No. 1.

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to a commission proceeding under the act 1641, and not dated till the year 1650, because this commission was totally superseded in the year 1649, when a new commission was appointed, and all possibility of acting under the former commission therefore at an end.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

No. 2.

a process of augmentation, modification, and locality, against the heritors; and in the rental given up by him he stated the burgh acres, stock and teind, at £1. 5s. per acre, which he affirmed was below their real worth.

The heritors insisted, that the annual amount of the total drawn teinds should be condescended on; and that this should be held as the teinds of the burgh acres in general. Answered by the Minister: The impropriety of this plea, and the injustice done him by the heritors, who neither would allow him to enjoy the teinds of the parish as titular, nor to have a fixed and permanent fund for his stipend, agreably to the true worth and value of the teinds, is evident. The heritors knew that the drawn teind for each man's possession could not be ascertained for any number of years back, because it was impossible for the Minister to have a separate barn for every acre, and therefore the whole teind sheaves had been constantly thrown together. They also knew, that the burgh heritors in general had for years past managed matters, so that they had reduced the total drawn teinds greatly below the five shillings per acre, over head, at which the pursuer in his rental had valued them. Some indeed had paid a great deal more, but others nothing at all; and upon the whole, it had occurred to them that if they could contrive it so as to make the drawn teind the rule, and at the same time to *average* it, by first proving what the total had been for some years past, and then subdividing it among them, this would be undoubtedly the most advantageous mode of valuation for the heritor. Whereupon, 'The Lords sisted process till the pursuer have an opportunity of bring-'ing his process of valuation of the burgh acres belonging to the defenders.'

Accordingly, a process of valuation was brought, and the Court, on hearing a verbal debate, 'Repelled the objections made to the pursuer's title to insist 'in this action, and allowed a conjunct probation to both parties, for proving 'the rental of the defenders lands libelled, in stock and teind, parsonage and 'viccarage, jointly or separately, with the usual deductions.' A proof was accordingly led by both parties, and a scheme of valuation having been made up, on the part of the defender this general objection was made, that the value of the teind as actually drawn is the only rule that can be adopted agreeably to King Charles First's decree-arbitral.

Pleaded in support of this objection: The artificial mode of stating teinds as a fifth part of the real rent of the lands, in place of a tenth part of the teindable produce, has arisen from mere necessity, and is applicable only to the case of actions of valuation being brought, where the stocks and teind must be valued jointly, there being no proper separation of them; but it is by no means applicable to the case, where the teinds are really separated from the stock as in the case of drawn teind; for there being no necessity for adopting an artificial mode of calculation, the teinds themselves admitting of a valuation according to their true worth, that mode of valuation only can be followed.

The idea of valuing teinds was not an original one in our law. They were really what the name imports, a tenth part of the produce annually separated

No. 2. and collected in kind; but by Charles First's decree arbitral, the power of valuing teinds, by process before commissioners, was given to those heritors whose lands were liable in teind, as a privilege and relief from the disagreeable effects that were felt from the actual separation of the teind. In this decree arbitral, however, the rule of valuation is set forth, distinguishing between the case where the stock and teinds are valued apart and separately. Vide the words of the decree arbitral itself, and Mr. Erskine's comment upon it on this point, and decisions there cited, Larger Institute, B. 2. Tit. 10. § 29.

Indeed the rule contended for, upon these authorities, has been followed in such valuations as have hitherto been brought of the teinds of these very burgh acres of Dumfries, particularly in a valuation, at the instance of Mr. Copland of Collieston, wherein he obtained decree on the 15th of July 1741; and any other mode of procedure, would obviously be attended with the greatest injustice and oppression, of which the present case affords a most striking instance, as it is believed, a fifth part of the rents, as the pursuer had endeavoured to prove them, would do more than triple the burden, that had hitherto been paid by the proprietor of these lands, in name of teind.

Answered to this objection: One thing, obvious from the decree arbitral, is, that the tenth sheaf was considered to be a heavier teind than the fifth of the rental, otherwise a deduction would not have been given of a fifth part of the teind proved in the first way, under the name of the Kings-ease: And from experience it is found that, even after this deduction, the value of the tenth sheaf is always considerably higher than a fifth of the rental, stock and teind, when matters are fairly conducted. In fact, it must have been considerably higher in the present case, where the lands are all arable, and at the gates of a populous town, had not devices been lately fallen upon to give it the appearance of being lower; and, notwithstanding these devices, if it was possible to value each man's teind separately and by itself, it would still be higher than taking a fifth part of the rent.

But be this as it may, the law cannot require impossibilities; nor was any such thing meant by the decree arbitral. The pursuer admits that the decree arbitral has pointed out two modes of valuation; but if one of these modes happens to be impracticable, from the circumstances of the case, recourse must necessarily be had to the other. In the present case, the mode contended for by the defenders is neither practicable nor just; the following particulars being clearly established by the proof, 1*mo*, That, thirty or forty years ago, the burgh acres were generally in crop; and, when a common belonging to the town, and upon which the possessors of burgh acres had a right of pasturing their cattle, was taken in and feued by the town, the burgh acres fell in their rent, so as to yield only from twenty to thirty shillings per acre over head; yet the drawn teind of the whole yielded three times more victual than it has done for these nine years past, although they are now let at an average between £2 and £2. 10*s*. per acre; 2*do*,—That, of 350 acres, about 200 acres, are for the most

part in grass, turnips, potatoes, or garden ground, which was not the case formerly; so that, notwithstanding the rise of the price of victual, the drawn teind has considerably decreased. Taking a medium of ten years, from 1742 to 1752, the teind was at £56. 7*s.* 10*d.* Sterling yearly, though the medium price of grain was only £5. 15*s.* 7*d*; from 1752 to 1762, the teind fell to £50. 10*s.* though the price was £7. 11*s.* 5*d*; from 1762 to 1774, the teind fell below £50. though the grain was £9. 7*s.* 6*d.* No. 2.

3*tio*, That it is impossible to condescend on the value of the drawn teind of any particular parcel, or the ground from which any particular quantity of the teind has been drawn for years past; because to have made such a destination, would have required a barn for each acre of the ground, or for each man's possession, and a separate account must have been kept of the victual produce for each.

But there is a distinct proof, 1*st*, of the lands in the possession of the heritors, what rent they would yield, stock and teind, if let together; and 2*dly*, what rent the lands possessed by tenants do actually yield, the stock being taken without the teind, which is drawn. A fifth part of the former is the teind of the lands, according to the legal rule of valuation, where the teind cannot be ascertained, and a fourth part of the latter is precisely equivalent; for, if a fourth of the stock is added, then there will be five-fifths which compose stock and teind.

This was the rule followed in the case of the Duke of Buccleugh against the Feuers of Dalkeith, 1st February 1744, No. 144. p. 15745. where the teind had been in use to be drawn, but was under the same difficulty of being ascertained. The argument in that case, as appears from the record, after reciting the act of parliament, was as follows: 'As the intention of this, and other laws 'to the same purpose, was to favour heritors in drawing of their own teinds, 'upon making payment to the titular of a reasonable value, therefore the legis- 'lature has presumed and statuted, that where lands are let for a joint rent, 'stock and teind, the fifth of the rent is the value of the tithes; and where 'the lands are not let for a joint rent of stocks and teind, if the value of the 'teinds by themselves can be distinctly and with certainty proved, that value, 'deducting a fifth part, called the Kings-ease, for the benefit of the heritor, is 'declared to be the rate of the teinds. These are the only rules of valuation 'allowed of by law: And therefore, when it happened, as in the present case, 'that it was impracticable, from the nature of things, with any certainty, to as- 'certain the just and real value of the tithes, separately by themselves, the 'uniform practice of the Court had been to value such teinds at a fourth part 'of the rent paid for the stock; and there was no other possible way whereby 'the rate of teinds of the lands of these defenders could be ascertained, by reason, 'as appeared from the proof brought by the Duke in this very process, the teinds, 'not only of the feuers, but of his Grace's whole tenants in the neighbour- 'hood, were all mingled and stocked together promiscuously, so that it was

No. 2. 'not possible to distinguish the value of the teinds of any of the vassals by 'themselves.'

The Lords found accordingly, what was the just worth and constant yearly avail of the teinds, parsonage and viccarage, of each man's lands, according to a scheme made out by the other rule of stock and teind.

In the cause of Lauder, the Earl of Lauderadale brought an undoubted proof of the number of stooks and sheaves, drawn for twelve years out of each man's lands; and as they were cast together, and threshed out jointly, he proved the value of one stock with another overhead. The Court however found, that the Earl's proof was defective, as one man's sheaves might differ from another in value; and, therefore, a proof of stock and teind was taken.

An interlocutor, to which the Lords adhered so late as 4th August 1773, was in these words: 'Having considered, that according to the Earl's account 'of the method observed in drawing the teinds and disposal of them, no proof 'is or can be brought of what was the yearly amount of each particular bur-'gesses teind drawn; and consequently, as the decree before the sub-commis-'sioner has been deserted for time out of mind, the only method by which the 'teind can now be ascertained, is, by adducing witnesses of skill and know-'ledge, not connected with any of the parties, who will swear what the lands 'do or may pay yearly.' (No. 158. p. 15764.)

In the case of Hume against Wedderburn, founded on, the Lords allowed a proof of the drawn teind, which was certainly very proper; but it is not said what was the result of the proof. In all probability, such proof would be satisfactory in that case, because it related to the lands of a single heritor, and not to the lands of a number of small heritors, where, from the nature of the subject, the teind sheaves must be thrown together, so as not to be capable of being separately ascertained. The case of Copland of Colliston is not explained, but it must have been of the same nature. The pursuer does not mean to say, that it is impossible that the drawn teind can be proved in any case. There have no doubt been instances of it; and, where the drawn teind of each man's lands can be separately ascertained, and the value of them fixed, good and well; the Court may follow that rule: But surely, where they cannot be separately ascertained, the other rule must be followed, viz. that of stock and teind.

What the defenders seem here to point at, is not that the Court shall take the separate value of each man's drawn teind, as truly is, or has been for years back; because, for the reasons already mentioned, no proof of this appears, or can be had; but that a very different rule shall be taken, viz. a cumulo valuation of the drawn teind of the whole burgh lands for a number of years past, and then that this cumulo shall be divided, so as to give each parcel its share of it.

No. 2.

But in the first place, the proof even of the cumulo drawn teind is imperfect, no exact account having been kept.

2dly, Though it were competent, it would be a very improper rule, because one man's lands may be different from another's. Such mode would be different from any of the two, which are pointed out in the decree arbitral; for it is neither the fifth of the rent, nor the just avail of the teinds of each man's lands, but an imaginary value, arising from the operation of throwing a great many men's lands together, as if they were one estate, then valuing them, and subdividing that value; whereby one heritor may be obliged to pay more teind than he ought to do, and another less.

3dly, This is not all; for it will be observed, that the cumulo which the defenders are pleased to assume, is not composed of the teinds of the whole lands, but only of the teinds of about a third part of them, laying the rest altogether out of the question, as if they were not teindable; for as it has already been explained, that two thirds, or more, of the lands, have of late been generally in grass, so the drawn teind arises only from the remaining third which happens to be in crop; and although the precise same acre is not always in grass, or always in corn, yet in the cumulo way, it comes to be the same thing, if such has been the proportion between the grass and corn for a good many years past, which is clearly established by the proof.

It is impossible the Court can go into this; nor will an instance of it be found in the records. There is neither law nor justice to authorise it, being contrary to the known legal rules, and leading evidently to inequality, and injustice.

The Lords found, that the rule of valuing the teinds of those lands, in the natural possession of the heritors, must be a fifth part of the rental of their respective lands: Found, that where any of the defenders' lands libelled, are possessed by tenants, and the stock thereof only ascertained, the fourth of the stock must be taken as the teind of those lands: Found the defenders liable in the expenses of this process; and ordained the pursuer to give in an account thereof; and remitted to the Lord Ordinary, to prepare a state of the teinds of the respective defenders' lands libelled, and to report.

Lord Ordinary, *Gardenston.* For the Minister, *Ilay Campbell.*
For the Heritors, *A. Crosbie.*

W. Wallace.

1777. *July* 9.

PATRICK RIGG of Downfield, *against* The OFFICERS of STATE.

No. 3.
Although a proprietor had paid a high price

THE Court had valued the rent, stock, and teind of the lands of Downfield, &c. belonging to Mr. Rigg, in the parish of Kettle, at £100 Sterling, and the fifth part thereof was declared to be teind, &c.