regulations of former statutes for the sale of teinds, " to all teinds," except such as were appropriated for the provision of Ministers; which, although allowed to be valid, are exempted from sale. The subsequent acts proceed upon the same general plan; and when exceptions are judged necessary, they are particularly mentioned. As, therefore, no exception of the teinds of annexed property was ever made by any of the acts, such exception cannot now be introduced contrary to the general plan of all these statutes, and to the liberal construction which they have uniformly received. No. 71.

As to the objection, That the acts in 1633, and subsequent acts, ought not to be extended beyond the revocation in the year 1625, and the proceedings in 1628 and 1619, said to be the ground-work of these acts; and, therefore, that the teinds of Dunfermline being, in 1629, the King's property, could not fall within the revocation and submission; and by consequence not under the statutes relative to the sale of teinds; answered, in the *first* place, That the objection proceeds upon a mistake in fact; for it supposes that the revocation in 1625 found the whole lordship of Dunfermline in the King's possession at that time; and consequently no object of the revocation: whereas, the fact is, that the revocation expressly mentions and annuls several grants of lands and teinds, part of this very lordship, made by the King's mother and himself; and consequently, by the pursuer's own argument, the teinds of this lordship must as much be an object of the acts 1633 as any other in the kingdom. In the *next* place, even the decree-arbitral pronounced by the King, in 1627, contains a general regulation for " all teinds," and, in express words, includes " those belonging to the King." *Lastly*, The words of the act 17th Parliament 1633 are entirely general, without reference to any preceding transaction, which, not being made the ground of the act, cannot influence or restrain its exposition.

" The Lords decerned in the sale of the teinds, parsonage, and vicarage of the pursuer's land, at nine years purchase," &c.

Act. *Lockhart.* Alt. *Craigie & Grant.*

B. *Fac. Coll. No.* 175. *p.* 260.

*** This case was appealed. The House of Lords ORDERED, That the interlocutor complained of be affirmed.

1756. *February* 4.

The MINISTERS and HERITORS of EYEMOUTH, and PROCURATOR for the CHURCH, *against* The OFFICERS of STATE, as Patrons, WILLIAM EARL of HOME, and the HERITORS and MINISTER of SWINTON.

No. 72.
A Minister of one parish

The parishes of Swinton, Paxton, and Eyemouth, were parts of the erected priory of Coldingham; and the stipends of these parishes were allocated in

No. 72. found entitled to possess teinds out of another parish, whereof he had been 40 years in possession by virtue of a decree of the Commissioners of Teinds.

such manner, that the Minister of Swinton received about three chalders of victual out of the teinds of Paxton, and one chalder out of the teinds of Eyemouth. The commencement of this allocation, which was probably made to serve the convenience of the titular, did not appear; but, by the record of an old process, in 1663, touching the right of the priory of Coldingham, betwixt the Earl of Home and Sir Alexander Home, it appeared, that, in the year 1643, the Minister of Swinton had a decree of augmentation, whereby he had three chalders eight bolls victual of the readiest of the teinds of Coldingham.

In the year 1675, the Minister of Eyemouth obtained a decree of augmentation, which allocated to him the chalder payable out of Eyemouth to the Minister of Swinton; but the Minister and heritors of Swinton were not made parties to that decree.

In the year 1676, the Minister of Swinton raised a process of locality against the titular and heritors of Swinton, Paxton, and Eyemouth, coucluding for payment of his stipend, and particularly of this chalder from Eyemouth, according to use and wont. In this process, the Minister of Eyemouth appeared for his interest, and pleaded sundry defences; but, at the same time, said he would not oppose the said chalder being paid to the Minister of Swinton, provided he were reponed against his own decree 1675, that he might get his augmentation out of other teinds in his parish.

The titular and heritors of Paxton appeared also, and pleaded: That *decimæ debentur parocho*, both by the canon law, and by our acts of Parliament; and that the arbitrary allocation of the titular could not prejudge the law.

Upon this debate, the Lords gave judgment in favours of the Minister of Swinton, allocating to him the said chalder from Eyemouth, the three chalders from Paxton, and the remainder from Swinton; and they reponed the Minister of Eyemouth against his decree 1675.

In the same year, 1676, the Minister of Eyemouth insisted in a process of augmentation and locality, reciting and founding upon the Minister of Swinton's decree; and he obtained a decree giving him an augmentation out of the other teinds of his parish.

Thus matters rested, till the present Minister of Eyemouth and the other pursuers brought a new process of augmentation; and, in order to enlarge the fund, they concluded for a reduction of the Minister of Swinton's decree 1676, and insisted upon the following reasons:

1mo, That as it did not appear the then Mnister of Eyemouth was called in the process at the Minister of Swinton's instance in 1670, his voluntary compearance and consent could not bind his successors in office.

2do, That the decree was informal, and inconsistent with the 15th act 1672, upon which it was founded. The act declares, "That the Commissioners shall have power to appoint constant local stipends to ilk Minister, out of the teinds of

the parish where they serve the cure;" and yet the decree concludes for a locality out of the other parishes, according to use and wont. No. 72.

3tio, By the act 1617, James VI. P. 22. Cap. 3. and act 1633, Charles I. P. 1. Cap. 19. the Commissioners are empowed to modify and set down a constant local stipend to ilk Minister, to be "paid out of the teinds of ilk parishen." By plain construction of these, and the whole other acts concerning plantation of kirks and valuation of teinds, and of the decree-arbitral of Charles I. the Commissioners had no power to give a stipend to any Minister out of any other parish than that in which he serves the cure; and the heritors had a right to purchase all their own teinds, except such as were allocated to their respective Ministers; by consequence, the Minister of Swinton's decree 1676 was against law, and *ultra vires* of the Commissioners: It was therefore void and null, and could not be the foundation of prescription, far less be *res judicata* against the pursuers: That, at any rate, prescription cannot bar heritors from valuing and purchasing their teinds *quandocunque*, nor bar Ministers from augmentation and modification, although a former decree be the title of the Minister's possession. These principles had influenced the Lords in two cases, viz. in the case of the Minister of Dun, 4th February, 1711, and of the Minister of Inchtuir, 28th November, 1716. (See APPENDIX.)

Answered for the defenders: That the decree 1676 was most just and equitable. The Minister had at that time been in possession immemorial, as appeared from the record before mentioned; and the heritor of Swinton had purchased his teinds in 1649, upon the faith that the chalder from Eyemouth was to continue part of the Minister of Swinton's stipend: That as to the *first* reason of reduction, it was not necessary to call the Minister of Eyemouth; and, at any rate, his compearance was equivalent to his being called.

To the *second*, That the act 1672, upon which the Minister of Swinton libelled, refers to all former acts, so the libel was laid upon all the laws and acts concerning teinds, and must receive its construction from them all.

To the *third*, which was the material objection, answered, 1*mo*, That the words of the act of Parliament founded upon are only designative of the funds for the payment of each Minister's stipend, but are not reductive of old allocations to other pious uses: That although the Commissioners might not have power to make a new allocation of teinds to a Minister out of another parish, yet they had ever sustained themselves competent to maintain a Minister's possession of such teinds: That instances of parishes in a situation similar to that of Swinton were very numerous; and it would introduce great confusion to establish a precedent for alterations in this particular: That the Minister of Swinton's settlement was *res judicata* against all parties here, and could not be opened; 2*do*, *et separatim*, Whatever objections of informality or injustice might have elided the defence of *res judicata*, had they been offered within the years of prescription, whatever powers this Court may have to open their decrees within these years, yet, as this was a decree of the proper Court, it was a good foundation of prescription; and as the Minister of Swinton has possessed upon it more than forty years, it is not now liable

No. 72. to challenge. With regard to the cases quoted for the pursuers, they are not similar to this case. In the case of Dun, the Minister of Maryton's possession was not founded upon a decree; and, *2do*, The interlocutor taking the teind-bolls from him was really of consent; and in the case of Inchtuir, the Minister had neither decree nor possession.

"The Lords repelled the reasons of reduction of the decree of locality of Swinton; and also assoilzied the Minister and heritors of Swinton from the reduction."

Act. *Pringle & D. Dalrymple.* Alt. *Miller, Bruce, & Swinton.*

B. *Fac. Coll. No.* 184. *p.* 272.

1756. *July* 24. DUKE of ATHOLE *against* The DUCHESS.

No. 73.

A proprietor who obtains a tack of his teinds from the Exchequer must communicate the benefit thereof to the liferentrix.

*** This case is No. 17. p. 7766. JUS SUPERVENIENS, &c.

1757. *July* 6.
JOHN HAY of Lawfield, and Others, *against* The DUKE of ROXBURGH.

No. 74.
Debated, Whether, in consequence of the Reformation, the patrons of benefices without cure became heritable proprietors of the teinds annexed to these benefices?

The Duke of Roxburgh had right, by progress, to the patronage of the prebendary of Pinkerton. In a process of valuation and sale brought by John Hay and others, the tithes of whose estates belonged to that prebendary, it was insisted for the Duke, That the price of the surplus teinds must be rated at nine years purchase; for that, as patron of this prebendary, which was not a benefice of cure, he had a full right to the tithes, prior to the acts of Parliament 1690 and 1693: That the tithes of benefices *sine cura* returned to the patrons after the Reformation *pleno jure;* but as, at that time, tithes were considered sacred, the patrons of Provostries and Prebendaries were, by act 12. Parl. 1657, allowed and requested to present bursars to such benefices; but that act of Parliament laid no positive injunction upon the patrons to apply the tithes of their benefices to these uses. In process of time, though the form of presentation was kept up, the presentee was understood to be but a name, with whom the patron, without being guilty of simony, might paction for the whole profits, for behoof of the patron himself: And at last, these forms were omitted, and the patrons of these benefices without cure were understood to have an heritable right to the tithes, Upon this footing, the teinds of Hedderwick, lying in the same parish of Dunbar, were rated, in the year 1679, at nine years purchase; and, in the year 1724, Sir Hew Dalrymple, then President of the Court of