

1708. *January 20.*—The case mentioned 28th November last, the Minister of North-Leith against the Aberdeen Merchants, being this day heard in presence, it was contended, that the minister's possession by his decreets, &c. was, as to fishes taken by the Leith or Newhaven boats, or as to fishes imported into Leith from other parts, in order for consumption, and to serve the country; but where they were taken elsewhere, with a design to export them abroad, such a servitude would be a grievance on trade, and, if allowed, would amount to many stipends, instead of one. Answered, These words in their rights, giving the Minister the half-teind of all the fishes of Leith and Newhaven, were not taxative and restrictive, but only exegetic and demonstrative; and, to take off the pretence of a grievous burden, they offered to quit it to any that would secure the church in a stock of £.50 Sterling a year, that the kirk may not be any longer called greedy. It being put to the vote, Exeem such fishes landed at Leith as are to be exported again, or not? the Lords were equally divided, and the President, by his vote, found them not liable to the Minister in any teind; which did cut off a great branch of that kirk's stipend. But the President thought these double burdens of teinds on exported fishes was too great a clog and discouragement on foreign trade.

*Fountainhall, v. 2. p. 397. & 421.*

\* \* See Forbes's report of this case, No. 50. p. 15652.

1787. *November 15.* ROBERT WILLIAMSON *against* ROBERT LUNAN.

The lands of Lethindy-bank had formerly been the uncultivated part of a large farm, from which they were afterwards disjoined, and brought under tillage. They were then granted in lease to Robert Lunan; and Mr. Williamson, the parish Minister, having been in use to levy, in the parish, the vicarage-tithe, particularly that of lint, claimed the ordinary proportion of this article raised on those lands.

Robert Lunan objected to this, and

Pleaded: Vicarage-tithes are only due from such particular farms, and out of such articles, as have been rendered subject to that burden by immemorial and inveterate usage. In the present case, then, the vicarage of lint cannot be due; because, till very lately, the farm possessed by the defender never was in a situation to produce any thing but grass.

Answered: The right of levying vicarage-tithes is no doubt entirely consuetudinary; and if it could be alleged, that none had been levied out of certain lands, or even that, with regard to some articles, the tenants of a certain farm had been uniformly exempted, a valid exception would thence arise, although by far the greatest part of the parish had been liable to this burden in its fullest extent. But where, throughout a whole parish, the vicarage-tithe has been uniformly levied

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The vicarage of lint due, if in use to be paid out of the farm.

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out of every article raised on the lands, it cannot be thought, that because a small part of the farms, from the method of cultivation formerly used in it, has been incapable of producing one particular species of fruit, out of which a tithe of this sort is due, it is therefore to be altogether exempted.

“ The Lords unanimously repelled the defences, and found expenses due.”

Ordinary, *Lord Alva.* Act. *D. Williamson.* Alt. *Hagart.* Clerk, *Colquhoun.*

C.

*Fac. Coll. No. 3. p. 7.*

1796. *March 9.*

The Reverend JOHN HUNTER, Minister of the Parish of Oxnam, *against* The  
DUKE OF ROXBURGH.

No. 124.

A minister who is titular of the vicarage-teinds of certain lands in his parish, and of which his predecessors had granted successive leases to the heritor for upwards of a century, is not entitled, on the expiry of the current lease, to claim the tithe of all the articles from which vicarage is usually payable, but must either accept the rent and grassum as its value, or bring evidence of the particular subjects from which vicarage-teinds were drawn before the first lease was granted.

Part of the stipend of the parish of Oxnam arises from certain vicarage-tithes due out of the lands of Plenderleath and Hyndhopes, belonging to the Duke of Roxburgh. These tithes, since 1686, have been uniformly let, by the incumbent for the time, to his Grace's predecessors, for £.106 13s. 4d. Scots of yearly rent, and a *grassum* of £.100 Scots at the commencement of each lease.

The leases were always made to endure for the life-time of the granter, and three years longer; and the subject let was described to be, “ All and sundry the vicarage-tithes, fruits, emoluments and duties, of all and hail the said Duke of Roxburgh his lands and barony of Plenderleath,” &c.

Mr. Hunter, the present Minister, on the expiry of the lease current at his admission, brought an action of declarator against the Duke of Roxburgh, in which he contended, That he was entitled to the *ipsa corpora* of the vicarage-teinds of all the articles raised upon the lands from which vicarage is payable; and, at all events, that he was entitled to the tithe of stirks, lambs, and wool.

In defence, the Duke contended, that the evidence of the pursuer being titular of the vicarage-teinds was incomplete; and that, even although this were established, there was no evidence of their having been ever paid in kind: And further,

Pleaded: 1st, The heritor, by forty years disuse of payment, acquires a total immunity from the burden of vicarage-tithes; Mackenzie, B. 2. Tit. 10.; Bankton, B. 2. Tit. 8. § 140; and for the same reason, as the defender has paid only the rent and grassum for a much longer period, nothing further can now be demanded from him; 10th December, 1740, Lord Cranstoun against the Heritors of Hobkirk; (not reported, see APPENDIX.)

2dly, At all events, vicarage-teinds being wholly local and consuetudinary; Ersk. B. 2. Tit. 10. § 13.; 29th January 1706, Earl of Galloway, Sect. 4. *h. t.* the pursuer must either accept the rent as the *quantum* of the teinds, or prove what were the articles from which they were paid before the leases were first granted, which he has not hitherto done: And should the pursuer be unable to