APPENDIX.

PART I.

TEINDS.

1777. *February* 12.

The MAGISTRATES and TOWN COUNCIL of Kirkudbright, *against* DUNBAR, Earl of SELKIRK.

No. 1.
Right of titularity—Decree of valuation.
See No. 159. p. 15765.

MR. ROBERT MUTTER, Minister of the Gospel of Kirkudbright, having brought a process of augmentation of stipend and locality against the heritors of that parish; and a rental of the whole lands in the parish having been given in by him, appearance was made for the Town of Kirkudbright, and a decree of valuation of their teinds, dated 20th February 1650, produced, with which it was remitted to the Lord Monboddo Ordinary, to prepare a scheme.

After some procedure in adjusting this scheme, objections were given in for the Earl of Selkirk, as titular of the teinds of the parish of Kirkudbright, to the decree of valuation above mentioned. To these objections the Magistrates of that burgh answered by denying his claims, or his right of titularity to the whole teinds of the parish. The Lord Ordinary, (10th February 1776,) pronounced the following interlocutor: 'Having considered these objections for 'Lord Selkirk, also objections by the Town of Kirkudbright to Lord Selkirk's 'title, and answers to my Lord Selkirk's objections to their decree of valuation '1650, and having also considered Lord Selkirk's answers and replies, Finds 'that my Lord Selkirk's right of titularity, of the teinds of the parish of Kirkud-'bright, is sufficiently instructed, and repels the objections to the same: Finds 'that the Earl has made objections to the town's decree of valuation sufficient 'to set it aside, and decerns and declares accordingly.'

To this interlocutor his Lordship, (19th November 1776,) adhered, upon advising a representation with answers.

No. 1. The Magistrates and Town Council of the burgh of Kirkudbright, contended, in a reclaiming petition, 1*st*, That the Earl of Selkirk had not produced sufficient evidence to instruct his right of titularity; and, 2*d*, That their decree of valuation 1650, was a valid and legal valuation of the teinds belonging to the burgh. The first of these points they endeavoured to support, by objections to the Earl's progress. Lord Selkirk on the other hand maintained, that the progress of his titles was unexceptionable; and contended, moreover, that as the Magistrates and Town Council claimed no right to the titularity of these teinds themselves, it was *jus tertii* for them to set up the right of any other party against his. With regard to the decree of valuation—the objections stated to it by Lord Selkirk, were, first, that neither the patrons of the parish, nor titular of the teinds, were made parties to the action whereon it proceeds; 2*d*, That this valuation proceeded upon no proper proof, with respect to the parsonage teinds, and upon the oath only of one person, as to the viccarage teinds, and who is not even properly designed; 3*d*, The decree does not bear date till the 20th February 1650, while it mentions at the same time that the commissioners were appointed by the Parliament 1641, and libels upon the act of that Parliament; 4*th*, The Town of Kirkudbright have passed from this decree of valuation, by paying fifty merks more than the sum contained in it to the Minister, in consequence of a subsequent decree of modification and locality. These objections the petitioners endeavoured to answer in the following manner.

1*st*, It is laid down by our lawyers, it was said, and particularly by Mr. Erskine in his Institute, B. 2. Tit. 10. § 35. 'That in actions of valuation brought 'before the Session as the Commission Court, the titular or his *tacksman*, and the 'minister of the parish, must be made parties to the suit.' The tacksman indeed is the person chiefly interested; for the reversionary right of the titular is very remote and insignificant, and many instances have accordingly occurred of valuations, where the titular does not appear to have been called. This doctrine was strengthened by two decisions of the Court; one collected by Lord Kaimes, Duke of Roxburgh against Scott of Horsliehill, 12th December 1744, No. 142. p. 15741; and the other Thomson of Ingliestown against the Earl of Galloway, 20th July 1763, No. 151. p. 15754. In the present case the tacksman, or the heir of the tacksman, appears by his counsel, makes no objection to the valuation, which proceeds upon the contract or subset of his predecessor to the town of Kirkudbright, which affords full proof of the value of the lands. All parties were therefore called who had any interest, and the writings produced that were necessary, and there can accordingly be no objection to the decree of valuation, supposing the titular not to have been called.

2*d*, The viccarage teinds are ascertained by the oath of Mr. Caesar, one of the bailies: His oath was taken upon the reference made by the Minister, and every person concerned in the valuation of the teinds, acquiesced therein. As

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to the objection that he is not properly designed, nor appears to have been authorised by a mandate from the community, it was answered, that his designation seems to be broad enough; and as to his authority, the law presumes he was sufficiently authorised, otherwise he would not have been heard, or his oath admitted: At any rate, in virtue of his office of bailie he was authorised to act. It was also argued, this decree of valuation was afterward homologated, and approved by every party concerned, in the year 1699, when it was made the basis of a decree of augmentation modification and locality. It was made the rule for allocating the teinds upon the burgh, and has continued to be the rule ever since.

3d, With regard to the objection that this decree was pronounced, by commissioners appointed in the year 1641, and yet does not bear date till the 1650, two years after the death of Charles the First;—it appears that many valuations have been carried through in the same manner. The act rescissory 1661, Chap. 61. proves clearly that there is nothing in this objection; for notwithstanding that all the acts of the Parliament 1640, and 1641, and since, are declared null by it, yet it is provided, 'that all and whatsoever valuations, acts, 'sentences, and decrees, done, concluded and decerned, by virtue of any com-'missions granted by the saids pretended parliaments, with all executions used 'or to be used thereupon, are and shall stand valid in all time coming, notwith-'standing of the foresaid act rescissory.' It can therefore be no objection to this decree of valuation, that it proceeded under the parliament 1641, or that it does not bear date till the 1650.

4th, The fourth objection, that the burgh of Kirkudbright had passed from this decree of valuation, by paying a greater sum to the Minister than was contained in it; this the petitioners contended was obviated by what was stated concerning the decree of augmentation in 1699, which proceeded upon and ascertained the decree of valuation in the year 1650.

To these arguments it was replied for the Earl of Selkirk.

1st, That nothing is more *triti juris*, than that the patron or titular to the teinds must be made a party to every valuation: That the cases founded upon by the petitioners applied only to decrees of the sub-commissioners, whose decrees were not valid till approved of by the high commission; and before the high commission, the titular must always be called: And that in the case of the Duke of Roxburgh and Scott, the titular had been called, and only pretended to challenge the decree, on account of an heritor not being called who had homologated it.

2d, As to the evidence of the tack ceded to the town of Kirkudbright by Lord Kirkudbright, this appears to be nothing else, than a collusion betwixt him as tacksman, and that burgh, to the prejudice of the titular: And the evidence of Bailie Caesar with regard to the viccarage teinds falls under the same objection.

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3d, The reservation in the act rescissory affords no ground of argument to the town of Kirkudbright: For the reservation in that act cannot apply to a commission proceeding under the act 1641, and not dated till the year 1650, because this commission was totally superseded in the year 1649, when a new commission was appointed, and all possibility of acting under the former commission therefore at an end. The decree in question would therefore have been *funditus* void, though there had been no act rescissory whatever.

4th, It is not pretended that more is not paid to the Minister, than the sum contained in the decree of valuation. This is a plain fact, and cannot be got over by a pretended homologation in a process not now before the Court.

The Lords (12th February 1777,) Refused the desire of the petition, and adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Monboddo*. For the Town of Kirkudbright, *D. Armstrong*.
For the Earl of Selkirk, *A. Crosbie*.

J. W.

1777. *June* 25.

MR. THOMAS MUTTER, First Minister of the parish of Dumfries, *against* The HERITORS of the BURGH-ACRES of DUMFRIES.

No. 2.

The rule for valuing teinds, when the titular has been accustomed to draw the *ipsa corpora*, or teind sheaves of burgh-acres.

For a long time past, the living of the first Minister of the parish of Dumfries has consisted of £58 Sterling yearly, paid to him by the landward heritors, and the *ipsa corpora*, or teind sheaves of the burgh acres, which he has drawn as titular, burdened, however, with 400 merks, which he pays to the second Minister of Dumfries, in virtue of assignments from the Crown, as in place of the Bishop of Galloway; to whom that sum was in use to be paid, (upon what ground is not known,) out of the teinds, then wholly enjoyed by the Minister of this parish, which was originally a parsonage.

The present incumbent having been unsuccessful in an action brought against him at the instance of the Magistrates of Dumfries, as assignees of the second Minister, for payment of the 400 merks, and which he had of late declined, as thinking it hard that this burden should be continued upon him, when by the alteration of management as to the burgh acres, his stipend was so much reduced, that after payment of the 400 merks, there was not a competency remaining; and that the assignment of it to the second Minister bore, that this 400 merks was payable out of the *excrescent* teinds;—and having been also unsuccessful in an action raised by him against the landward heritors, upon his right of titularity, in order that he might be really put in possession of the excrescent teind, out of which it was contended that the 400 merks should be payable, in case he was made liable in the same: He, in the next place, brought