

1708. *January 20.*

The KIRK SESSION of NORTH LEITH, and WILLIAM WILLIAMSON, their Tacksman, *against* THOMAS BROWN and ANDREW SKEEN, Merchants.

No. 50.

A right to teind fish imported to a certain harbour not extended to fish imported in order to be exported only, whereof the teind was drawn in another place where they were taken.

In the action at the instance of William Williamson, as having right by tack from the Minister and Kirk Session of North Leith, to the teind of fishes imported to Leith and Newhaven, against Andrew Skeen and Thomas Brown, for payment of the teind of several kinds of fishes taken in the North Seas, and imported to Leith, in order to be exported to the Straits, upon this ground, That the Minister of North Leith had been in immemorial possession of 20s. for each last of herring, and 1s. of each twenty dry fish imported to Leith, conform to a right flowing from the Lord Holyroodhouse; for instructing whereof, the pursuer produced several decrees *in foro* against several merchants for payment of such a teind, with a ratification of these decrees in Parliament;

Alleged for the defenders: *1mo*, The decrees produced were *res inter alios quoad* them, and cannot exclude their defence, viz. That the teind of the fishes imported was already paid at the place where they were taken in the north, and they cannot be liable to a second teind; *2do*, The fishes for which the teind is now claimed were brought to Leith to be put aboard a vessel for export to the Straits, and nothing could be claimed for them but the ordinary shore-dues.

Answered for the pursuers: They have right to the teind of what is imported, without exception of what is re-exported; which distinction would make the execution inextricable, afford a seed of unbeseeeming differences and pleas, and disturb the Minister from attending his cure. There needed a particular statute in the matter of customs and excise upon goods imported, for a drawback of the duty of what should be re-exported within a limited time; and the pursuer's right is affected with no such quality or statute; so that their *jus quæsitum* by the importation cannot be taken away by the subsequent exportation.

The Lords sustained the defence, that the fish whereof the teinds are pursued for were taken in the north seas, and paid teind where they were taken, and were imported into Leith in order to be exported only.

Forbes, p. 224.

1708. *February 13.*

The MARQUIS of TWEDDALE, *against* ALEXANDER ORROCK of that Ilk.

No. 51.

Annuity not due by the sovereign's tacksman for teinds belonging to the sovereign

The Marquis of Tweddale having obtained from the late King William a tack for several nineteen years, of the feu and teind-duties of the Abbey of Dumfermling, charged the Laird of Orrock to pay 295 pound 8 shilling 6 penies, as the price of rental bolls, payable by him for the teinds of his lands the crop 1706; who suspended upon this ground, that the charger and his father had these forty

years bygone intromitted with the whole teind-duties of the suspender's lands, without discounting the Queen's yearly annuity of twenty pounds, to which the suspender has right for onerous causes from the Earl of Lowdown, who had commission from King Charles the First to dispose of the annuities due out of the whole teinds in Scotland; and the annuity will more than compensate the sum charged for.

Alleged for the charger: The teind-bolls charged for belonged to the Queen in property, and to the Marquis only as tacksman; therefore no annuity out of them was or could be constituted; since *Res sua nemini servit*.

Answered for the suspender: Annuity is no servitude; not a personal servitude, as being neither *usus-fructus*, *usus*, nor *habitatio*; nor yet is it a real servitude, because, the teinds out of which it is payable, can in no sense be called a *prædium*, and it may be due to such as have no *prædium*. Besides, to pay so much money for each boll of teind is *aliquid facere*, which agrees not with the common nature of a real servitude, that consists in an obligation *aliquid non facere, aut pati in suo*. 2do, It is very consistent, that the teinds of the suspender's lands, may pertain to the Queen in property, and yet her Majesty's tacksman be liable to pay annuity. For, 1mo, It being clear from the acts of Parliament 1633, about the annuity and valuation of teinds, the preceding general submission with the King's decret-arbitral, and act of commission following thereon; that the King, resolving to establish an universal order, ordained all persons except Bishops, Minister, &c. to denude of the right to other men's teinds, and even teinds belonging to his Majesty were to be sold; now the King was to have his annuity out of all teinds whether sold or not, unless what belonged to Bishops, Ministers, &c. without excepting the tacksman of the King's teinds; *et exceptio firmat regulam in non exceptis*. Nor is it conceivable how the annuity could have been (as was designed) a constant rent, or certain patrimony of the Crown, if teinds pertaining to the King in property, or falling in his Majesty's hands by succession, forfeiture, bastardy, *ultimus hæres*, &c. could not be burdened with annuity while in the hands of tacksmen, and possessors thereof. 2do, Tacksmen of the Queen's teinds are bound to pay a share of supply, Ministers' stipends, and all publick burdens, consequently are liable for annuity, which was calculated to be a publick burden upon all possessors of teinds, and a branch of the patrimony of the Crown.

Replied for the charger: 1mo, What is inferred from the acts of Parliament 1633, decret-arbitral, &c. is nothing to the purpose; for the annuity being given to King Charles the First, as a gratification for passing from the severity of his general revocation, cannot be thought to extend to teinds that were in his Majesty's person *jure privato*. The clause appointing annuity to be paid out of all teinds except those belonging to Bishops, Ministers, &c. must be understood *in terminis habilibus* of teinds whereof his Majesty had not the right, but lords of erection and other titulars. Now as the annuity could not subsist as a burden upon the teinds in the Queen's person, neither can her tacksman be obliged for annuity. Because, if annuity was not a burden upon the sovereign's property

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in property at the time when annuity was established by law, though the sovereign had right to annuities *jure corona*, and to the teinds *jure privato*.

No. 51. *ab initio*, it could not emerge, or become due by the subsequent grant of a tack without any new law ; besides, the tacksman's possession is her Majesty's possession. Again, there is a manifest disparity betwixt teinds of the Queen's property when the annuity was imposed, which could not be burdened with it, and teinds which, being once liable to annuity, fell afterwards in the sovereign's hands by forfeiture, bastardy, *ultimus hæres*, &c. And yet even in these, the property would absorb the inferior right of annuity. *2do*, It is not material to allege, that the Queen's teinds bear a share of publick burdens ; for the annuity and supply are differently counted for in Exchequer, and differently applied. The supply is not granted to the Queen to be disposed of as the patrimony of the Crown, but for certain special public uses ; upon which account her Majesty's proper lands bear a proportion with the rest of the shire.

The Lords found, that the King having right to annuities, and to the suspender's teinds, the time of the acts of Parliament 1633 ; the annuity could not burden these teinds ; notwithstanding that the King had right to the annuities *jure coronæ*, and to the said teinds *jure privato*.

Forbes. p. 239.

1721. *November 22.*

HAY of Drumelzier against SIR JOHN HOME of Blackadder.

No. 52.

Parsonage teind may be purchased by the heritor, as well while they are in tack as where they are in the possession of the patron. See APPENDIX.

Fol. Dic. v. 2. p. 443.

1724. *February 28.*

The MINISTER and KIRK SESSION of NORTH LEITH against JAMES LAW of Hillhousefield.

No. 53.

Teind found payable at the rate of the highest fiars.

The pursuers, as having right to the teinds of Hillhousefield, which, by a decree of valuation, in the year 1631, were ascertained to seventeen bolls and a half of bear, insisted against Mr. Law for payment of the teind-duty since the year 1704, at the rate of the highest fiars.

It was pleaded for the defender: *1mo*, That though *per errorem* he had paid those teinds till the year 1704, yet, having then discovered that he had an heritable right to them, upon which he was infest, and which was intimated to the pursuers, he refused to make any further payments ; and they had not, since that time till now, claimed these teinds ; he was therefore entitled to the benefit of a possessory judgment.

2do, Though he were liable for the teinds, yet they could not be rated at the highest, but at the Commissary or second fiars ; which are looked upon as the standing rule for Ministers' stipends, and teinds payable in victuals.