

No. 11. found not to be entitled to any deduction from the rental, on account of having communicated to his tenants the benefit of a servitude of digging peats for their own use, over the moss of a neighbouring heritor.

of Edinkillie and Rafford, by which the possessors of the estate of Grange have the privilege of digging peats for their own use:

Mr. Peterkin communicated the benefit of this servitude to his tenants; and in a valuation of the teinds of Grange, (of which the Earl of Moray is titular *qua* patron,) it was established by the proof, that if this servitude had been withheld from the tenants, their farms would have been less valuable, to the extent of £38 yearly.

In the scheme of valuation, this £38 was accordingly admitted as a deduction from the rental; and the scheme having been approved of by the Court, in absence of the titular, his Lordship, in a reclaiming petition,

Pleaded: That it is a point already fixed, that when the titular has not the right of digging peats for sale, the deduction claimed is inadmissible; 14th December 1796, Sir Hugh Munro, No. 166. p. 15711.

Mr. Peterkin, on the other hand, contended, That the judgment in the case of Sir Hugh Munro, could not govern the present one; *1st*, Because here the servitude was given over a moss which did not belong to the heritor; and, *2dly*, Because the Earl of Moray, although titular of the dominant, was not titular of the parishes in which the servient tenement was situated.

On advising the petition, with answers, it was

Observed on the Bench: Where tenants have not the right of digging peats for sale, the benefit derived by them is too indefinite to be a legal ground of deduction. On this principle, although the discovery of a coal mine,—the establishment of a manufacturing village,—of a public market,—or of a harbour, will have the effect of raising the rent of the adjacent lands, yet the heritor, when valuing his teinds, will get no deduction from his rent on any of those accounts.

The Court, by a great majority, repelled the claim of deduction.

Act. *W. Robertson.*

Alt. *Rae.*

R. D.

Fac. Coll. (APP.) No. 15. p. 34.

1801. *June 3.*

Major HECTOR MACNEIL, *against* The MINISTERS of CAMPBELTON.

No. 12.

It is not a relevant objection to the approbation of a sub-valuation, that the minister of the parish, if a stipendiary, was not cited as a party to it.

THE teinds of the lands of Ardnacross, belonging to Major Macneil, were valued in 1630 by the sub-commissioners of the presbytery of Argyle.

These lands lie within the ancient parish of Kilchouslane, now united to that of Campbelton. The Bishop of Lismore was titular of the teinds; and the minister serving the cure merely a stipendiary.

It appeared from the report of the sub-commissioners, that the heritor of the lands, with the titular and tacksman of the teinds, had been called as parties; but it did not appear that the minister of the parish had either been called, or had consented to the subvaluation.

Major Macneil having brought an approbation of the report of the sub-commissioners, and the minister of Campbelton having opposed it, on the ground that the minister of the parish had not been a party to the proceedings, the pursuer,

Pleaded: Where the minister was a parson or vicar, and of course had right to the teinds *proprio jure*, it was no doubt necessary that he should have been a party to the subvaluation; 4th February 1795, Fergusson, No. 164. p. 15768. But it was otherwise in the case of stipendiaries. Their interest and that of the titular were inseparable; and therefore the proceedings were held to be sufficiently regular, if the latter was cited; 20th July 1763, Thomson, No. 12. p. 10687. Accordingly, by the practice, at least in Argyleshire, the stipendiary clergy were not called*.

The acts 1633, C. 19, and 1661, C. 61, also prove, that the presence of the stipendiary clergy was not required. These statutes allow subvaluations to be rectified at the instance of the minister, 'not being titular,' on account of enorm lesion arising from collusion between the titular and the heritor. But if the stipendiary clergy had been parties in the original proceedings, such collusion could in no instance have occurred, and consequently the extraordinary remedy provided by these statutes against its consequences, would not have been provided by the Legislature.

Answered: The minister serving the cure, even when he was not titular *proprio jure*, had an immediate and direct interest in the proceedings of the sub-commissioners, both on account of the stipend which was then payable to him, and because the surplus teind was the only fund from which he could have derived any future augmentation. It is not to be supposed, therefore, that it should not have been necessary to have made a person so deeply interested a party to the proceedings; and the practice of a remote county cannot be received as fixing an opposite rule.

Even if the interest of the minister had been uniformly the same with that of the titular, the minister could be as little bound to trust his interest to the care of the titular, as the titular was to trust his to the care of the minister. And it is accordingly on this principle, that at present, although most of the clergy are stipendiaries, they must be made parties, not merely to new valuations, but even to approbations of the proceedings of the sub-commissioners.

The inference arising from the statutes 1633 and 1661, seems to be the reverse of that drawn by the defenders. These statutes establish, that the sti-

* From an examination of the report of the sub-commissioners for the county of Argyle, it appeared, that of 43 parishes there were 23 where the ministers were either parsons, vicars, titulars, or otherwise beneficiaries, and 18 where the ministers were merely stipendiaries. It appeared that every one of the beneficed clergy had either been cited, or entered an appearance in the subvaluation; whereas, of the stipendiary ministers there were only two instances of an actual appearance by them, and even in these cases there was nothing in the proceedings which shewed that either of them had been cited.

No. 12. pendary clergy were admitted on all hands to have had an important interest in subvaluations; and it would have been strange to have given them a right to appear in a court of review, if there had been no necessity for making them parties in a radical court.

The Lords (28th January 1810) repelled the objection, and, on advising a reclaiming petition, with answers, they unanimously adhered.

Act. *Connell.*

Alt. *Wm. Robertson.*

R. D.

Fac. Coll. No. 233. p. 527.

1805. *December 4.*

COMMON AGENT in the Locality of Eddleston, PETITIONER.

No. 13.

An heritor may at any time secure himself from any other payment, by surrendering to the minister his whole teind as valued.

In 1768, the stipend of the parish of Eddleston was modified to two chalders of victual and 1060 merks. In allocating the stipend, the victual was laid upon Miss Elliot and three other heritors, who had neither heritable rights nor tacks of their teinds. The allocation was (13th February 1770) approved of. These four heritors afterwards obtained a valuation of their teinds in money.

In 1795, a further augmentation was given. But only the same quantity of victual fixed by the former locality was laid on these four heritors' lands, which they paid down to 1800, when they tendered to the minister the whole of their money-teind, instead of the victual they had been in use to pay. Upon this the minister brought a new process of augmentation, when the stipend was fixed at six chalders of victual and £50.

In allocating this stipend, the common agent proposed, that the old stipend, as allocated in 1770, should continue to be paid, and the new augmentation be laid on the other heritors. On the other hand, it was contended, that no part of the old stipend could be allocated upon them, as they had surrendered their money-teind; and that as they had no interest in the locality, they ought not to be subjected to any part of the expense in allocating the stipend.

The Lord Ordinary (2d February 1802) ' finds, That as Miss Anne Elliot, ' John Ballantyne, Elizabeth Gibson, and her husband, and John Paterson, ' have surrendered their full valued teinds, to be now, and in all time coming, ' allocated to the minister as part of his stipend; therefore none of them can ' be liable for, or subjected in, any part of the expenses to be incurred in this ' process of locality.'

The common agent reclaimed, and

Pleaded: A locality which has been long settled, cannot be set aside, or the use of payment altered by any of the heritors surrendering his money-teind in lieu of the victual-stipend allocated upon them. The consequence of the