

No. 126. upon his own peril and hazard. And this is the first decision where the quantity proved was decerned, notwithstanding of the warrant to lead from the Commission, and notwithstanding of the approving of the valuation.

Act. *Stuart, & Craig.*

Alt. *Nicolson.*

Clerk, *Gibson.*

Durie, p. 651.

1639. *March 8.* HEASILHEAD *against* HIS TENANTS.

No. 127.

Rentallers found not entitled to pursue a valuation.

Some tenants to the Laird of Heasilhead, being rentallers of some of his lands for their lifetimes, and the life of the setter, for payment of a certain duty therein contained for the lands, and for paying of the teind-duty, as should be imposed, obtain decret before the Lords of Session against their Master, setter of the rentals, and who had acquired right to the teind from the titular, according to a valuation of the teinds tried and estimated before the Commission, finding that they should bruik the teinds of their lands set to them in rental, for payment of their proportion of the valued bolls. This decret was desired to be reduced, by reason that by virtue of the said Commission, the benefit of valuation of teinds, is by no clause of the Commission, conceived in favours of tenants of other heritors' lands, who are but naked rentallers, and rentallers only during the lifetime of the setter and receiver conjunctly; for that clause of the Commission, concerning life-renters, is only to be understood of life-renters by virtue of infeftments, as conjunct fee, and other sicklike right; and therefore these rentallers could never have had interest to pursue such an action, and to crave the benefit of the valuation of teinds. The Lords found the reason relevant, and reduced the decret; for the Lords found, this Commission of teinds contained no clause in favours of any rentaller of land, which ought to give them right to claim the benefit of valuation of teinds, but when any action should be pursued against the rentallers, for their teinds, the Lords declared that they would have consideration of the rentals, and what should be in equity paid by them for their teinds.

Alt. *Maxwell.*

Clerk, *Scot.*

Durie, p. 881.

1661. *December 11.* The EARL of ROXBURGH *against* MACDOWAL of Stodrick.

No. 128.

Exorbitant valuation.

The deceased Earl of Roxburgh, having obtained decree of the Commission, for the valuation of teinds, *in anno* 1635, against Macdowal of Stodrick, this Earl having right from the deceased Earl, pursues Stodrick for payment of the valued duty. The defender alleged, no process, because he had intented reduction of the said decree, and improbation of a procuratory mentioned therein, to have been produced by Mr. Robert Trotter, warranting him to consent for Stodrick to that.

valuation ; which is the only ground of the decree, without either dispute or probation ; in which reduction, terms are taken to produce ; and being prejudicial to this action, it must be first discussed. The pursuer answered, that there can be here no prejudiciality, which is only betwixt two principal actions ; but here *res est judicata*, by a decree, *et stat sententia, et dubius est eventus litis* ; neither can reduction, which is a petitory judgment, sist the pursuer's process, which is a possessory judgment, upon pretence of prejudiciality ; otherwise possession might still be inverted upon such pretences ; nor can the Earl be put from his possession thereby ; especially for the years preceding the intending of the reduction.

The Lords repelled the defence, as to the years *ante litem motam*, by the reduction, but sustained it for the years since, in respect the Earl's possession was not clear, and that the valuation was exorbitant, near as great as the stock,

Stair, p. 67.

No. 128.

1667. February 9.

DAME GEILS MONCRIEF *against* TENANTS of NEWTOWN and WILLIAM
YOEMAN.

Dame Geils Moncrief being served to a terce of the lands of Newtown pursued the tenants for a third part of the duties ; who having deponed that they paid so much for stock and teind jointly for yards, parks, and the whole lands possessed by them ; compared William Yeoman, as now having right to the fee, who alleged no terce of the teinds, because they fell not under terce ; *2dly*, Nor terce of the yards, because as the manor-place belonged to the fiar without division, so behoved the close gardens, orchards, yards, &c.

The Lords found the pursuer to have no right to the teind by her terce, unless there had been an infeftment of the teinds by erection, and therefore laid by the fourth part for the teinds ; and found that the years in question being possessed by the tenants, and there being nothing alleged nor instructed, that there was a tower, fortalice, or manor-place, having a garden, or orchard for pleasure, rather than profit, they found no necessity to decide what interest a tercer would have in such, but these being set, by appearance, as grass yards, they repelled the allegiance.

Fol. Dic. v. 2. p. 441. Stair, v. 1. p. 440.

No. 129.

Though the fifth part of the rent is the legal estimation in questions betwixt titular and heritor ; in other cases, where the true value is to be considered, the fourth part of the rent payable jointly for stock and teind is the rule.

1679. January 24. WINTON *against* ARCHBISHOP of ST. ANDREW'S.

In the Earl of Winton's case with the Archbishop of St. Andrew's, claiming the teind of Kirkliston, at least the tack-duty, and refusing to accept of the valued duty, Sir G. Lockhart was positively of opinion, that the valuation led of these

No. 130.
Consequences of difference between the