No 12. not on that account be deprived of his right to the valuation of the teinds, either of the lands possessed by his father, who was not called in that process, or of the lands which he since purchased at a judicial sale.

"The Lords found, there was no sufficient evidence of any dereliction on the part of the pursuer, and therefore ratified, allowed, and approved of these several reports of the sub-commissioners libelled on; reserving to the Earl of Galloway to be heard on his claim to the bygone teinds of the pursuer's lands, during the currency of his tack and prorogation, before the proper Court; and reserving to the pursuer his defences against the same, as accords."—*See* Teinds.

Act. *M'Queen & Ferguson.* Alt. Solicitor *Montgomery & Lockhart.*

*A. W.* *Fol. Dic. v. 4. p. 89. Fac. Col. No 216. p. 271.*

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1764. *February* 1.

Sir James Maxwell of Pollock *against* The University of Glasgow.

No 13.
The court refused to approve of a valuation of teinds by the sub-commissioners, on account of dereliction.

George Hutchieson, proprietor of the lands of Yocker and Blawarthill, lying in the parish of Renfrew and presbytery of Paisley, in the month of August 1629, brought a process of valuation of the teinds of these lands before the sub-commissioners, appointed by the high commission, agreeable to the powers vested in them by Charles I. in the 1627. Sir James Maxwell, Hutchieson's successor in these lands, commenced an action, to have the decreet of the sub-commissioners approven of by the Court of Session, appointed in place of the High Commission. From the decreet of the sub-commissioners it appears, that the lands of Yocker and Blawarthill, stock and teind, are valued at nine chalder, the fifth-part of which being teind, amounts to 28 bolls, 3 firlots, 3 lippies, and 1-5th of a lippy.

Against this process it was *pleaded* by the University of Glasgow, That the decreet sought to be approven of could not receive the sanction and approbation of the court of commission, for two very sufficient reasons: 1*st*, In respect of the irregularities and intrinsic nullities apparent upon the face of the decreet; 2*dly*, As being lost by the negative prescription, and by an immemorial use of contrary payment. As to the irregularities in the proceedings before the sub-commissioners, it ought to be observed, that the rule of valuation established by the King's decreet-arbitral is, that the fifth part of the constant rent which each land pays in stock and teind, when the same are valued jointly, shall be accounted the teind. Therefore, it is absolutely necessary that the present rent, as it really stands, without any deduction whatever, should, in the first place, be discovered and ascertained. But the sub-commissioners, in the present case, appear to have adopted to themselves a rule of valuation extremely different; for, without inquiring into the real produce of the lands, they had fixed the

rent to a certain quantity of victual, after having taken into their consideration a number of foreign and extraneous circumstances, destitute of every legal sanction, and after allowing certain deductions altogether unprecedented in similar cases. They allowed, for instance, a deduction on account of the damage the lands had sustained from inundations, from the want of the benefit of liming, and some other such like casualties. What they understood by this, it is impossible at this distance to discover. However, it is sufficiently evident, that their proceedings had no authority from law. The tenants continued to pay the same rent as formerly; they neither asked nor got any deduction; and, therefore, the rule of valuation ought to have been the rent the lands then paid in stock and teind; but, when they transgressed that rule, they exceeded their powers, and whatever they did cannot now be confirmed. It was *pleaded* too by the University, That before the high commission could approve of any sub-valuation, they must necessarily be informed upon what grounds it had been made, and must be furnished with the evidences and proof adduced before the sub-commissioners. The Court could not blindly interpose their authority to approve a valuation, without they were furnished with materials to discover whether it was proper or improper, just or unjust: That there was no such proof to be had in the present case: That the simple affirmation and averment of the sub-commissioners was all that could be got; and, therefore, the decreet sought to be confirmed could not receive the approbation of the Court, as it was pronounced in consequence of proceedings so directly opposite to law. No 13.

Upon the second point, relating to the negative prescription, the University *insisted*, That, though the decreet fixed the teind to be 28 bolls, &c. yet that the pursuer and his predecessors had been in the constant use, for a hundred and forty years past, of paying 30 bolls as the teind of these lands; consequently, what was the valuation is now of little importance, as it seems never to have been observed in any of the subsequent transactions between the pursuer and the college, but to have been entirely derelinquished and abandoned from time immemorial.

In answer to these objections, it was *pleaded* by Sir James Maxwell, That the proceedings before the sub-commissioners were entirely regular and formal, and agreeable to the rules generally observed in such cases at the time they were carried on. All the parties interested were called: The bishop of Glasgow, as patron, was cited, and compeared; the rectors and the regents of the college, as titulars of these tithes, and the parson of the parish, were all in the field: That the rental of the stock and teind had been produced and subscribed by the pursuer before the sub-commissioners, and a proof led upon the same; all this appeared from the decreet, and showed the proceedings to be perfectly regular. As to the deductions objected to, they were no more than what were customary, in cases where the situation of the lands rendered them equitable. With regard to the negative prescription, and the dereliction of the valuation, it was *answered*, That the first did not take place in cases of this kind, and that

No 13.

the second could not be extended by implication to the prejudice of the pursuer, any further than he himself consented: That he had paid 30 instead of 28 bolls, which addition he consented to, and was still willing to pay; but that justice would allow his concurrence to be carried no farther. Here he appealed to the case of Drymen, No 8. p. 10675.; where the heritors were not barred from founding on their sub-valuations, although they had so far derelinquished them as to take tacks from the Exchequer, the grassums of which were valued, not according to their former valuations, but the real rents of the lands when set.

It was *replied* by the college, That the dereliction had been a great deal more extensive than admitted by the pursuer; for it appeared from the college-books, that Lord Pollock, rector of the university, in 1705, applied for and obtained a deduction of 6 bolls yearly from the teind-duty payable out of the pursuer's lands. As to the case of Drymen, it did not apply; for the decreet there founded on had been carried away by Oliver Cromwell, and only lately discovered in the hogsheads returned; so the heritor could not relinquish a right he did not know existed.

'THE LORDS refued to approve the valuation of the pursuer's lands, assoilzied the defenders, and granted a proof to both parties of the present rental.'

Act. *W. Stewart.* Alt. *Alex. Lockhart.*

*A. C.* *Fol. Dic. v.* 4. *p.* 89. *Fac. Col. No* 131. *p.* 306.

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1770. *August* 2.

WILLIAM ROBERTSON, Shipmaster in Leith *against* JANET ROBERTSON and HUSBAND.

No 14.
An adjudication was led against two distinct subjects, but no infeftment taken; so that it remained a personal right. Possession having been maintained only upon one, the right to the other found to be cut off by the negative prescription.

THOMAS ROBERTSON, the pursuer's grandfather, had two sons, Robert and Thomas. Robert was creditor to his father in different sums; and in security thereof, on the 28th April 1699, he obtained an heritable bond over his subjects in Leith and Inveresk. In 1709, an adjudication was obtained for this debt by a trustee for Robert's behoof over his father's subjects in Leith and Inveresk; which the trustee, on 27th October 1709, conveyed to Robert. The legal of the adjudication was allowed to expire; and the right having come into the person of the pursuer, Robert, the adjudger's son and heir, he, in 1754, brought an action of mails and duties before the Sheriff of Edinburgh against the tenants and possessors of the subject in Inveresk.

In this action appearance was made for Janet Robertson, daughter of Thomas, the common ancestor's second son, who claimed right to the subjects on the following grounds. In 1717, old Thomas Robertson had, in his son Thomas's contract of marriage, conveyed to him and the heirs of his marriage the subject in Inveresk; and in 1746 Janet, the child of the marriage, acquired right to the conveyance in the contract by disposition from her father.