say it was decided in favours of the Bishop, by the Commissaries of Edinburgh, in January 1680. *Vid.* 20th March 1683, a similiar case, No. 31. p. 7956. It is certain that Bishops must set their tacks, with consent of the Chapter, by act 15th, Parl. 1621. But some go a farther length, and think that Bishops may set tacks, both for their life-time, and for 19 years, to begin to run after their death. For any ordinary beneficed person may set for his life-time, and three years thereafter. Act 200, Parl. 1594.

Where there is a tack of Bishops teinds yet running and not expired, *Quær.* If the Bishop can set a 19 years tack of these teinds, to commence and begin at the expiration of the current tack, which if allowed would tend to a clear dilapidation, and mightly would anticipate the successor's livelihood? Sir Robert Sinclair thought, if the Bishop lived till the old tack expired, and the new tack began, and was cloathed with possession, then the same was valid; but if he died before, that the tack fell, and might not subsist, being *collatum in tempus indebitum.*

If a Bishop may lawfully discharge teind tack-duties for 19 years to come in prejudice of his successor, albeit he should die long before the 19 years do run out? No. 130.

Fountainhall, v. 1. p. 37.

1698. *June.* 30. SIR WILLIAM BRUCE of KINROSS *against* SIR DAVID ARNOT.

No. 131.
Mode of valuation.

Sir William Bruce of Kinross, as titular of the teinds of the parish of Portmoog, against Sir David Arnot of that ilk, for spuilzie of teinds. Alledged, Absolvitor for all teinds preceding the time you served inhibition against me; because I was in use of paying allenarly three chalders of victual to the Minister, and never being called nor interpelled for a greater duty, it must be presumed there have been old tacks for that rent, and so he bruiks by tacit relocation till the inhibition, and cannot be charged for more. Answered, parsonage-teinds never prescribe farther than an immunity for all years preceding 40; and the case founded on, 28th November 1676, Sheils, Minister of Prestonhaugh, against his Parshioners, was in the case of vicarage, which are local and prescriptable, No. 61. p. 10761, and that of the 16th June 1681, Freerland against Hamilton of Ormiston, No. 63. p. 10763, does not concern this case; for the Minister was not titular of the teinds, and their interest in the teinds are quite distinct: The titular's discharge of his proportion of the teind cannot liberate the heritor from what he owes the Minister; so neither can the Minister's discharge be obtruded against the titular. The Lords found the use of payment to the Minister could not defend against the titular *quoad* the superplus of the teind, notwithstanding of the titular's long cessation in craving it. Then the question arose, how the teind should be valued for these years? Sir William claimed it at the 5th part, conform to a decreet of valuation obtained by him. Arnot answered, that could only operate as the rule in time coming, for the lands might be improven of late; and some years there was little or nothing tilled or sown, but lay in grass, in which case the parsonage teinds were not due, as appears by the decision, 9th June 1676, Burnet against Gib, No. 102. p. 15717. Replied for Sir William, if you have, *in æmulationem vicini*, cast your lands lee, that cannot prejudge me, and it is inextricable to prove how much was sown every year to constitute a quota, and you should instruct what lay in grass, else it must be all presumed as arable. The Lords would not take the subsequent valuation as the rule of preceding years; but for constituting the quantity, allowed a conjunct probation to either party what the value of the teinds were the several years acclaimed, which will be very difficult to find out farther than by a conjectural trial.

Fountainhall. v. 2. p. 8.