1773. *June* 23.

Mr. JOHN KNOX, Minister of Slamannan, and The HERITORS of the Parish of SLAMANNAN.

No. 25.
The value of teinds, in a question with the Minister, can only be ascertained by a proper decree of valuation of the proper court. Hence, the proceedings in a prior action of modification, now founded on as importing a valuation, found no bar to a new process of augmentation at the Minister's instance, on the ground of the valued teind being exhausted.

In a process of augmentation, brought at the instance of Mr. Knox, the present Minister of Slamannan, against the heritors of that parish, the defenders founded upon a decree of augmentation of stipend obtained before the High Commission, at the instance of Mr. John Drysdale, then Minister of Slamannan, dated March 22, 1637; and, 2*dly*, On a subsequent contract and submission entered into, Sept. 12, 1644, between the Earl of Callender, patron of the parish of Slamannan, on the one part, and the whole heritors, on the other part; to which contract, the foresaid Mr. John Drysdale is a subscribing witness, relative to the augmentation of the then stipend of that parish, which, they alleged, had accordingly taken effect; and, in consequence, the stipend was raised to 800 merks, and proportioned among the several heritors; and, conformably whereto, it had been paid ever since; and contended, that, as from these writings, it appeared, that the teinds of these lands had been formerly valued, that, therefore, the present rent of the lands could not be the rule for ascertaining the amount of the teinds; and, as the valued teinds were fully exhausted, there could be no room for an augmentation.

Objected by the pursuer: That the decree 1637 was not a proper decree of valuation; that a process of valuation behoved to be prosecuted at the instance of the procurator-fiscal against all parties having interest; or at the instance of the heritor against the titular; but that it could not proceed at the instance of the Minister; whereas, the process 1637 was brought solely at the instance of the Minister, for the purpose of obtaining a modification of a competent stipend; accordingly, the libel was laid in the ordinary form of a libel for a modification; and that the oaths of the heritors was resorted to, as a *vidimus* to the Court of the amount of the funds, out of which the stipend was to be modified; but that this could not prejudge the right of the titular to the full amount of the teinds, nor from the King's annuity; because action is expressly reserved for both, as well as to the Minister, to obtain a further augmentation, when the teinds shall be proved to be of greater worth and quantity than is therein declared.

The Lord Auchinleck Ordinary pronounced an interlocutor as follows:—"Having considered the debate, and the writing founded on by the heritors, defenders, as a decree of valuation of their teinds, finds the same is not a decree of valuation, not only as it does not specify the extent of each heritor's teinds, but, as being only a decree of modification of the Minister's stipend, and under an express declaration, that, when the teinds should thereafter come to be properly fixed, the Minister should be entitled to make a further demand; and therefore finds the defenders' teinds fall to be fixed agreeable to the rental given out by the pursuer, upon which the defenders have been held as confessed."—And the heritors having represented, the Lord Ordinary, by a subsequent interlocutor, "hav-

No. 25. ing considered, that nothing can ascertain the value of teinds, in a question with the Minister, but a proper decree of valuation by the proper court; and that what in this case is pleaded on by the heritors as a decree of valuation, is not a decree of valuation; and that the private contract between the patron and heritors, though it may be effectual to the parties contractors, cannot affect the right of the Church, refuses the desire of the representation, and adheres to the former interlocutor."

Pleaded in a reclaiming petition: The defenders cannot agree with the pursuer's doctrine, that a process of valuation cannot be prosecuted at the instance of the Minister of the parish. By the act 1633, being the first parliamentary appointment of a commission for valuing teinds, and for carrying into execution the decreets-arbitral pronounced by King Charles I. full power is granted to the commissioners "to prosecute and follow forth the valuation of whatsoever teinds, parsonage or vicarage, within the kingdom, which are as yet unvalued." They are further impowered, "after the closing and allowance of the valuations of ilk kirk and parochine, to appoint, modify, and set down a constant and local stipend, and maintenance to ilk minister, to be paid out of the teinds of ilk parochine, according to the tenor of the acts above specified."

The valuation of tithes was a public measure, intended to take place within the whole kingdom, and to be forthwith carried into execution. The object of it was, 1*mo*, That the proprietors of lands should have the leading of their own tithes, and should not be further liable to the titular, or those having interest, beyond the just value thereof, as the same should be ascertained by the decree of valuation. 2*do*, That a fixed and constant stipend should be modified and localled to the Minister out of these tithes, after the valuations were completed, to fix the extent of the teinds; and, 3*tio*, In order to ascertain the extent of the annuity payable to his Majesty.

As so many separate interests were established in a valuation of tithes, it must follow, from the nature of the thing, that the action may be prosecuted at the instance of every person who had an interest in having the value of the tithes ascertained. As the pursuer admits, that it may be prosecuted at the instance of the heritor, or at the instance of the procurator-fiscal, on account of his Majesty's interest, no good reason occurs, why such action may not likewise be prosecuted, at the instance of the titular, or at the instance of the Minister of the parish.

It would appear from the foresaid statute 1633, that the valuation of the tithes ought to precede the modification of a stipend to the Minister And, indeed, as the Minister's stipend could only burden the tithes of the parish, and fell to be made greater or less according to the extent of the funds out of which it fell to be paid, it was natural, and highly reasonable, that, before a constant localled stipend should be fixed in favour of the Minister, the extent of the funds out of which it fell to be modified should be established; and, if so, it would seem to follow of consequence, that it was competent for the Minister to bring a process of valua-

tion of the teinds of his whole parish, as a proper preparatory step to obtain a modification of a suitable provision and maintenance out of the tithes; and the defenders are informed, that there are sundry instances of such valuations pursued at the instance of the Minister, in order that he might obtain the modification of a proper stipend; and that, when all those having interest were made parties to them, they were understood to be proper decrees of valuation. No. 25.

In the present instance, the decree 1637 appears to be a distinct and proper valuation of the whole parish. The summons expressly concludes, that the defenders "should have heard and seen lawful probation led and deduced of the true worth of the stock and teind of the lands within the said parish." Accordingly, a proof is taken by the heritors' oaths, upon a reference made thereto by the Minister; the titular, who was another party to the process 1637, not objecting: And there is a decerniture, ascertaining the value of the whole tithes conformably to these oaths.

The commissioners, who were a committee of Parliament, were not tied down to the strict rules of judicial proceedings. They admitted such evidence as appeared to them to be satisfactory; and, in fact, many of the decrees of the subcommissioners do rest upon the rentals given up by the heritors, and supported by no evidence other than the heritors' own assertion. But, even according to the strictest rules of judicial proceeding, the oath of party is an unexceptionable mean of proof, when resorted to by the other party.

The reservation in the decree appears to have been very irregular and improper, and for which no other reason was assigned, but that the commissioners suspected that they had, for the most part, undervalued their teinds, although they had no evidence before them, upon which they they could ground such suspicion. This reservation is of the nature of every other reservation, "as accords of law." Where the reservation is proper, and well founded, effect will be given to it; but, where it is otherwise, such reservations become nugatory, and can have no effect.

If the Minister, or titular, or any other person having a proper interest, had, *debito tempore*, brought a challenge of the decree, and had offered to prove that the depositions of the heritors were erroneous, and that the rents of their lands were then much higher than they had given them up to be, there would then have been room for the question, what effect ought to be given to the foresaid reservation? and whether, in consequence thereof, notwithstanding the extracted decree, such proof was admissible? But, as no such challenge was attempted, but, on the other hand, the decree has been acquiesced in by all parties concerned, for above the space of 130 years, when a proof of a higher rent has become a thing impracticable, no force or effect can be given to the foresaid reservation. The decree of valuation must be held as pure and simple; and it must be the rule for regulating the extent of the tithes of the parish in all time coming.

The prayer of the petition was, "To alter the interlocutors of the Ordinary, and to find that there is no room for a re-valuation of the teinds of their lands;

No. 25. and that, as their teinds, as ascertained by the decree 1637, are fully exhausted, no further augmentation can be given out of their lands."

The petition was "Refused, without answers."

For the defenders, *Macqueen.*

Fol. Dic. v. 4. *p.* 300. *Fac. Coll. No.* 73. *p.* 176.

1773. *June* 29.

MR. WILLIAM WALLACE, Minister of the Parish of Drummelzier, *against* The EARL of MARCH and RUGLEN.

No. 26.
The exception in the Act 1690. Cap. 23. along with possession by the Minister, of an annual duty and services out of lands formerly holden of the vicar of that parish, with that *reddendo*, found to give the Minister a preferable right both to the feu-duty and personal services, in a question with the patron, now become proprietor of the lands.

Mr. William Wallace, minister of Drummelzier, brought an action against the Earl of March, present proprietor of the lands of Happrew, in order to assert his right to a small duty of £.4 Scots, and likewise certain services, which the pursuer claimed as due to him out of these lands of Happrew; concluding, as to the services, for an annual sum of £.6 Scots, as their value, from the period of the Earl's purchase of said lands in 1756, since which they had been withheld, and for performance in time coming; and he referred to the original feu-charter of these lands granted by Ninian Douglas, Vicar of Stobo, to Nicol Brown, dated 15th January, 1536, the reddendo whereof was expressed thus: "Reddendo inde annuatim dict. Nicholas Brown, et hæredes sui præscrip. mihi, et meis successoribus, Vicariis de Stobo, summam quatuor librarum monetæ regni Scotiæ, ad duos anni terminos, &c. et sex dies servitii secular. in angariis, sive parangariis, sive in utrisque, ad voluntatem meam, et successorum meorum, semel in anno, quando mihi et meis successoribus videbitur magis expediens, tantum, pro omni alio onere," &c.

The pursuer, in support of his action, set forth, that the parish of Drummelzier was anciently a vicarage, depending upon the parsonage of Stobo; and the Vicar's living partly arose from certain duties payable out of the lands lying in the parish of Stobo; in particular, the lands of Happrew were always held feu of the vicars of Drummelzier, for payment of a yearly duty of £.4 Scots, with six days service of men and horse, which, by the practice, has been explained to be the service of one man and one horse for six days: That, after the Reformation, and when Drummelzier came to be a separate parish, the Minister serving the cure there continued to exercise this right of superiority over the lands of Happrew, and has immemorially enjoyed all the emoluments thereof, which never were annexed, or taken away from the church of Drummelzier by any of the statutes after the Reformation: That, when Mr. Wallace, the present incumbent, was admitted Minister of this parish, he found this superiority a part of the benefice, and he enjoyed the emoluments thereof, as his predecessors had done, from the earliest times; and Mr. Brown, the late proprietor, took a charter from him, as his lawful superior, and was regular in the payment of the feu duty and performance of the above mentioned services, which had been wrongfully discontinued, only since the defender became purchaser from