

1763. July 20.

DAVID THOMSON of Ingliston, *against* The OFFICERS of STATE, and
ALEXANDER EARL of GALLOWAY.

IN 1615, William Bishop of Galloway granted a lease, during his own life, and for 19 years thereafter, of the teinds of the parish of Kirkanders and others, to Alexander Lord Garlies, which, in 1618, was prorogated for the further term of five 19 years.

The ministers of these parishes having obtained augmentations during the currency of this prorogated lease, the Earl of Galloway brought a process of prorogation in the 1731, in which, amongst others, he called William Gordon of Knockbrev, Barocco, and Kingzeanton; the result of which was, that, after a rental had been exhibited by the Earl, and a calculation thereupon instituted, to shew in what period of time he would be indemnified, by the surplus-tithes, for the losses he had sustained, the Court, by their decree of 22d June 1737, prorogated his lease for 19 years from that date.

Before this time, adjudications had been led by the Creditors of the said William Gordon, and a process of sale of his lands of Knockbrev and others was raised: And, as the creditors did not know that any valuation of his lands had been made by the sub-commissioners, a fifth part of the rent was deducted for the teind. In these terms letters of publication issued in 1740. But the Earl of Galloway having thereafter obtained a decret in absence, against William Gordon, for a large sum of bygone teinds, and charged him with horning thereon, he, upon the 8th of October 1740, wrote a letter to Mr Heron, one of his most considerable creditors, informing him, that the lands had been valued in the year 1642, and that it would be necessary to search Gordon of Kirkconnell's papers for the valuation. In this letter he also informed Mr Heron, that, amongst his own old papers, he had found a decret of valuation of the lands of Ingliston and Moncraig.

Some time after this, William Gordon's Creditors recovered the decret of valuation of Knockbrev lands from among the writings of Gordon of Kirkconnell; and, upon the 30th of July 1743, these lands were purchased by David Thomson, the proprietor of the lands of Ingliston, Moncraig, and Rattraw.

The Earl of Galloway having brought an action against Mr Thomson, for payment of bygone teinds from the time of his purchase of Knockbrev, he produced the decret of valuation which had been found amongst Kirkconnell's papers; and thereafter brought a process of approbation, both of that decret and of two others of the same date, relative to his own lands of Ingliston, Moncraig, and Rattraw, in which he called as defenders, the Officers of State on behalf of the Crown, the Earl of Galloway, and Mr David Forbes, minister of the gospel at Bogue.

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Found in conformity with the principle of the case of the Heritors of Drymen against Officers of State, No 8. p. 10675. that there was no sufficient evidence of dereliction of a valuation of teinds, by the sub-commissioners, whose report was consequently approved of after 40 years.

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Pleaded for the Officers of State, and for the Earl of Galloway; *imo*, The decreets of valuation now sought to be approved of are intrinsically void and null, in respect that the Crown, who was the undoubted titular, as having come in place of the Bishop of Galloway, was not called.

Answered for the pursuer;

imo, As the sub-commissioners were authorised to execute the business committed to them in the manner that should be most agreeable to justice, without being limited to the nice forms of ordinary courts; so there are many instances of valuations having proceeded without calling the titular, or, at least, without its appearing, from the face of the decreet, that he had been made a party; and though, in the process of approbation, at the instance of Sir John Clerk and Sir David Forbes, against Moir of Stonnywood, in the year 1713, the like objection was made, the Court approved of the valuation. See TELINDS.

2do, It appears from the valuations themselves, that the Earl of Galloway, who had been in possession of the teinds for many years before, and had the most substantial interest in them, was reputed the titular, and called as such; and the heritors were not bound to know that he was only a tacksman.

3tio, As prelacy was abolished in 1640, two years before the date of these valuations, the Bishop of Galloway remained no longer titular; the property of the teinds had then returned to the Crown. So that, if any other titular fell to be called besides the Earl of Galloway, whose right, under the lease, was a hundred times more valuable than the reversionary interest, it could only be the Officers of State, in behalf of the Crown. But no instance can be given of the Officers of State being ever called as titulars before a sub-commission. Indeed, it would have been an idle piece of form, seeing that they themselves were members of the high commission, who gave this deputation to the sub-commission; and, if it had been necessary to call them in a valuation of this kind, they ought, by the same rule, to have been called in all valuations, as the King was interested in every one, in respect of his annuity, whether he was titular or not.

Replied for the defenders; Although it should be supposed that the sub-commissioners were not limited to every nice form of procedure observed in ordinary courts of justice; yet, as the purpose of these valuations was to take from the titular the right which he formerly had to the teinds themselves, and to substitute in lieu thereof a certain determined rent or value, nothing could be more unjust, or more adverse to all the principles of judicial procedure, than that this value should be ascertained without making him a party to the process, and allowing him to lead a conjunct proof. A process without a defender is a paradox in common sense, and a novelty in practice. Nor is it enough to say, that the Earl of Galloway was called, and that he had the most substantial interest in the tithes at that time. His right was only temporary; and, as the tendency of the valuation was to establish a perpetual value for the tithes,

the collateral interest of no third party could supersede the necessity of calling the titular. No 12.

The case of Moir of Stonnywood does no ways apply. In that case, the titular was called in the process of approbation; and, being satisfied that the teinds had been justly valued, notwithstanding the omission to call him in the sub-valuation, he made no objection; it was the tacksman only who objected, and the Court found he had no interest to do so. There is indeed a decision of the Court more to the point, in the case of the reduction of a decret of valuation obtained before the high commission in 1683, at the instance of John Forbes of Culloden, in which the Lords, upon the 26th June 1723, 'sustained the reason of reduction, that Culloden, the patron, was not called.' And, in the proceedings in that case, reference is made to another between the Marquis of Tweeddale and Smith of Gibleston, in 1708, where a decret of valuation, as old as 1631, was reduced, because the titular had not been called.

Neither will it avail the pursuer, that prelacy had been abolished prior to these valuations; for, though the episcopal government of the church had been then set aside, the livings or tithes belonging to bishops were not taken from them; and, therefore, the bishop of Galloway fell properly to be called as titular.

Duplied for the pursuer; The case of Culloden, quoted by the defenders, was a reduction of a decret of the high commission; and there is no arguing from the form of procedure observed by them to that observed by the sub-commissioners. The high commission may be considered as a court of judicature which had a power of cognoscing and determining in various matters besides the valuation of teinds. The sub-commissioners, on the other hand, were appointed for the single purpose of making enquiry into the value of the several lands within their district; and, as there was no reason to doubt their making an impartial enquiry, so no hardship could arise to any party from his not being called before them, seeing he had it in his power to point out any mistakes, when the reports came to be approved by the high commission. As to the bishops continuing to enjoy their tithes after their order was abolished, it is difficult to conceive upon what ground the proposition can be maintained. They had then no longer any right to their benefices, and the teinds, which formerly belonged to them, fell of course to return to the Crown *tanquam bona caduca*; and so it seems afterwards to have been understood by the act 1693, cap. 23d where the right of Crown to the bishops teinds is mentioned as the natural consequence of abolishing prelacy.

Pleaded for the defenders; *2do*, The reports of the sub-commissioners were no more than a delivery of their opinion upon the proofs taken by them, subject to be canvassed and redargued before the high commission, and, like steps of procedure in other actions, must be lost by the negative prescription, if not carried into execution by an approbation within the space of forty years.

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Answered for the pursuer; A decret of valuation, whether pronounced by the commissioners or the sub-commissioners, does not establish a new claim to either of the parties, which ought to be put to legal execution within the years of prescription. It only restricts the titular's claim to the real value of the tithes at that time, and operates an exception to the heritor against any further demand; and, if such exception is once competent to the heritor, it cannot, from the nature of the thing, be excluded by any course of time, without his own consent. The objection of prescription is therefore altogether ill founded; and, from the year 1713, down to the year 1757, when the sub-valuation of the parish of Drymen was approved of, no less than fifteen valuations of the sub-commissioners were produced, and received the approbation of the Court, although the same objection lay against every one of them.

Replied; In those cases which have hitherto occurred, some sort of apology for so long a delay has always been thought necessary, in order to avoid the objection of the negative prescription; and, in the noted case of Drymen, the valuations of which parish had been carried off to London, and had only been lately found in the hogsheads which were saved in their return, the maxim, *Contra non valentem agere non currit præscriptio*, was applied with great propriety. But no instance can be given of decreets of the sub-commissioners being approved, which have been all along in the hands of the parties who obtained them.

Duplied; The valuation of the lands of Knockbrex was discovered amongst the papers of Mr Gordon of Kirkconnell; and the valuation of the lands of Ingliston, Rattraw, and Moncraig, which belonged formerly to the pursuer, were found in the hands of Mr Gordon of Knockbrex; so that, the recovery of them being accidental, the question is precisely the same as if they had been found amongst the hogsheads that came from London. At the same time, the decisions of the Court in former cases, could not proceed upon the maxim *Contra non valentem*. That maxim can only take place where the inability to pursue arises not from any casualty or accident, but from the nature of the right. Thus, prescription runs not from the date of an obligation, but from the term of payment; but it never was or could be sustained as an interruption, that the document of debt was lost or amissing, during any part of the years of prescription. These decisions proceeded upon more solid grounds. The Court considered the reports of the sub-commissioners as evidence of a matter of fact; and, therefore, equally available after the lapse of forty years, as at the time they were made.

Pleaded for the defenders; *3tio*, The sub-valuations in question have been derelinquished and abandoned; and, therefore, cannot now be resorted to; for, *imo*, The minister of the parish obtained a decret of modification and locality in 1650, at which time the heritors of these lands, instead of founding upon their valuations, allowed themselves to be held as confessed upon a

rental exhibited by the minister, which was made the rule for ascertaining the teinds, and proportioning the stipend.

2do, In the process of prorogation at the Earl of Galloway's instance, the proprietor of these lands never once founded on the valuations in question; but, on the contrary, acquiesced in the rental exhibited by the Earl, and thereby concurred in establishing a new rate of teind, and prevailed in a limitation of the prorogation to such a number of years as, according to that rate, might afford to the Earl a precise and adequate recompence for the damage he had sustained by former decreets of augmentation.

Answered for the pursuer; *1mo*, In the process of modification brought in 1650, no rental was given in by the minister, but only a scheme for localling three chalders of victual, L. 500 of money, and L. 40 for communion-elements, amongst the different heritors; to which they agreed. Besides, it appears that the stipend allocated upon the lands in question was short of the valued teind, as ascertained by the sub-commissioners in 1642. And, in the case of Drymen, though the heritors had taken tacks from the Exchequer, according to the ordinary rules laid down by that Court, and had submitted to pay grassums, conform to the real rent of their respective lands; yet, as it could not be alleged that they had paid, upon the whole, more than the valued duty contained in the report of the sub-commissioners, the Court was of opinion, that a different form of possessing the tithes was not sufficient to import a dereliction; and therefore approved of the report; and this judgment was affirmed in the House of Lords.

2do, The pursuer's father, who was then proprietor of the lands of Ingliston, Moncraig, and Rattraw, was not called in the Earl's process; and, although William Gordon, proprietor of the lands of Knockbrex, Barlocco, and Kingzeanton, was called in that process; yet he neither gave authority to any person to compare for him, nor took any concern in it, his estate being then adjudged by his creditors. Besides, the valuations were not then in the custody of the persons entitled to found upon them; and, at any rate, the neglect upon the part of Knockbrex, in not taking due notice of the Earl's process, could not affect his creditors, who had adjudged his lands for onerous debts, or the pursuer, who purchased them at a judicial sale, at a very high price, upon the faith of these decreets of valuation, which were by that time recovered.

Pleaded separatim for the Earl of Galloway; Supposing these valuations should be approved *quoad futura*, it would be unjust to give them a retrospect, so as to impair the satisfaction which was decreed to him out of the teinds of these lands, as estimated in the process of prorogation.

Answered for the pursuer; The free teinds of Knockbrex's lands, even as stated in the decreet of prorogation, amount scarcely to a forty-eight part of the teinds which were comprehended under the Earl's tack; so that, though the valuations had been then produced, it could have made but a trifle of difference in the prorogation. But, whatever be the difference, the pursuer can-

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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. *N^e Queen & Ferguson.*Alt. Solicitor *Montgomery & Lockhart.**A. W.**Fol. Dic. v. 4. p. 89. Fac. Col. No 216. p. 271.*

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 decret of the sub-commissioners approven of by the Court of Session, appointed in place of the High Commission. From the decret of the sub-commissioners it appears, that the lands of Yocker and Blawarthill, stock and teind, are valued at nine chaldar, 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 decret sought to be approven of could not receive the sanction and approbation of the court of commission, for two very sufficient reasons: *1st*, In respect of the irregularities and intrinsic nullities apparent upon the face of the decret; *2dly*, 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 decret-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