1758. *July* 12.

The KING'S COLLEGE of ABERDEEN *against* ALEXANDER LORD FALCONER of Halkerton, and Others.

No. 75.
Heritors are not bound to transport their valued teind-victual to a market town.

The parsonage and vicarage of the parish of Aberbuthnot, now Marykirk, in the county of Kincardine, belonged anciently to the hospital or convent of Red Friars, at St. Germain's, in East Lothian.

In 1494, Thomas Pyot, master of that hospital, disponed the teinds of the said parish to William, Bishop of Aberdeen, founder of the King's College, by whom the same were annexed to the College. This right was, in 1497, confirmed by act of Parliament.

From the time of that annexation, the College possessed the teinds of the said parish; but it not being found convenient to draw the *ipsa corpora*, tacks of the teinds were from time to time granted by the College to the respective heritors within the parish.

In 1756, the College raised a process for valuation of the teinds of this parish, in common form, against the whole heritors. Upon advising the proof of the rental, which consisted chiefly of the depositions of the tenants, the Lords Commissioners pronounced decree, "finding and declaring the just worth and constant yearly avail of the teinds, parsonage, and vicarage, of the respective defenders their lands libelled, to be now, and in all time coming, the quantities of victual and sums of money (therein) particularly specified."

After extracting this decree, the College insisted, That the heritors were bound to make their tenants transport their victual-teind thereby payable to any place, in the option of the titulars, at as great a distance as the tenants were bound, either by tack or custom, to transport their victual-rent payable to the heritors. Of this demand Lord Halkerton and other heritors complained, by suspension, to the Court of Session.

Pleaded for the College: 1*mo*, As the tenants are bound to carry their whole victual rent, teind included, to the next market town, the heritors can have no interest to oppose the tenants carrying that part of the rent which belongs to the College, to the same market town, alongst with their own. The refusing such carriage is calculated to oblige the College to convert the teind bolls below the market price, as it has neither horses nor servants for collecting and transporting the victual from the several farms to the market.

2*do*, The 17th act of Cha. I. declares, That the just rate of teinds, when valued, shall be the fifth part of the constant rent which the lands pay in stock and teind. A titular is therefore entitled to a fifth of the rent in as ample and beneficial a manner as the heritor is entitled to the remaining four parts. If the tenant is only bound to deliver his victual rent at his own barn, the titular cannot demand delivery at any other place; but if the master, instead of exacting the full number of bolls which the farm might yield, payable on the ground, shall take a lesser number of bolls, and, in consideration thereof, oblige his tenants to carry their victual to

a distant market, where he will receive a greater price for his victual than upon the ground, the titular will not receive his fifth part of the rent, unless it is delivered to him at the same place where the total rent was deliverable to the master at the time of valuation. No. 75.

3*tio*, Had the victual-teind been converted into money in the process of valuation, the conversion would have been regulated by the price which the victual would give at the place where it was deliverable to the heritor, and not the price it would give on the ground of the lands, or at the heritor's dwelling. Thus the titular would have had the full fifth of the rent in that case; and where there is no conversion, the carriage of the victual, which is a *modus* of the rent, cannot be separated from it, without diminishing the composition given by law to the titular for the teinds. And,

4*to*, After valuation, the titular has right to the full fifth of the rent, and can levy it from the tenants, if the master does not pay it; and consequently he can exact it from them in the same way that it is payable to the master; nor can he be in a worse case when the master himself makes payment of the valued teind.

Answered for the heritors, 1*mo* Teinds were originally allotted for the maintenance of those who discharged the ministerial functions in that tract of ground where the subject of the teind was produced.—In process of time teinds were allotted for the support of clergy residing at a distance, and even of such useless members of society as the Red Friars of St Germain's, whose religious duty it was to entertain all vagrants who went on an idle errand to the Holy Land. When payment of teind so far deviated from the original institution, it happened of course that the teinds were not of equal value as when destined to the support of the clergy residing on the lands where the teinds are drawn. It is a certain maxim, that the change of the creditor alters not the nature or extent of the debt: The expence of transporting teind victual is therefore a burden which necessarily falls on him who has right to teinds in a way contrary to their primary institution. Nor can the heritors of Marykirk be bound to more severe prestations in favour of the College of Aberdeen, than they could be in favour of the Red Friars, or original titulars, did they still subsist.

2*do*, By the act 1633, teinds belonging to universities may be valued, but cannot be purchased, which is a loss to the heritors. They must for ever remain liable in a fifth of the constant rent, as at the time of valuation. But as before valuation, the titular who draws the *ipsa corpora* of the teind, must draw the same upon the ground which produces it, and must be at the expence of carrying it off, without being even permitted to stack it upon the ground; so there is no reason why a different rule should obtain after valuation, further than that the heritor being thereby allowed to carry the whole crop to his barn yard or granary, the proportion declared to be teind must afterwards be deliverable at that place to which he is entitled to carry it for his own conveniency. Were the valuation made from the drawn teind, there could be no pretence for this demand; and

No. 75. where it is made on a proof of the stock and teind, there is no reason for subjecting the heritor to a burden before unknown.

3tio, It is a mistake to consider the carriage in question as part of the rent.—Tenants in Scotland do not put a value upon such services, nor could more rent be expected were they discharged, although it might be otherwise beneficial for the master to relieve the tenants of such a burden.—Services not converted are never taken *in computo*, in valuations of teinds, nor in judicial sales.—An obligation to perform a carriage of this kind is not constant, but is often dispensed with when the heritor has occasion to use his victual at home; and it is therefore yielded by the tenant in favour to the master, and not as an increase of rent.—Such carriage stands on the same footing with all other personal services not converted; and is not a *modus* of the rent, but is easily separable from it, were it a teindable subject, as it clearly is not.

4to, The act 17, 1633, ordains, "The prices of victual, and other bodies of goods whereof the teind consists, to be redacted into money, according to the worth and price of victual and goods in such parts of the country." And the act 19, 1633, appoints the commissioners "to set down the prices of saleable teinds, according to the worth thereof in each part of the country where the same grow and are bred."—This shows, that the value on the ground is the rule; nor is any mention made in the statutes of the value at any market-town—And,

5to, Whatever might be said in behalf of this new claim before valuation, it is now foreclosed by the decrees of valuation, which cannot be altered by this Court.—These decrees do not ascertain in general the fifth of the rent to be paid; but declare certain quantities of victual to be payable as the avail of the teind. The titular has therefore nothing to demand from the heritor but the precise quantities modified in lieu of the teind; and as no place of delivery is ascertained by the decrees, the common rule of law must take place, that payment must be taken at the domicil of the debtor, or at his granary, upon the lands where his corns are laid up.—When the heritors offer this, they offer sufficient implement of the decrees against them. Nor is there a single instance where, in any valuation, heritors were decerned to transport victual to market-towns for the benefit of the titular.

Replied for the College, It is only the business of the commission to ascertain by proof what the constant or standing rents of the lands is at the time of the valuation.—When that is proved, the fifth part thereof is declared by law to be the teind in all time coming. The ascertainment of that fifth can be nothing but the operation of figures; and it can make no difference upon the nature of the titular's right, whether the amount of it is expressed in the decree of valuation or not. The valued teind must therefore still be considered as the fifth of the rent, and ought to be delivered in the same manner with the other four-fifths payable to the heritor; and it has been the custom for heritors to deliver it accordingly

both to colleges and Ministers, though not specially decerned so to do. As it belongs to the Court of Session to award execution on decrees of valuation; so where there is no place of delivery specified in the decree, it must be inherent in the jurisdiction committed to the Session to determine the place of delivery; and in doing so, the common rule as to the *locus solutionis* must give way to other considerations applicable to this particular case. No. 75.

The Lords found, That the suspenders were not obliged to transport their teind-victual to a market-town."

For the College, *Burnet, Miller, Advocatus.* Alt. *Sir Dav. Dalrymple, Ferguson.*
Reporter Woodhall.

D. R. *Fac. Coll. No.* 121. *p.* 222.

1759. *February* 21.

HERITORS of the Parish of INVERNESS *against* The MAGISTRATES and TOWN-COUNCIL of INVERNESS.

No. 76.
Grounds gained from the sea by building walls, are not subject to pay teinds.

In the process of augmentation and locality, at the instance of the Ministers of Inverness against the heritors of that parish, the following question occurred betwixt the magistrates and Town-Council and the other heritors, viz. Whether certain lands gained off the sea by the town in the year 1746, were teindable, and ought to be assessed with payment of part of the stipend to the Ministers?

Pleaded for the town: This piece of ground was formerly a salt marsh covered by the sea, till about the year 1746, that the town built very high dikes round it, in order to keep out the sea, by which means it came to be so improved as to yield £.183 12*s.* Scots of rent: That this acquisition was made at a very great expense, in proportion to the value of the ground; and the annual expense of supporting the dikes, which, from the damage occasioned by the sea, required constantly to be repaired, was also very considerable; and this improvement was in daily hazard of being totally undone by the sea's breaking through the bank; and therefore the £.183, 12*s.* now paid to the town, could not be said to be a constant and certain rent, which is a requisite by law in all estates out of which the fifth part is to be claimed in name of tithes: That it was now a fixed point in the practice of the Court, founded on the most reasonable principles, that subjects of this sort, which have been acquired at an unusual expense cannot be subjected to the payment of tithes; as has been decided in a variety of cases. Thus a loch having been drained at a considerable expense, whereby the ground formerly covered with water, having become arable and good, in the locality of the parish of Calder, within which the ground did lie, the question occurred betwixt the proprietor of the loch and the other heritors, whether it was to be subjected to the payment of tithes? And the Court, on the 11th July 1739, found, That such piece of ground could not be subjected to the payment of tithes. The reasons for exempting the town's new improvement, in the present case, is much stronger than occurred in that of the loch, as must be evident from the facts before specified. See APPENDIX.