

REV. DR. JOHNSTONE, Minister of the Gospel, North Leith, and THOMAS GLADSTONE, Treasurer, for behalf of the Kirk-Session of the said Parish, and ROBERT STRONG, their Lessee, - - -	}	<i>Appellants;</i>	1781. <hr style="width: 10%; margin: 0 auto;"/> JOHNSTONE, &c. v. CHALMERS, &c.
MR. JAMES CHALMERS, Merchant, and JOHN WATSON, Cooper, both in Leith,	}	<i>Respondents.</i>	

House of Lords, 6th April 1781.

TEIND FISH—DUTY—PAROLE—USAGE.—The minister of the parish of North Leith, by virtue of grants, has a right to exact a duty on all fish brought into the ports of Leith and Newhaven. Action being raised to enforce this right, held by the Court of Session, (1.) That the minister had no right to the tithe of fish brought into Leith and Newhaven, which were meant to be again exported, and, (2.) Nor to the tithe of fish which had paid teind where they were caught. In the House of Lords, affirmed as to the first point, but reversed as to the second; upon the ground, that a practice of so exacting teind on all fish brought into Leith and Newhaven, without distinction, was established by the proof led in explanation of the extent of the right.

The church and parish of St. Cuthert's of Edinburgh, were annexed to the abbacy of Holyroodhouse, at the time it was erected into an abbacy in 1128.

The parish of St. Cuthbert's and abbey lands then extended to Newhaven and Leith, and, in virtue of the grant, a certain teind duty had always been exacted on the importation of all fish into Leith or Newhaven. The charter grants, “ Ecclesiam sancti Cuthberti cum parochia et omnibus rebus que eidem ecclesie pertinet; volo etiam ut iidem canonici habeant libertatem molendini faciendi in eadem terra; et ut habeant in hereth. omnes consuetudines illas et rectitudines, et asiamenta, viz. in aquis, in piscationibus, in pratis, in pascuis,”—“ et Inverlet illamque vicinor est portui cum rectis divisio et cum ipso portu et cum medietate piscationis et cum tota decima totius piscationis quæ ad ecclesiam sancti Cuthberti pertinet.”

In 1606, an act was passed for erecting the kirk of North Leith into a separate parish. And the abbacy, after the Reformation, being erected into a temporal lordship, Lord Holyroodhouse, in 1631, sold and conveyed to the “ minister, elders, deacons, kirk-session, neighbours, and inhabitants of the parish of North Leith, and their successors, as a provision for the maintenance of the minister, &c. of that parish, heritably and irredeemably, all and sundry the

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- This title was supported by decrees of the Court of Session in 1635 and 1662, declaring their right to the teind fish brought into Leith and Newhaven.—In the present case, the appellants claimed, as in use and wont, under the above title, for every last of herrings (12 barrels) 1s. 8d., and the twentieth fish of all other green or dried fish; and, in exacting this teind duty from the respondents, the latter refused to pay, which resulted in the present action. In defence, it was stated, 1st, That the kirk-session of North Leith was not entitled to exact teind duty on fish which had paid teind at the place where they were caught; and, 2d, That they were not entitled to exact it on fish imported into Leith and Newhaven, for the purpose of being again exported.
- July 23, 1777. The Lord Ordinary found, "That as it is admitted that the fish in question paid teind where they were caught, they cannot be subjected to a second teind upon their importation into Leith. Found no necessity to determine the question, Whether they would be liable to teind, if they were exported from Leith?"
- Nov. 29, 1777. On representation, the Lord Ordinary pronounced this interlocutor: "Adhere to the last interlocutor upon the general point, finding, that the fish which paid teind where they were caught, are not liable to pay a second teind on importation. Find, that the respondents must pay teind for the 579 barrels, which they admit were used for home consumption, excepting so far as they can shew that every part of them paid teind where they were caught; but as to what was exported to Jamaica, Grenada, Tobazo, and London, find that they are liable to no teind, and decern."
- Dec. 16, 1777. On further representation, the Lord Ordinary adhered.
- July 1, 1778. On reclaiming petition to the Court, the Lords pronounced this interlocutor: "Repel the defences to this action, and find the defenders liable to the pursuers in 20s. Scots for each last of herrings, and in one dry fish out of each twenty, landed by them respectively in the ports of Leith and Newhaven; and remit to the Lord Ordinary to proceed accordingly, and further to do as he shall see just."
- The defenders gave in a petition against this interlocutor, in which they stated many averments relative to the practice; and the Court, on advising the petition with answers, appointed them to give in a special condescendence of the circumstances, and of what they offered to prove. This be-

ing done, the Court remitted to the Lord Ordinary to hear parties, and to do therein as he might see just. His Lordship ordered a proof, which, after being taken, the Lord Ordinary reported the whole cause to the Court. The parties deduced different conclusions from the proof. The appellants alleged that this duty was payable, and had been constantly paid, upon importation of all fish at the ports of Leith and Newhaven, without distinction whether they were for exportation or home consumption, and that no drawback or return had ever been exacted or uplifted. The respondents, on the other hand, alleged, that for 40 or 50 years back, it was established by the proof, that the kirk-session and their lessees were in the practice of taking such a composition upon the whole as the merchants and dealers in fish choose to give. Whereupon the Lords pronounced this interlocutor: “ On report of Lord Monboddo, and having advised the proof adduced, and informations *hinc inde*, the Lords find, that the pursuers, the minister and kirk-session of North Leith, and the tacksman, are not entitled to draw from the defenders any teind of any fish which shall be imported by them into the port of Leith, and afterwards exported; neither are they entitled to draw from the defenders any teind of any fish which, from a certificate from the minister of the parish, where they were caught, or other titular having right to draw the teind thereof, shall appear to have paid teind elsewhere, and remit to the Lord Ordinary to proceed accordingly; and further to do as he shall see just.”

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The church of North Leith, as well as the duty on fish now in question, originally belonged to the abbacy of Holyroodhouse. That institution being turned into a temporal lordship, the Lord thereof conveyed the teind fish of Leith and Newhaven, to the parish of North Leith, to which it became annexed, for the maintenance of the minister, reader, and schoolmaster of the parish.—Since then (1631) the kirk-session of North Leith, as is shewn from the proof, have had their right to uplift this teind fish twice established by the Court of Session, which has pronounced judgment twice in favour of the minister and kirk-session of North Leith. And this right holds with reference to fish brought to Leith and Newhaven for the purpose of being exported, as well as to fish that have paid teind at the places where they were caught. The right extends to all

1781. fish whatever imported, without regard to whether they are intended for export, or have already paid teind at the place where they were caught. The right conveyed to the North Leith parish is unqualified by any exemption of the nature here referred to.—It is imposed on, and exigible from, all fish imported into these places, without distinction. But as the objection, that the fish have paid teind where they were caught, and so are not liable to pay teind when imported into Leith and Newhaven, is founded on the supposition that the duty so payable, was really in the true sense a teind duty, it was necessary to confute this erroneous idea. Although called by that name (teind), yet, from the thing out of which it is paid, as well as the *quantum* payable, it is clearly not a tithe, and can only have got the name of teind from its being paid to the minister with the other teinds of the parish. Tithe is payable out of land,—the smaller tithe out of rural or farm produce. It is truly an impost, or port duty leviabie on all fish, without exception, by the minister and kirk-session of Leith, and no more.

Pleaded for the Respondents.—The right to the vicarage or small tithes of a place, which this undoubtedly was, cannot extend to what is neither produced nor consumed in that place. The appellants' title could be no broader than that of Lord Holyroodhouse, their immediate author, which was to the tithe fish of Leith and Newhaven, as included in the tithes of the parish of St. Cuthbert's. And could never at any time mean more than the fish caught by the people residing in those places, or fish brought in for sale and consumption. But this being nothing more than a tithe, it is contrary to principle, and to the nature of the thing, that tithe should be exacted twice for the same thing. When the tenth part of the produce of industry was affixed to the church for its support, the wildest rapacity of the church of Rome never went so far as to charge this tenth twice on the same article.—Here the fish are charged with teind where they were caught; and it is again charged upon them when brought into Leith and Newhaven, which is a claim quite unfounded and untenable. And it is no answer to this, to maintain that this is not a tithe, but a tax or duty upon fish imported in these ports, because this, beyond all doubt, is nothing but the vicarage, or smaller teind of the parish. The dues of the harbour of Leith, &c., were quite distinct, and the right which was originally in the abbacy to the harbour and shore dues, is now vested in different parties

altogether, namely, the Magistrates of Edinburgh ; but the tithe fish of St. Cuthbert's was in Lord Holyroodhouse as titular, and conveyed by him, as a distinct right, to the North Leith parish. It is therefore illegal to exact tithe twice, or to exact teind on fish merely imported for the purpose of export.

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After hearing counsel, the

LORD CHANCELLOR said :

“ My Lords,

“ There are two points which the Court below have determined, namely, 1st, That the minister of North Leith had no right to the tithe of fish brought into Leith which were meant to be again exported. 2d, Nor to the tithe of fish which had been paid at the place where caught, and, after considering the case maturely, I move your Lordships that the interlocutor be affirmed upon the first point, but reversed on the second point ; resting my judgment upon the proof brought, of the practice of so drawing the teind in the latter case.

It was ordered and adjudged that the interlocutors of the (Lord Ordinary) 23d July, 29th November, and 16th December 1777, complained of be *reversed* ; and that in the interlocutors of the (Court) 18th November 1780, and 5th December adhering thereto, after the words “ into the port of Leith,” the words “ for exportation,” be inserted : And that so much of the said interlocutors as find that “ neither are they (viz. the pursuers) entitled to draw from the defenders any teind of any fish which, from a certificate of the minister of the parish where caught, or their titular having right to draw the teind thereof, shall appear to have paid teind elsewhere,” be *reversed*.

For the Appellants, *Henry Dundas, Tho. Erskine.*

For the Respondents, *Dav. Rae, John Maclaurin.*

JAMES BYWATER,	- - - -	<i>Appellant ;</i>
THE CROWN,	- - - -	<i>Respondent.</i>

House of Lords, 1st May 1781.

COURT OF JUSTICIARY — JURISDICTION — APPEAL. — Competency of an appeal to the House of Lords from the sentence of