an inhibition had been previously used, which, however had not been insisted on in due time. No. 170.

*Fac. Coll No.* 153. *p.* 257.

*** This case is No. . p. . *voce* PRESCRIPTION.

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1802. *June* 15. COLQUHOUN *against* FERGUSON.

No. 171.
A decree of valuation which is reduced as to the Minister's right, upon an objection of his not having been a party, cannot remain effectual as to the other parties concerned.

The parish of Luss being in ancient times a parsonage, the parson serving the cure was the titular of the teinds, and had right to them *proprio jure*.

In the year 1658, certain parts of the parish were disjoined, and erected into the separate parish of Arrochar, of which last, as of the former, the family of Colquhoun of Luss were patrons, and in that character acquired right under the acts 1690 and 1693, to the whole teinds not heritably disponed. Macfarlane of Macfarlane was proprietor of the estate of Arrochar, lying in the parish of Arrochar, the teinds of which were valued in 1629. The report with regard to Nether Arrochar bears, that Walter Macfarlane, heritor of the lands, John Colquhoun of Luss, the patron, and Mr. John Campbell, "parson and Minister of the said parish-kirk, of their awin assentis, are contentit, that the auld rental of the teinds of the said lands of Nether Arroquhaire, stand in time coming as it has been thir forty years and maire by-past, to wit, 12 bolls tynd meal of paarsonge-tynds, with 412 merks money yearly."

This report was approved of by the high commission, and the valued teind was exhausted.

The proceedings as to the lands of Upper Arrochar, are dated 31st December 1629, at Dunbarton; and the record bears: "The qlke day, comperit John Macfarlane of Arroquhaire, lyand within the said parochin of Luss, and John Colquhoun of Luss, patron of the said parish-kirks; and there the said heritor and patron, of their awin consent, are contented that the auld rental *of the teinds* of the said lands of Arroquhaire, stand in time-coming as it is and has been thir monie years bypast, to wit, 400 merks."

Finding that the words "of the teinds;" are scored in the record, Macfarlane, upon the idea that 400 merks was the amount of stock and teind, obtained a decree of approbation in 1769, fixing the amount of the teind at 80 merks.

Ferguson of Raith purchased in 1785 the estate of Arrochar. The Minister of the parish soon after brought a process of augmentation, and stated, that instead of 80 merks, the lands of Upper Arrochar paid five times that sum in stipend. Ferguson then brought a new process of approbation, contended that the words "of the teinds," in the report, should never have been obliterated, and that the teinds should be declared to be 400 merks. To this the Minister objected, that the rental had not been fixed by proof, and that the Minister had not been made a party to the proceedings; that the consent of the heritor and patron

No. 171. alone, fixing the amount of the teind, could be of no avail; because the parish being a parsonage, the Minister had right to the whole teinds *proprio jure* as parson, and consequently had the most substantial interest in every thing regarding the valuation of the teinds. The Court accordingly refused to approve of this report; 4th February 1794, No. 164. p.15768.

Sir James Colquhoun, the titular of the whole parish of Arrochar, upon the footing that the teinds of Upper Arrochar remained still unvalued, brought a claim for the teinds of these lands since Mr. Ferguson's purchase, and in all time coming, under deduction of the stipend payable to the Minister, and

Pleaded: The nature of a process of valuation of teinds, which was intended to settle and ascertain the rights of all the parties, plainly does not admit that it should be ineffectual to one party but valid to another. The sub-commissioners were to find out the true value of the lands in every parish; and for this purpose all parties were to be present, otherwise no report could be effectually pronounced. Even if certain lands had been valued regularly, the titular, the heritor, and the Minister, all appearing, so little can the report be divided into parts, that the benefit of it may be lost by dereliction, whether the over-payment has been made to the Minister or titular: The sub-valuation becomes totally ineffectual. If the objection be not derelinquished, but that the Minister was not a party to the valuation, it is thereby in like manner rendered ineffectual to the titular as well as to himself.

The report cannot be looked upon as a judicial contract between John Colquhoun of Luss and the heritor of these lands, regulating the amount of the teind, so as to be binding on the present pursuer, and exclude his action. There is no evidence of any such intention, as the report proves only that certain measures were taken for the valuation of the teinds, but not an intention of entering into any agreement which did not fall within the jurisdiction of the Sub-commissioners. It cannot be supposed that the patron and heritor intended in this way to fix the amount of the teinds, so far as regarded their own interest, because a private deed would have better answered this purpose. They meant to form a regular report; but this they have not done; and it cannot be converted into a contract, which they had no intention of entering into. The consent was given, under the condition, that all parties having interest concurred. This condition has not been fulfilled, so that it cannot now be binding; Watson agrinst Fede, 5th February, 1724, (see APPENDIX.) If the heritor and titular had entered into this agreement, for the express purpose of settling their interests, it would certainly regulate the rights of their successors; Robertson against Duke of Hamilton, 16th November, 1796. (Not reported; see APPENDIX.)

But it does not appear how John Colquhoun of Luss could make an agreement with respect to these teinds, so as to exclude the pursuer's claim, who has acquired right to them by a supervenient public law, long after the date of it. The Minister was titular, and had right to the whole teinds *proprio jure*. John Colquhoun was only patron, and, as such, he had at that time no direct interest in the teinds:

No. 171.

For he had only the *nudum jus præsentandi*. The teinds belonged *proprio jure* to the parson, who must necessarily have been a party in every thing regarding the teinds of his own parish; while the patron's appearance in such a process does not seem so necessary. Patrons sometimes obtained an indirect interest in the teinds, by obtaining tacks of them from their presentee, which were secured by 1612, C. 1.; but still this was an indirect, and was at best but a temporary interest, depending upon the will of the parson to renew them. But even this interest in the teinds it is not pretended that John Colquhoun had, and if he had, and if a contract of this kind were to be at all binding, it could only bind during the existence of the tack.

But the pursuer is titular of these teinds, in virtue of a supervenient public law. John Colquhoun, the patron, in 1629, may have consented for any interest which he may have then had in the teinds. It cannot affect the interest which the pursuer has in these teinds in the different character of titular.

Answered: The pursuer, as representing his predecessor, must be bound by his actings, in the same way as his predecessor would have been. John Colquhoun appeared before the sub-commissioners, and solemnly consented to hold the value of the teinds of Arrochar at 400 merks; and by this consent he was bound, not only so far as his interest was then concerned, but also as to any future interest he might acqure in the teinds; for the agreement is perfectly indefinite and unconditional. If another layman had been titular at the time, and after the above agreement, John had succeeded by his death, he would have been bound, as one making such a contract is supposed to have every such contingency in view. He acquired right *qua* patron to these teinds; and if in that character he had previously settled their value, he cannot contravene his own act. As little can the pursuer; for John Colquhoun was his author, and he must be equally bound by this act.

But though the Minister was not present at these proceedings, and that he consequently is not bound by them, they must still have effect, and bind those who were parties, and who well knew that the Minister was absent. The sub-commissioners were not regularly a Court of law, nor their valuations of the nature of judicial proceedings; Earl of Aberdeen against patrons of Gordon's Hospital, 12th December 1798, (not reported—see APPENDIX,) requiring every person having the remotest interest to be called; and the patron and heritor could plainly enter into a contract to effect themselves only, though not the Minister. The patron even might have sold the teinds to the heritor without any process of valuation and sale. If the contract, being made extrajudicially, would have been binding, it does not become less so, when a Court of law has interposed its authority. They have entered into an agreement as solemn, as if a regular bond between the heritor and patron had acquitted Macfarlane of the teind duty, upon payment of 400 merks; and there is as little inconsistency in the report being binding upon one person, and not upon another, as there could be in such a bond, which would be valid, though the Minister were no party to it.

The Lord Ordinary reported the cause on informations, when the Court, (10th

No. 171. February 1802) " sustained, the defences;" but on advising a reclaiming petition with answers, they unanimously (15th June 1802) " altered" their former interlocutor, and found the defender liable for the full teinds.

Lord Ordinary, *Cullen.* Act. *Robertson, Monypenny.* Agent, *Wm. Callender.*
Alt. *H. Erskine, Hay.* Agent, *Ja. Dundas, W. S.* Clerk. *Gordon.*

*Fac. Coll. No. 46. p. 92.*

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1802. *December* 8.

EARL of SELKIRK *against* OFFICERS of STATE.

No. 172.
No deduction allowed for improvements by manure, nor for *extra* houses in the valuation of teinds.

In the valuation of the teinds of the parishes of Rerwick, Kirkcudbright, Twyneholm, and the old parish of Kirkcormick, now annexed to Kelton, the Earl of Selkirk claimed deduction on account of improvements, by making fences and drains, building houses, and laying on lime. The claim of deduction was allowed for the improvements of fencing and draining, (7th December, 1797;) but was rejected as to the buildings and liming. With regard to these last, it was again, on the part of the heritor, in a reclaiming petition,

Pleaded: In ordinary cases, the expense laid out in manuring lands will afford no claim of deduction from the teinds of such lands; because it is presumed, that the sum laid out is replaced by the extraordinary crops which are the consequence of it. But where, in order to obtain a higher rent for his lands, the heritor agrees with the tenant to lay on a certain quantity of lime, the produce to be enjoyed by the tenant, and not by the heritor, the increased rent is created by the heritor's expenditure of money, not by the lands themselves, nor by the industry and skill of the proprietor or tenant; the whole rent received by the heritor cannot be held as the annual produce of the lands. If, instead of employing a sum of money in laying lime upon the farm, the landlord had, in order to induce the tenant to give a higher rent, agreed to allow him a certain sum to be employed in this way, the landlord would have been entitled, in valuing the teinds, to have deducted from the rent a sum equal at least to the interest of the money so expended. It makes no difference that the landlord lays out the money himself, so long as the tenant enjoys the benefit of the improvements, paying only a rise of rent, as in this case, equivalent to $7\frac{1}{2}$ *per cent.* the deduction claimed; Town of Dunbar against Earl of Roxburgh, quoted by Forbes on Tithes, Ch. 9. § 3, (See APPENDIX;) Gordon against Officers of State, 23d February, 1785, No. 160. p. 15765.

As to the deduction for houses, where the proprietor does no more than lay out money in erecting houses absolutely necessary for the accommodation of the tenant, and without which the lands could not have been let, he can claim no deduction on account of such expenditure; because no part of the rent is paid on account of the houses, from which the tenant derives no profit; but if the tenant, desirous of better accommodation than usual, agrees with the landlord to give a higher rent for the use of a house beyond the style of what the farm usually has,