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being done *in æmulationem* and invidiously, is not to be indulged; and at this rate, in England, their parsonages would dwindle to nothing; for in many parishes there, we know there is little corn, but all hay and grass; yet the parson gets the teind of hay, which makes his benefice considerable, besides his lamb, stirk, and wool. Answered, that, in propriety of language, *decimæ garbales* are the corn-teind, as Craig and all our lawyers hold, and is the tenth of the whole product; which uses to be divided in this manner, one third sequestrated and laid by for the seed, and live-stock; another third for the tenant's bread and maintenance, and to buy oak and iron with; and the last third for the master's rent and farm; so that the teind is indeed the fourth of the whole growth, deducting seed and bread, yet for the ease of the heritors, it is established at the fifth by our acts of Parliament. And as to the inconvenience of turning it all to grass, and so defrauding the parson, it is answered, this may be retorted as equally prejudicial to the vicar; for if the heritor shall rive out his ground which many years before was in grass, and turn it into corn, is not the vicarage as much diminished, as the parsonage in the former case? next, *qui jure suo utitur nemini facit injuriam*; who can hinder a proprietor either from grassing or tilling, as he sees most convenient for him, though *ex consequentia* it happen to prejudge the titular. *3tio*, The Lords have found heritors cannot be hindered to change their lands from grass, to corn, or from corn to grass, without regard to the titular's interest, 9th June 1676, Burnet against Gib, No.102. p.15717; and lately in the case of Sir William Bruce of Kinross, against Sir David Arnot of that Ilk, No. 131. p. 15735; and if the titular find himself prejudged, he has a remedy by pursuing a valuation, and then he gets a fixed rent conform to what it was during the seven years preceding; and vicarage might as well be defrauded as the parsonage; for though I keep my ground still in pasture, yet I may only take in horses or yell nolt upon it, which having no young, will yield no vicarage at all. The Lords, by plurality, found the sowing and holding could not be the rule here, but only the fifth of the rent, deducting a stock for the vicarage; which must be proved what it will amount to, the same being local and consuetudinary, different in several parishes according to custom and the use of payment.

Fol Dic. v. 2. p. 441. Fountainhall, v. 1. p. 320.

1706. *February* 27.

The Earl of Roxburgh *against* Sir Walter Riddel of that Ilk, and other Heritors of the Parish of Lilliesleaf.

No. 134.
Effect of valuation and sale as to relief of burdens on the teind.

The Earl of Roxburgh, as titular of the teinds of the parish of Lilliesleaf, having pursued the heritors for their respective teind-duties of several years bygone; it was alleged for the defenders, That they had a depending action against the Earl

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before the commission for valuation and sale of their teinds, and had procured a warrant to draw them, upon finding caution to make the valued teind-duty furthcoming at the event of the valuation: And therefore, till a decreet is therein obtained, no process for the duty formerly in use to be paid, because *non constat* but the same is higher than the valued duty will be.

Answered for the pursuer: There is no commission of teinds now in being, and therefore no valuation can be depending before them. However, the pursuer does not hinder the defenders to draw their own teinds, they paying the accustomed teind-duty; but they must not keep both the teind and teind-duty, without acknowledging him who pays public burdens for the teind, of which, after a valuation and sale, they are bound to relieve him. And since the Earl cannot get a suspension of the cess for the defenders having a warrant to draw their own teinds, why should they have a suspension of the teind-duty out of which the cess should be paid?

The Lords found the defenders liable for the teind-duties in use to be paid for all terms preceding those for which caution is found simply; and for the said teind-duties, for terms subsequent to the finding caution; with this quality, that the Earl, before extracting, find caution to the defender, to refund or allow in the first end of the valued duties, to be decerned by the high commission, whatever superplus the said accustomed teind-duties shall extend to by and attour the valued duties.

Forbes, *p.* 107.

1730. *December* 2. Baillie *against* Duke of Douglas.

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In an action of valuation of teind at the heritors' instance against the patron, it was insisted on for the patron, That the heritor having got a considerable grassum for a nine years tack of his lands, the ninth part of that grassum ought to be added to the yearly rent, in order to make out a valuation of the teind; but it was found, That in respect the old rent was kept up, and that grassums were not in use to be paid formerly for tacks of the pursuer's lands, therefore the grassum could not be taken into the calculation in ascertaining the valuation of the teinds.

In the same process the patron likewise insisted, That here the tenants, by their tacks, being taken bound to pay annually the half of the land-tax, this payment ought likewise to be considered as increasing the value of the teind, since the fifth part of the gross rent, without deduction of public burdens, is the rule, by act of Parliament, for valueing tithes. To this it was opposed, That the quantity of land-tax is uncertain, its endurance not absolutely certain, and therefore it has been the practice of the Court not to augment the teind rental on account of the tenants paying the half or the whole of it. The Lords likewise repelled this allegeance.—See Appendix.

Fol. Dic. *v.* 2. *p.* 440.