

1793. February 13.

SIR THOMAS DUNDAS *against* ROBERT BAIKIE and Others.

No. 32.

When a joint feu-duty is payable for stock and teind, the portion paid for the latter is free teind.

The Earls of Morton, from whom Sir Thomas Dundas derived his right, held the earldom of Orkney and lordship of Shetland, with the teinds belonging to them, by a grant from the Crown, in 1635, confirmed by various acts of Parliament.

That family feued out a great part of the lands contained in this grant, for payment of an annual feu-duty for stock and teind, without distinguishing the proportion payable for each.

The Minister of St. Andrew's and Deerness in Orkney, having got an augmentation of stipend, Sir Thomas Dundas made up a scheme of locality, in which the augmented stipend was allocated, *1st*, On those heritors who had no right to their teinds; and, *2dly*, On those who had acquired right to them by the feu-charters above mentioned.

Mr. Baikie, and other heritors in this last situation, objected, That the part of the feu-duty payable by them to the titular for their teinds, must be considered as free teind, and allocated *primo loco*; and

Pleaded: When teinds are let in tack to the heritor, the tack-duty must be exhausted before any further burden can be imposed on him; Erskine, B. 2. T. 10. § 51. Now, there is no room for making a distinction between a tack and a feu of teinds: Both give a real right: A tack may be granted for a period equivalent to a perpetuity; 7th November, 1763, Wight against Earl of Hopetoun, *voce* TACK. And in both there is an irritancy *ob non solutum canonem*, and a yearly payment, which is, or at least in law is supposed to be, the full value of the subject.

When a titular is forced to sell his teinds at the rate of six or nine years purchase, it is equitable that he should be freed from, and that the landlord acquiring an heritable right, for a price so inadequate, should be burdened with all future augmentations. But if the same rule held where, by an extrajudicial transaction, the titular gets the yearly value of his teinds, the heritor would be subjected in double payment of them.

This objection is supported by 1587, C. 29. which is in full force, in all cases where a process has not been brought upon the subsequent statutes, and by the following authorities; Forbes on Tithes, Part 2. C. 6.; 11th March, 1684, Heritors of Tullialin against Colvill, *voce* TEINDS; February 1738, Duke of Douglas against Elliot, *IBIDEM*; Erskine, B. 2. T. 10. § 51, 52.

Answered: The titular had an undoubted right to sell the teinds to the heritors, in which case he would receive a price on which no future burden could be imposed, and they would acquire the privilege of drawing their own teinds, which could not afterward be allocated till the free teind was exhausted.

The objectors have, by their feu-charters, obtained a permanent heritable right to their teinds, very different from the temporary right of a lessee, and, for that reason, their teinds have been allocated only *secundo loco*.

No. 32.

For these advantages they have given a valuable consideration; and it cannot affect the rights of parties, whether it consisted in a price instantly paid, in a bond payable at a future period, or, as in the present case, in an equivalent annuity payable out of the lands; Erskine, B. 2. T. 10. § 38. See also Forbes on Tithes, p. 296.

The Lord Ordinary pronounced the following interlocutor: "In respect it is admitted, that part of the duties paid by the heritors of the parish of St. Andrew's and Deerness to Sir Thomas Dundas are teind-duties, finds, That these teind-duties are first to be allocated along with the other free teinds of the parish."

The Court "adhered" by two consecutive judgments.

Lord Ordinary, *Stonefield*.

For the Objectors, *Honyman*.

Alt. *W. Robertson*.

D. D.

Fol. Dic. v. 4. p. 301. Fac. Coll. No. 27. p. 55.

* * Similar judgments were pronounced in a case of the same kind, occurring between Mr. Grahame of Kinross and his Vassals. See APPENDIX.

1793. February 13. WILKIE against HERITORS of CULTS.

No. 33.

Where the teinds are exhausted, the Court cannot award an allowance for communion-elements out of the stock.

Fol. Dic. v. 4. p. 301. Fac. Coll.

* * This case is No. 5. p. 2493. *voce* COMMUNION-ELEMENTS.

1793. February 27. JOHN GORDON against The EARL of FIFE and Others.

No. 34.

The Reverend John Gordon, Minister of the parish of Strathdon, obtained, without opposition, an augmentation to his stipend, which was modified in grain.

The heritors, having afterwards discovered that almost the whole of the teinds were valued in money, in a reclaiming petition,

Pleaded: The Clergy were parties in the submission to Charles I. By his decretal, and by the various statutes made for enforcing it, it is declared, that valuations made under its authority, in which the Minister of the parish, and, in case of a vacancy, the Presbytery are necessarily defenders, shall never afterwards be called in question.

The teinds, in this case, have been valued in money; and to oblige the heritors

When the teinds are valued in money, an augmentation cannot be modified in grain.