

No. 123.

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 *ipso 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

do this, his predecessors are alone to blame, as they ought to have specified in the leases the different articles from which the teinds were payable. No. 124.

Answered: 1st, Had the defender and his predecessors, without accepting leases of their vicarage-teinds, merely paid a sum of money in lieu of them, there might have been something in his argument. But as they have possessed them as lessees under the Minister, their possession must be considered as his, and consequently, that possession being now at an end, the pursuer is entitled to exact the teinds precisely as they were drawn before it began; Ersk. B. 2. Tit. 10. § 30.

2dly, By the leases the defender's predecessors got right to all the vicarage-teinds of the lands in question; from which it must be inferred, that the titular has a claim to the tithe of every article mentioned by our writers as subject to vicarage-teinds; Bankton, B. 2. Tit. 8. § 140.; Stair, B. 2. Tit. 8. § 6. At all events, he must be entitled to the tithe of lambs, stirks, and wool, which are included under the most limited species of them; Ersk. B. 2. Tit. 10. § 13.; 24th July 1678, Grant against Mackintosh. No. 62. p. 10763.

The Lord Ordinary took the question to report.

Observed on the Bench: The pursuer's right of titularity is fully established; but as vicarage-teinds depend entirely upon custom, he must either take the rent and grassum as their amount, or prove from what subjects they were payable before the leases were first granted. It is a mistake to suppose, that wherever vicarage is due, stirks, lambs, and wool, fall under it. The writers on our law have expressed themselves some what inaccurately on this point; but their meaning is, that vicarage is more ordinarily payable from these than from other articles.

The Lords, 20th November 1795, "found, That the pursuer, as Minister of the parish of Oxnam, is titular of the vicarage-teinds in question; but in respect he has not condescended upon, or offered to prove, what vicarage-teinds were in use to be drawn by his predecessors, found, That *in hoc statu*, his demand falls to be restricted to the sum of £.106. 13s. 4d. Scots of tack-duty yearly, and £.1000 Scots of grassum in use to be paid at the admission of each incumbent."

The Duke of Roxburgh, in a reclaiming petition, stated, That, by inveterate practice, he and his predecessors, on paying the £.1000 Scots of grassum, were entitled to a lease of the teinds during the life of the incumbent, and three years longer; but that by the present judgment, he was made liable for the grassum at the admission of each incumbent. His Grace therefore prayed, that the interlocutor might be so far altered, or explained, as to find that he was entitled to a lease on the usual terms.

The Court pronounced the following interlocutor: "Find, That upon payment of the fine or grassum of 1000 Scots, the petitioner and his successors are entitled to a lease of the vicarage-tithes in question during the life of the incumbent at the time, and for three years thereafter; and, with this explanation, adhere to the interlocutor reclaimed against."

Lord Ordinary, *Eskgrove.* Act. Solicitor-General Blair, *Dickson, Ar. Campbell, junior.*

Alt. Rolland, *H. Erskine, R. Craigie.* Clerk, *Pringle.*

R. D.

Fac. Coll. No. 213. p. 498.