

1795. February 4. WILLIAM FERGUSON *against* JOHN GILLESPIE.

No. 164.

A report of the sub-commissioners approved of, where the value of the lands was ascertained without a proof, by consent of the heritor, patron, and minister; but rejected when it proceeded on consent of the two former only.

A valuation in grain is not held to be derelinqushed by payments to the minister in money, of an equal value.

Mr. Gillespie, Minister of the parish of Arrochar, having brought a process of augmentation, Mr. Ferguson, proprietor of the estate of that name, contended that his teinds were exhausted, and brought a process in order to have two reports of the sub-commissioners relating to them approved of.

At the date of these reports, the estate of Arrochar was divided into Upper and Nether, which belonged to different proprietors.

The report as to Nether Arrochar, dated at Dumbarton, 19th August 1629, bore, that the heritor, patron, and Minister, had, in presence of the sub-commissioners, consented that the old rental of the teinds should be held as their value in all time coming.

The report as to Upper Arrochar, dated at Dumbarton, 31st December 1629, stated, that the heritor and patron had given a similar consent, but nothing was said as to the presence or consent of the Minister; and in both, the lands had been valued accordingly without further proof. The amount of the whole teinds was fixed at 412 merks in money, and 12 bolls of meal. In practice, no victual had been paid to the Minister, and his money-stipend had been £30. 11s. 2d. Sterling. The Minister objected to these reports; and

Pleaded: *1mo*, The report as to Nether Arrochar cannot be supported, because no proof was led to ascertain the real value of the lands. The consent of the incumbent for the time cannot bind his successors.

The report as to Upper Arrochar is still more defective. From its mentioning the presence and consent of the heritor and patron, and being silent as to the Minister, it is evident that it proceeded in his absence, and most likely without his being even cited to attend.

2do, Although these reports had been originally unexceptionable, they have been derelinqushed by the heritors paying both in a different species, and in a larger quantity, than that which they established; 28th February 1753, Earl of Morton and Stewart against the Officers of State and Marquis of Tweeddale, No. 7. p. 10672. 1762, Duke of Athole and Earl of Dunmore against Drummond and the Minister of Kinclaven, (not reported, see APPENDIX;) 1st February 1764, Sir James Maxwell against the University of Glasgow, No. 13. p. 10692.

For, converting the 12 bolls of meal at 100 merks the chalder, (the usual mode of conversion at the time,) the money-stipend payable to the Minister should have been only £.27 1s. Sterling.

Answered, *1mo*, Even in a court of law, the admission of all parties concerned is considered as an unexceptionable mode of evidence, and the sub-commissioners who, as a committee of Parliament, were not tied down to the same strictness of procedure, were still more at liberty to proceed on it.

Besides, in a letter from Charles I. while the submissions to him were in dependence, ratified by the High Commission, (28th February 1628), it is declared,

that the old rentals shall "stand for a valuation, where the parties consent or do not oppose it." Forbes on tithes, C. 9. § 3. p. 399. To support the valuation, even as to Upper Arrochar, therefore, it is sufficient, that no opposition was made by the Minister, who, though the citation is not now extant, must, *post tantum temporis*, be presumed to have been regularly called.

2do, If one sort of grain had been substituted in place of another, there might have been said to have been a change in the species of payment, but not where, as in the present case, money has been paid instead of grain, of which it is the representative. And if the meal is converted at a moderate rate, there will be no excess in point of value. Besides, dereliction is not to be presumed from a small excess of payment to the Minister, which may have proceeded from good will to him, or perhaps from the heritor not being in possession of the report of the sub-commission, owing to some of the various accidents to which the teind records have been subjected; 23d July 1760, Adam against Colville. (Not reported; see APPENDIX.)

The Court, upon advising memorials and additional memorials, laid no weight upon the alleged dereliction in this case, and were of opinion, that the consent of all parties was sufficient to supply the want of proof; but that in the case of Upper Arrochar, there was no sufficient evidence of the Minister's consent, either express or implied.

The Lords (11th June 1794), unanimously ratified the report as to Nether Arrochar, but refused to approve of it, *quoad ultra*.

And, upon advising a reclaiming petition and answers, they adhered."

Act Rolland, Hay.

Alt. W. Robertson, Ar. Campbell, junior.

D. D.

Fac. Coll. No. 156. p. 358.

* * * This case was appealed. The House of Lords ORDERED and ADJUDGED, Feb. 15, 1797, That the original appeal (brought by Mr. Ferguson) be dismissed, and that the interlocutors therein complained of be affirmed; and it is further declared, that the appellant in the original appeal do pay, or cause to be paid to the respondent in the said appeal £.150. for his costs in said appeal; and it is further ORDERED and ADJUDGED, that the cross appeal be dismissed this House; and it is declared that the said order of dismissal of the said cross appeal be without prejudice, it being unnecessary to enter into the matter of the same.