No. 85.

ing infeftments for the security of titulars. Indeed, from the style of similar enactments in the act 1633, Chap. 19, and in the decrees-arbitral of King Charles I. it seems clear, that the Legislature never intended that the titular should be secured in this manner. See also Mackenzie's Observations on 1633, Chap. 15. Besides, the statute 1633, Chap. 19. puts titulars and Ministers on the same footing; so that, were the claim of the College to be sustained, the clergy might with equal justice insist for infeftment on the lands of every heritor who pays them stipend. But, in fact, neither require any additional security, as at present both are put in possession of a decree upon which they can raise every sort of diligence necessary for their safety.

It was observed on the Bench, that although this second claim seemed to derive some support from the act 1633. c. 17. yet as it appeared unnecessary, and was unprecedented. it ought not to be granted.

The Court also repelled this claim.

Act. *Solicitor-General, Morthland.* Alt. *Jo. Millar, jun. Davidson.*

R. D. *Fac. Coll. No.* 38. *p.* 76.

1794. *May* 14.

SIR ALEXANDER RAMSAY IRVINE *against* The Honourable WILLIAM MAULE.

No. 86.
An heritor may pursue a sale of his teinds, although they have been valued more than two years before.

When an heritor brings a scale of his teinds already valued in victual, the grain is converted at the medium of the fiar prices of the county, for seven years preceding.

George Dempster, in the year 1772, brough a process of valuation and sale of the teinds of certain lands in the county of Forfar, in which the Earl of Panmure, the titular, was called as defender. The teinds were accordingly valued, but the conclusion for selling them was not at that time insisted in.

Sir Alexander Ramsay Irvine afterwards bought these lands; and, in the year 1792, he, with a view to purchase his teinds, wakened the former action, and called Mr. Maule, the Earl of Panmure's representative, as defender, who

Pleaded, 1*mo*, As the teinds were valued in the year 1772, the pursuer is not now entitled to insist for a sale of them. By the statute 1633, C. 17. confirmed by 1633, C. 19. it is enacted, "That each heritor in the kingdome being willing to buy his owne teind from the titulars having power to sell the same, shall be obliged to buy the teinds of his own lands," &c. "and to pay the prices foresaid betwixt and the terme of Martinmasse, in the yeare of God 1635 yeares, where the valuation of the teinds is made and approved, of before the date hereof; and where the same is not yet valued, and approved within the space of two yeares after the same be valued and approved by the Commissioners to be appointed by his Majestie and his estates, to that effect. After the expiring of which time, his Majestie and estates declare, that the said titulars shall not be compelled to sell the same, except they doe it of their own good will and consent."

In several after statutes, this limitation was extended from two to three years, (1661, C. 61. 1663, C. 28. 1672, C. 15. 1685, C. 28. and 1686, C. 22.) which shows it to have been the opinion of the Legislature, that some restriction of this

sort was necessary; and that the one introduced by the act 1633, C. 17. was not meant to be temporary. No. 86.

The act 1690, C. 30. refers to the rules prescribed by 1633, C. 19; and as it takes no further notice of the intermediate statutes than to abolish the commissions introduced by them, the Legislature must have intended to restore the original limitation of two years.

It is true that the regulations introduced by these acts have not been attended to in practice; but as the objection has never been stated, it must be presumed to have been waved by the titular: Besides, it is a very delicate matter to allow an erroneous practice to get the better of positive statute, Dict. *v.* CONSUETUDE, Sect. 3. particularly in the present case, where it seems to have been the object of the Legislature to prevent the titular from being harassed with a new litigation at a great distance of time from the date of the valuation.

2do, At any rate, the grain should be converted at the current prices of the country. Indeed the act 1633, C. 17. expressly declares, that the money-price paid for teind shall be regulated "according to the worth and price of victual in each part of the country to the which the same is, &c;" which is inconsistent with the court-conversion of £.100 Scots the chalder being adopted for the whole kingdom. The price to be paid in the present case may be ascertained, either by taking the average of the fiars of the county for some years back, or by proof.

Answered: *1mo*, Although, for a century back, numberless sales of teinds have been brought many years after their valuation, this objection has never been stated; and, if supported, it would be equally contrary to the interest of the country and to the uniform object of the Legislature, which has been, to give every heritor an opportunity of acquiring his own teinds. The limitation of the act 1633, C. 17. was meant to be temporary only. It was introduced from the mistaken idea, that the commission to be established by C. 19. of that year, would be able to overtake the valuation of the whole teinds of the country in the period thereby prescribed. Accordingly, it was altered by the subsequent statutes, which gave the heritor a right to purchase his teinds within three years from the date of the valuation, and at last altogether taken away by the act 1690, C. 30. 1693, C. 23. and 1707, C. 9. which gave a similar right, without any limitation in point of time.

2do, In the year 1772, when a proof was allowed to both parties, the Earl of Panmure might have established the ordinary rate at which victual was converted; but since he did not do so, he must be presumed to have been satisfied with the ordinary conversion of £.100 Scots, and as the term was circumduced against him, no new proof can be allowed. After a proof is led in a valuation, although the process should lie over any period short of forty years, if it be afterwards wakened, a new proof is not allowed. The same rule ought to hold in the present case. The defender is so far from being a loser by the delay, that in fact the pursuer, who was entitled to his teinds at nine years purchase, has by its means been paying him above 10 *per cent.* for the price. At all events, the grain should

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be converted according to its value in the year 1772, and not according to that which it now bears.

On advising memorials, the Court unanimously thought, that the pursuer had still a right to purchase his teinds, but were a good deal divided in opinion as to the rate at which the grain should be converted.

The Lords "repelled the defence stated by the defender Mr. Maule, that the pursuer is not entitled to insist in a sale after the lapse of two years from the date of the decreet of valuation, and found the pursuer entitled to a decreet of sale of the teinds of his lands libelled, notwithstanding the decreet of valuation being obtained in the year 1772; but found, That the victual-teind must be converted at a medium of the fiar prices of the shire of Forfar, within which the lands lie, for these last seven years."

A petition for the pursuer, reclaiming against the last branch of the interlocutor, was refused without answers.

Act. *Gillies*. Alt. *Ar. Campbell, jun.*

D. D. *Fac. Coll. No.* 115. *p.* 256.

1795. *February* 25.
SIR JOHN SCOTT *against* The HERITORS of the Parish of Ancrum.

No. 87.
When a titular or patron brings an action, in order to have his right to teinds ascertained, and claims arrears for forty years back, a colourable title of possession is sufficient to defend the heritors against payment of those which became due prior to the decree in the process of declarator.

Sir John Scott having brought an action against the heritors of the parish of Ancrum, concluding to have his right to the teinds ascertained, and also claiming arrears for forty years back, he produced as his title, 1*mo*, A contract of marriage in the year 1675, in which John Scott of Ancrum conveyed to Patrick Scott, his son, the lands and barony of Ancrum, "with the advocation, donation, and right of patronage of the kirk and parochin of Ancrum, parsonage and vicarage teinds thereof:" 2*do*, A Crown charter in the year 1676, confirming the contract, and conveying the lands, "cum advocatione, donatione, et jure patronatus ecclesiæ et parochiæ de Ancrum, decimis rectoriis et vicariis ejusdem." He farther stated, that a similar clause occurred in all the subsequent titles to the estate; that he or his predecessors had, for a century back, uniformly presented the Minister on every vacancy, though, for time immemorial, no demand had been made by them against the heritors for payment of teinds.

The defenders, on the other hand, produced a number of discharges from the different Ministers of the parish. The style of these discharges was by no means uniform: In some of them, the payment was accepted in full of the stipend or teind due to the Minister; in others, as in full of "the teinds of the lands; and in three discharges granted to one heritor, as "in full of the tack-duty." There was, however, no other evidence that a tack had ever existed.

The heritors farther maintained, 1*mo*, That from the decision 29th February, 1680, Scott against the Archbishop of Glasgow, No. 1. p. 9339. it appeared, that in the year 1676 the patronage of the parish of Ancrum belonged to