

1773. August 4.

CHARLES SOMMERVILLE and Others, *against* The EARL of LAUDERDALE.

## No. 158.

A new valuation of teinds still competent, notwithstanding a prior decree of valuation; the titular having been immemorially in the custom of drawing the teinds; whence that decree was held to be derelinqushed, and lost by prescription.—What the proper proof, in this action, for ascertaining the value of the teinds?

The pursuers, all burgesses of the burgh of Lauder, and proprietors of acres and crofts of land lying within its territory, brought a valuation and sale of their teinds against the Earl of Lauderdale, as titular. In this process, a proof was allowed in common form; and the cause was remitted to an Ordinary to hear parties on the import of the proof.

Pleaded for the titular: That the whole lands within the parish of Lauder had been valued by the sub-commissioners of the Presbytery of Earlston, and their report was ratified and approved by the high commission, upon the 26th day of March, 1634: That, therefore, this decree of valuation must be held to be the just value of the teinds in all time coming; and that the pursuers could not be allowed to establish a different value, by bringing a new process of valuation; and, *2do*, That, if a new valuation was competent, the pursuers could not be allowed to recur to any other mode of proof, for ascertaining the value of the teinds, than by proving the value of the drawn teind, and of which the titular alleged he had brought a sufficient proof in this case.

The pursuers, on the other hand, contended, That the decree of valuation, 1634, could not be the rule, the same having been derelinqushed; for, that the titular had, time immemorial, been in the use and possession of drawing the *ipsa corpora* of the teinds of the whole of the pursuers' lands, the amount of which drawn teind is the proof which the defender has resorted to in this cause. That it would appear that valuation had been deemed a most unjust one, and, therefore, was never adopted as the rule of payment. The teinds, according to the decree, are higher than they are made to amount to by the proof which the Earl has now brought of the value of the drawn teinds at this day, and which is a thing highly improbable in itself; and nothing can point out more strongly the injustice done the heritors by that decree, than their submitting to the great loss and inconvenience arising from the drawing of the teinds, *ipsa corpora*, rather than to have the decree carried into execution.

*2do*, They maintained, that the titular had not, in this case, brought a sufficient proof of the value of the drawn teinds; and that, therefore, the teinds behoved to be valued in terms of the act 1633, at the rate of the fifth of the yearly value of the stock and teind, or of a fourth of the stock; and of which, the pursuers maintained, they had, in this case, brought a sufficient proof.

The Lord Ordinary pronounced the following interlocutor: "Having considered the mutual memorials, testimonies of the witnesses, and the decree of valuation in 1634, finds the pursuers have a good title to insist in the present process: Finds, that, as it is admitted by the Earl, the defender, that he and his predecessors have been in use to draw the teinds of the pursuers' lands, *ipsa corpora*, for time immemorial, the decree is cut off by the negative prescription, and neither

the pursuers nor the defender can resort thereto : Finds, that the proof brought by the defender of the extent of the teinds which he was in use to draw, is not legal evidence in a process of valuation of teinds, in which the proof ought to arise from probation of what the lands do or may pay : Finds the proof adduced on the part of the pursuers is likewise unsatisfying, not only in respect it is by burgesses of Lauder, *qui fovent consimilem causam*, but also, that it is confined to the stock, distinct from the teind, whereas it should have extended to both : Therefore, finds a new proof will be necessary ; and, in order thereto, appoints both parties to give into process a condescence of proper persons for putting a value upon the lands, and consequently upon the teinds in question."

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Against this interlocutor both parties represented ; and the Lord Ordinary pronounced the following interlocutor : " Having considered, in particular, that, according to the Earl's account of the method observed in drawing the teinds, and disposal of them, no proof is, or can be brought, of what was the yearly amount of each particular burgess's teind, drawn ; and, consequently, as the decree before the sub-commissioners has been deserted for time out of mind, the only method by which the teind can be now ascertained is, by adducing witnesses of skill and knowledge, not connected with any of the parties, who will swear what the lands do, or may pay yearly ; and, therefore, adheres to the former interlocutor."

Upon a reclaiming petition for the defender, and answers, " the Court adhered to the Lord Ordinary's interlocutor upon both points."

Act. Macqueen.

Alt. Solicitor General.

Teind Clerk.

Fac. Coll. No. 87. p. 221.

1777. February 12.

MAGISTRATES OF KIRKCUDBRIGHT *against* EARL OF SELKIRK.

The titular or patron of the teinds must be made a party to every valuation.  
See APPENDIX.

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Fol. Dic. v. 4. p. 358.

1785. February 23.

ALEXANDER GORDON *against* The OFFICERS OF STATE.

In an action for valuing the teinds of his estate, Mr. Gordon proved, that he was obliged, without any price, to furnish his tenants with marl for the use of their lands ; and that the increase of rent, on account of that stipulation, would be moderately estimated at 20 *per cent* : He therefore claimed a deduction to that extent.

The Lords distinguished this case from those in which an abatement had been refused on account of sea-ware, or other manure purchased by the tenants for

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In a valuation of teinds, an allowance given to the landlord on account of his furnishing marl to his tenants.