1796. *June* 15.

The Reverend DAVID BROWN, *against* WALTER HUNTER.

No. 125.
The right of the Minister to the vicarage-tithes of bog-hay will not entitle him to claim the tithe of hay from sown grass, although bog-hay should no longer grow in the parish.

Mr. Brown, Minister of Crailing, raised an action of declarator against Walter Hunter, and the other heritors of the parish, for ascertaining his right to draw vicarage teinds, in the course of which he established, that his predecessors had been in use of drawing the tithes of a variety of articles, and among others, of bog-hay. It appeared, however, that no hay of this sort now grew in the parish, and that it never had been produced in any considerable quantities, except on a piece of ground called the Warlie Meadow, which, for many years past, had either been pastured or in tillage.

The Lords, "on advising the proof, found, That the pursuer, as Minister of the parish, is titular of the vicarage-tithes payable out of the lands belonging to the defender, (Mr. Hunter), and has right to draw the tithe of lambs, wool, lint, hemp, and natural hay, but not of hay made from sown grass."

Mr. Brown reclaimed against this judgment, in so far as it denied him the tithe of artificial hay, and

Pleaded: The disuse of bog-hay has arisen from the improved state of agriculture, the same land which formerly produced it being now sown frequently with artificial grass. It would be hard, therefore, that while the heritor profits, the Minister should suffer. Besides, there is not that essential difference between the two sorts of hay which can admit of the one being titheable, and the other not. And although the Minister be a gainer by the improvement in the quality of the hay, it is equitable that he should be so, in order to compensate for the loss he may sustain by other articles of produce going into disuse. Thus hemp, an article liable to vicarage-tithe, and formerly produced in great quantities, is no longer raised in the parish.

Answered for Mr. Hunter: Custom is the sole rule, both as to the place whence vicarage-tithes are to be drawn, and the articles liable to be tithed; Stair, B. 2. T. 8. § 6.; Bank. Vol. 2. p. 53. § 140.; Forbes, p. 351.; 24th November 1665, Bishop of the Isles, No. 58. p. 10758; 28th November 1676, Schiel, No. 61. p. 10761. 11th February, 1665, Scott, No. 113. p. 15772. But the proof establishes the pursuer's right to bog-hay only, a species totally different either from ley-hay or sown grass. Both are greatly more valuable, and the latter is raised only upon ground in a high state of cultivation, which no farmer would sow with seed gathered from bog-hay. Besides, were the pursuer to prevail, the defender would not, as formerly, have to pay the tenth of the spontaneous produce of the ground, but a tenth of the return for the money which he has laid out, and for the seed and industry which he has bestowed; and thus the improvement of the country would be discouraged, and the value of the pursuer's vicarage tithes exorbitantly increased. Neither is the disuse of bog-hay any real hardship on him. It was at no period of much value; and, at any rate,

it is an inseparable quality of tithes of all sorts, that they import no restriction upon proprietors in the cultivation and management of their grounds. No. 125.

At all events, the claim could reach only to sown grass growing on Warlie meadow, there being no proof of the tithe of bog-hay having been drawn from any other part of the parish; 29th November 1678, Birnie, No. 1. p. 2489.

Several of the Judges were for supporting the pursuer's claim. It is hardly possible (it was observed) to draw the line between one sort of hay and another; and by such a distinction, the payment of teinds from hay might be entirely evaded, merely by throwing a few seeds among natural grass.

A considerable majority were, however, for refusing the desire of the petition. All attempts (it was said) to extend the right of the titular are justly unfavourable. Bog-hay is a different species from artificial grass, and teinds admit of no *surrogatum*.

The Lords "adhered."

Lord Ordinary, *Eskgrove*. Act. *Arch. Campbell*, junior. Alt. *Rolland*. *R. Hodgson Cay*. Clerk, *Home*.

Fac. Coll. No. 223. p. 522.

SECT. IV.

Valuation.

1632. *March.* DOUGLAS *against* L. EDNEM.

No. 126.
Effect of valuation.

In an action for wrongous intromission with the teinds of Ednem, of the crop 1631, the Lords sustained this action, and decerned according to the quantity of the teinds proved; albeit the defender alleged, that he intromitted according to a warrant of the High Commission, giving him power to intromit, he finding caution to pay the quantity to which the teinds should be valued, as use is in that Commission; likeas the teinds are valued, and the valuation approved by the Lords of the Commission, and he is content presently to pay the quantity, whereto it is valued; and therefore he alleged, that the decree ought to be restricted to that quantity, and no further ought to be decerned. This allegeance was repelled, and notwithstanding thereof the quantity proved was decerned, and the prices, but the smallest quantity that was proved was decerned; and this was so found, seeing the pursuer had not submitted, so that the act of the Commission could not astrict him; albeit the defender alleged, that if the Lords of the Commission had not given him the warrant to meddle and lead the teind, he would not have intromitted therewith; which was not respected, seeing he sought that warrant