

1795. *December 16.*

EARL of CASSILLIS *against* JAMES FINLAY, Common Agent for carrying on the Locality of the Stipend of the Parish of Dalrymple.

No. 37.

Where part of the lands in a parish are sublet, the rent paid by the principal lessee, and not that which he receives from the subtenant, is adopted as the rule for ascertaining the burden to be imposed on them in a process of augmentation and locality.

The lands of Gleneard and Merkland, belonging to the Earl of Cassillis, were let, about forty years ago, for £.25 3s. 6d. Sterling yearly, on a lease for three nineteen years, for which no *grassum* was paid. They have since been subset for £.80 a-year.

The Minister of the parish of Dalrymple, where these lands lie, having brought a process of augmentation and locality, he gave in a rental of the parish, in which he rated them at the rent paid by the subtenant. To this the Earl of Cassillis

Objected: In valuations of teinds, the rent *bona fide* received by the landlord himself is adopted as the rule for fixing the value of the lands; 2d December, 1730, Baillie, *voce* TEINDS; 6th February, 1745, Sir John Maxwell, *IBID.*; and the same must hold in processes of augmentation and locality, otherwise this preposterous consequence might follow, that, for a long series of years, the whole rent drawn by the landlord might be payable as stipend to the Minister.

Answered: It was intended by the act 1633, C. 17. that the tithe should be one fifth of the true rent of the lands; *Ersk. B. 2. T. 10. § 32.*; and that surely is to be ascertained, not by the terms of a lease granted forty years ago, but by the rent which they actually yield at the time; nor can it make any difference whether the whole of it is paid to the landlord, or partly to him, and partly to another.

The objection was first stated in the locality, and was repelled by the Lord Ordinary.

But on advising a reclaiming petition, with answers, it was

Observed on the Bench: It would be hard that an heritor should pay stipend for a higher rent than he himself receives. This question falls to be determined pretty much on the same principles as if it had occurred in a valuation of teinds, where the rent actually received by the landlord would have been adopted as the rule.

The Lords unanimously “ found, That the rent paid to the landlord must be the rule for ascertaining the rent of his lands, and therefore sustained the objection as to the rent of Gleneard and Merkland.”

Lord Ordinary, *Ankerville.*

*Act. Cathcart.*

*Alt. M. Ross.*

*R. D.*

*Fac. Coll. No. 193. p. 466.*