SECT. II.

Parsonage Teind.

NAIRNE *against* DRUMMOND.

No. 98.

Found that templars, hospitallers, and monks, ought to pay no teind for the lands they laboured or plenished themselves with their proper goods. (See APPENDIX.)

Fol. Dic. v. 2. p. 438. Colvil MS.

1614. *February 3.* LORD WIGTON *against* LADY CARWOOD.

No. 99.

In an action of spuilzie of teinds pursued by the Lord Wigton against the Lady Carwood, as executor of James Fleming of Carwood her spouse, the Lords sustained an exception proponed for the lands of Westra, being temple lands, which were never in use of payment of teinds, but free thereof by the space of fifty years before, which the pursuer was forced to reply upon use of payment of eleven bolls of malt for the teinds of these lands by the space of 20 years before.

Kerse MS. p. 98.

1664. *July 1.*

CRAWFURD *against* The LAIRD of PRESTONGRANGE.

No. 100.

The Lords found that the old privivege of the Cistertian order of being exempted from paying teinds, was not altogether so personal to the monks, but that it ought to be extended to the Lords of erection of their lands.

The Earl of Traquair being tacksman of the teinds of the parish of Innerlethem, and having assigned the valued duty of the vicarage of the lands of Lethenhops to Thomas Crawfurd, merchant, he pursues the Laird of Prestongrange, heritor, for payment of the valued duty. It was alleged, That the lands of Lethenhops were of old a part of the abbacy of Newbattle, erected in a temporality in favours of Mark, thereafter Earl of Lothian, from whom Prestongrange has right by progress to the said lands, and to the teinds to be possessed by him as of old; likeas, there is a protestation for him in the decreet of valuation, that it should not be prejudicial to his right, whensoever the lands should be plenished with his own goods, not set to tenants, at which time no teind is payable therefore, which, by the Canon law, was a privilege granted to the monks of the Cistertian order, whereof Newbattle was an abbacy; likeas, the abbots continually enjoyed that privilege, and since then, the Lords of erection, and the defender and

his father, as often as the lands were in their own hands. It was answered, That by the canon law, that privilege was only personal to the monks themselves, and not to any singular successor, as appears by the D. D. Panorm. &c. and therefore it cannot belong to the defender. Replied, That the privilege is notour, and by a decreet *in foro* recovered before the Commissaries of Edinburgh *in anno* 1589, it was found, That the privilege did belong to the Lord of erection, and has ever been enjoyed since syne. No. 100.

The Lords found the allegeance and reply relevant.

Fol. Dic. v. 2. *p.* 437. *Gilmour, No.* 110. *p.* 81.

1675. *January* 28.

The MINISTER of TULLIALLANE *against* COLVILL of Larg and Kincardine.

No. 101.
Found that heritors of land, having right *cum decimis inclusis*, were not liable to the augmentation of Ministers' stipend.

It was found by the Lords Commissioners for teinds, That the heritors of lands having right *cum decimis inclusis* were not liable to the augmentations of Ministers' stipends, and that no locality could be given out of their teinds, the said infeftments being before the year 1587; and that the feu-duty payable to church-men for stock and teind in victual was not liable thereto, because the teinds not being separate from the stock, and the heritors having right to the lands free of teinds, in effect there were not *decimæ*; and by the acts of Parliament, and the King's decreet-arbitral, teinds are liable to Ministers' augmentations, in consideration that the Lords of erection and titulars had right thereto from the King since the act of annexation; and that the King, who might have questioned their rights, was pleased by the said acts of Parliament, and decreet-arbitral, to affect them with the burden of Ministers' stipends; whereas such rights *cum decimis*, were granted by church-men, and did not flow from the King, but from them, at such time as by the law then standing, they might have granted the same.

Fol. Dic. v. 2. *p.* 437. *Dirleton, No.* 229. *p.* 108.

1676. *June* 9. BURNET *against* GIB.

No. 102.

It was found relevant to free a piece of land from paying teind, that it had been mortified for a glebe, whether for a kirk or chapel, wherein there was divine worship, though it was not designed by process or course of law, but by consent.

Stair. Dirleton.

*** This case is No. 35. p. 15640.

1678. *July* 12.

SIR JOHN FORBES of Monimusk *against* MENZIES of Pitfoddels.

No. 103.

In an action pursued to have it found that Menzies ought to bear a proportion of the Ministers' new augmentation, because his teinds, though his charter designed them *decimæ inclusæ*, yet were not truly such as have the privilege of exemption from paying any part of Ministers' stipends; because they were known and separate from the stock, in so far as his charter bore a separate *reddendo*, and duty payable for these teinds, viz. twenty-eight bolls of victual; likeas, *de facto*, they bore a part of the Ministers' old stipend; "the Lords found they were not the true kind of *decimæ inclusæ*, and therefore decerned him to bear a part of the new augmentation."

Fountainhall, v. 1. *p.* 7.

No. 104.

1678. *July* 16. EARL of QUEENSBERRY *against* GEORGE DOUGLAS.

A pursuit for teinds. Alleged the acres were of old a vicar's glebe, which by the Canon law paid no teind. Answered, Although they were free of the vicar's possession, yet they cannot plead exemption in a laick's, and the 62d Act, Parl. 5. James 6th, (1578) mentions not vicar's glebes. The Lords sustained the allegeance, unless the pursuer would prove they had paid teind within these forty years. It would not hold in vicar's lands, for they have no such privilege.

Fol. Dic. v. 2. *p.* 438. *Fountainhall MS.*

1678. *July* 17.

JOHN HOPE of Hopetoun *against* GEORGE YOUNG in Winchburgh.

No. 105.

Relief from Ministers' stipend, by what means obtained?

John Hope pursues George Young for the teinds of certain lands, which George bruiked by tack. Alleged, *absolvitor*, because, by the Earl of Winton's disposition, to the pursuer, of these lands, the defender's tack and prorogation thereof is expressly reserved, bearing a certain duty to be paid by him for feu, teind and silver duty; and so the pursuer can never be heard to crave any more than that duty which is stated in the disposition accepted by him, and by which he bruiks; besides, by the tack, he is to be relieved of Ministers' stipends, which clause would not have been inserted had he not paid the tack-duty for teinds and all; likeas, the defender and his predecessors have been in immemorial possession of these lands for payment of the tack-duty, both for stock and teind, and the teind was never drawn. Answered, Neither his tack nor rental mentions the teinds to be set in tack, and therefore he can never have right to teinds which are not disponed to him; and the mentioning the duty in Hopetoun's disposition can never give him

a right to teinds if he have it not before, &c. "The Lords found the defence founded on the rental, tack, and prorogation thereof made to the defender, with the exception from the clause of warrandice, contained in the disposition made by the Earl of Winton to Hopetoun, and that the defender has been in use to pay, and the Earl of Winton to receive, the duty contained in the rental and tack, relevant to be proved by the defender." No. 105.

Fountainhall, v. 1. *p.* 8.

1684. *March* 11. TULLIALLAN *against* CULROSS.

No. 106.

In the debate between the two kirks of Tulliallan and Culross, whether *decimæ inclusæ* could be burdened to make up a Minister's stipend, where there was no free teinds in the parish *aliunde;* the Lords ordained the allocation and mortification to be produced, and declared they would hear the point in their own presence. Sir George Lockhart affirmed they might as well burden the stock, for such teinds were in effect stock. But it may be queried, if, at least the tenth penny mail paid out of these *decimæ inclusæ* by the 29th act Parl. 1587, annexing Kirklands to the Crown, Art. 16th, may not be burdened with Ministers' stipends; See 10th January, 1662, Renton against Ker, No. 20. p. 15632.

Fountainhall, v. 1. *p.* 281.

1708. *January* 20. MAJOR CHIESLY *against* SIR ALEXANDER BRAND.

No. 107.
Nature of a tack of teinds.

The deceased Major Chiesly having sold his lands of Dalry to Sir Alexander Brand, and having submitted to the deceased Duke of Argyle what right he should accept of for the teinds of the lands; his Lordship, by his decreet-arbitral, decerned, That after the tack now running, let by the Lord Bellenden, either a new one should be procured from his heirs-male for three nineteen years, or a prorogation from the commission of the kirk for the same term of years. When the rights came to be searched, they found the tack expired, which was then thought current, and no heir-male could be condescended on, so the right could not be completed in the precise specific terms of the decreet-arbitral; therefore this method was fallen on. They belonged to the Bishop of Edinburgh during the standing of Episcopacy, and since its abolition to the Queen, from whom a tack is obtained to the said Sir Alexander Brand for four nineteen years; and this being offered as better than what he was to have got by the decreet-arbitral, he objected, 1*mo*, That seeing the decreet-arbitral was now found imprestable, et nemo tenetur ad impossibile, res nunc devenit in eum casum, that the minute of sale betwixt the Major and him must be the rule, by which he is to give the same price, viz. twenty years purchase for the teind, that he did for the stock; and seeing

No. 107. now an heritable right was not offered, but only a temporary, uncertain and very exceptionable right, he is either not bound to accept of it, or at least he must have deduction out of the price *quanti minoris*, he would have given if this had occurred at the time of making the bargain. Answered, If the performing of the decreet-arbitral be now imprestable *in forma specifica*, that is so far from dissolving the bargain, that it only makes room for an equipollent implement, the rule of law being *loco facti imprætabilis succedit damnum et interesse*. Now, this tack offered is better than the conveyance provided by the decreet-arbitral, for it contains nineteen years more; and he can seek no abatement of the price *eo nomine*, seeing he was to get none if three nineteen years had been obtained; and in all such cases the rule is *caveat emptor;* he should not have stipulated the same price for the teind which he gave for the stock. The Lords found the tack now offered was an equipollent implement of the obligement in the decreet-arbitral, and more, and nowise contrary to, or interfering with the said decreet-arbitral, and so he was bound to accept of it. Then Sir Alexander alleged, That this right offered was not so good as a prorogation would have been; for this supposes these teinds to have belonged to the bishoprick of Edinburgh, whereas, the old tacks make it appear, they were a part of the revenue and patrimony of the convent and abbacy of Holyroodhouse, and then of the Barons of Broughton, and Lord Holyroodhouse. *2do*, *Esto* they were erected into that bishoprick, the Queen, as come in their place, can set no longer tacks than the Bishops her authors could have done, and that was only for one nineteen years, *3tio*, Secretary Johnston, by a gift from King William, has a right for a sum of money out of the teinds, and he is not consenting. Answered to the *first*, King Charles I. purchased these teinds from the Lord of erection of Holyroodhouse, and erected them into the bishoprick of Edinburgh; and, among the rest, the teinds of the parish of St. Cuthbert's are *nominatim* mortified and expressed. *2do*, The Bishops were most justly limited from dilapidation of their benefices by longer tacks than nineteen years, else they might have left their successors in office nothing but the bare bones of a small elusory tack-duty; but this reason does not militate against the Queen. *3tio*, They acknowledge Mr. Johnston's right is prior to the tack offered, but they have obtained his consent. Replied, *Esto* they had been mortified to the bishoprick of Edinburgh, which was dismembered from the diocese of St. Andrew's, yet *non constat* the Bishops of Edinburgh were ever in possession of these teinds, and *quoad* several heritors of this parish they were not; whereas this argument would make them all liable, et quod nimium probat nihil probat. *2do*, This tack stands on a very sandy foundation; for, upon a revolution of church-government, the Bishops would recover these teinds again, if theirs; and he has no warrandice to recur upon. Duplied, The Bishop could not be in possession of these teinds of Dalry, because they were then under tack, and he had right to nothing but the tack-duty; but that being expired, the Queen *pleno jure* confers. To the *second*, there can be no security against revolutions and overturnings of government; and if that should happen, a prorogation, which was the right he was willing to accept of, would run the

same hazard and risk of being quarrelled by the Bishops. The Lords repelled the objections, and sustained the tack offered. No. 107.

Fountainhall, v. 2. p. 421.

*** See Forbes's report of this case, No. 49. p. 15650.

1737. *June* 15. MINISTER of BARRIE *against* GAIRDEN of Lawton. No. 108.

In a process of augmentation, a defence was made by one of the heritors, That his lands were teind free, in respect they did anciently belong to the abbey of Balmerino, a convent of the Cistertian order; and, in the year 1539, were feued out to the defender's authors by the abbot and convent *cum decimis garbalibus earundem;* that the Cistertians were one of the four privileged orders by the law of Scotland, whose lands were teind free, and that the defender, as deriving right from them while this privilege subsisted, was entitled to the same privilege; and for this Lord Stair was appealed to, Lib. 4. Tit. 24. § 9. and Sir George M'Kenzie, Book 2. Tit. 10. § 7. Answered, 1*mo*, The Cistertians had no privilege as to their teinds, except as to lands acquired before 1120, the date of Pope Innocent the Third's canon, which excludes the privilege of the four orders as to *acquirenda;* and, though this will exclude the privilege entirely with regard to Scotland, where the Cistertian order had no property for a century thereafter, it only shows the inaccuracy of our writers, who, in laying down the doctrine in general, have not adverted, that it would not apply to Scotland. 2*do*, The canon law, which introduced that privilege, makes it purely personal in favour of the Cistertian monks, and not communicable to their singular successors; and this is Sir George M'Kenzie's opinion in his observations on the act of annexation 1587. The Lords repelled the defence founded on the charter produced for the defender.

Fol. Dic. v. 2. p. 437, 438.

1746. *July* 2. MUIR *against* CUNINGHAM. No. 109.

An heritor having a tack of his teinds, and feuing out the lands, reserving the teinds, it was contended by the other heritors that the teinds of those feued lands should be burdened as free teinds. The Lords found that these teinds were liable to be allocated with those of other heritors who had tacks, as if no feu had been granted.

Rem. Dec. D. Falconer.

*** This case is No. 100. p. 10820. *voce* PRESCRIPTION.

No. 110.

1759. *February* 21. Heritors of Inverness *against* The Magistrates.

It was questioned whether a piece of ground which the Magistrates of Inverness had gained off the sea, by building dikes at a considerable expense, should be subject to pay teind. The Lords found that the piece of ground was not teindable.

Fac. Coll.

*** This case is No. 76. p. 15685.

No. 111.

1799 *June* 26. Mitchell *against* Writers of Ayr.

Fishings are subject only to vicarage teind, not parsonage.

Fac. Coll.

*** This case is No. 92. p. 15708.

SECT. III.

Vicarage Teind.

No. 112.

1611. *January* 19. Bailie of Munkland *against* Tenants.

In vicarage teinds, if a tenant have only four lambs or stirks, the tacksman will get no teind thereof. If he have five or six, he will be debtor for a half lamb or half stirk. If he have seven or above, under ten, the tacksman will get one of teind. Of the profit of wool, he will get of 10 pound of wool one pound. Of the profit of sheep or cow's butter or cheese, the tacksman will get the tenth pound of butter or cheese. For ilk ten cartful of hay, one cartful.

Fol. Dic. v. 2. p. 439. Haddington MS. No. 2105.

No. 113.

Vicarage teind is *secundum consuetudinem loci,*

1665. *February* 11. Scot of Thirlston *against* Scot of Braidmeadow.

Scot of Thirlston having right to the teind of Midshef, and pursues the possessor for 24 years bygone, and in time coming; who alleged, Absolvitor, because these teinds are allocated to the church, conform to a decree of locality produced,