

Case 26. John Scott of Hedderwick Esq; - - *Appellant*;
 The Magistrates and Town Council of
 Montrose, - - - - - *Respondents*.

5th June 1714.

Teind Court.—An Action of valuation being suffered to fall asleep, the minister lets a tack of the teinds to the magistrates of a royal burgh, and the action being awakened, these magistrates ought to have been called as parties.

A decree of valuation, obtained on a mistake as to the rental, set aside, and the mistake rectified.

THE teinds of the appellant's lands of Newbigging were, by a decree made by the commissioners for plantation of churches and valuation of teinds, in February 1648, settled at five bolls of barley and 11 bolls of oatmeal. These teinds were anciently part of the revenue of the Bishop of Brechin; and, upon the abolition of episcopacy, that revenue became vested in the crown. On the 28th of June 1701, his then Majesty King William, by his grant, settled a stipend out of the same payable to the first minister of Montrose, and particularly the said five bolls of barley and 11 bolls of oatmeal, payable out of the said lands of Newbigging as a part thereof.

In February 1700 the appellant commenced an action before the then commissioners for plantation of churches and valuation of teinds, for a valuation of the teinds of his said lands of Newbigging; and he called the then officers of state, and Mr. Arratt, the first minister of Montrose, as defenders. After some steps taken in this action, but no appearance made for the defenders, it was suffered to fall asleep, and continued so for several years.

In the mean time, on the 8th of May 1704, Mr. Arratt the minister, upon a contract made between him and the respondents, ratified an assignment to them before made, bearing date the 17th of September 1698, of all the teinds due and payable to him by the said decree in 1648; and also in corroboration thereof did fet and in tack let to the respondents and their successors all the stipend and teinds due and payable to him by the said decree in 1648, and by virtue of the said grant from his Majesty, or otherwise howsoever: in consideration whereof the respondents became bound to pay Mr. Arratt a certain annual stipend. The respondents, in consequence of their right acquired from the minister, received the teinds of the said lands of Newbigging from the appellant for several years.

On the 21st of April 1707, the appellant awakened his action of valuation by a new summons to the said Mr. Arratt and the officers of state; but the respondents were not cited as defenders. No appearance was made by the parties called, and in January 1709 a commission was granted to the provost, or any one of the baillies of Montrose, to take the depositions of such witnesses as should be adduced for the appellant to prove the yearly value of his

his lands. This commission was executed by one of the baillies, who examined several witnesses as to the rental, and the deductions claimed by the appellant, amounting to 8*l.* 13*s.* 4*d.* Scots *per annum*. The commission being reported, with the depositions taken thereon, to the Lords Commissioners, the appellant, on the 16th of February 1709, obtained their decree in absence, valuing the said lands of Newbigging at 223*l.* 13*s.* 4*d.* Scots *per annum*, and settling the teinds thereof at 44*l.* 14*s.* 8*d.* Scots *per annum*, being a fifth part of the yearly value of the said lands.

Soon afterwards the respondents brought an action before the Lords of Session as commissioners for plantation of kirks and valuation of teinds, for reduction of the said decret obtained by the appellant, for that all parties having interest, and particularly the respondents, had not been cited by the appellant therein. To this action the appellant made defences, and the Lords commissioners, on the 2d of July 1712, “found that the principal pro-
“cess of valuation having slept, and the defender having ap-
“proved of the minister’s assignment to the pursuers by paying
“his teinds to them before the wakening thereof they ought to
“have been cited by a process; but before reducing ordained the
“respondents to give in a rental of the said lands, that it might
“appear whether the said valuation was made with a diminution
“of the rental or not.”

The respondents, in the further course of the action, stated, that they might have proved the rental of the said lands to be 100 bolls and 20 merks money, and that the interrogatories which had been put to the witnesses were contrived for diminishing the rental on pretence of allowances which the appellant had at that time made to his tenant after two years of dearth and scarcity. The Lords, in December 1712, allowed the respondents yet to prove, that the said lands could, at the time of leading the said valuation, pay 100 bolls over and above the deductions allowed in the said decree; as also to prove the value of the said deductions at that time; and to the appellant to make what proof he could in support of these deductions.

A commission was thereupon granted, and sundry witnesses being examined, and a report made to the Lords Commissioners, they by interlocutor on the 11th of February 1712-13, “found
“that the respondents had not proved in terms of the act; but
“found that in their former decree the allowances made in the
“said valuation were deducted from 80 bolls, which ought to
“have been deducted from 100 bolls, and therefore reduced the
“said decree as to so much thereof, and declared the teinds of
“the appellant’s lands of Newbigging to be 61*l.* 8*s.* Scots for
“that year, and in all time coming.”

The appeal was brought from “an interlocutor or decree of
“the Lords Commissioners for plantation of kirks and valuation
“of tithes of the 2d July 1713, and of a sentence or decree of
“the said Lords on the 11th of February following.”

Entered,
15 March
1713 14.

Heads of the Appellant's Argument.

The appellant having summoned every person who had interest in the said teinds at commencing his action, as law requires, and particularly the minister, he was not obliged to have summoned every person to whom the minister's right might be conveyed. The appellant conceives, that his paying the teinds to the respondents upon their right from the minister does not alter the case, for it was a matter of indifference to the appellant to whom he paid the teinds, and no doubt he must have paid to the minister's attorney if he had so ordered. The respondents themselves were employed by the Lords Commissioners, to examine the witnesses, who proved the value of the appellant's estate and teinds, so that they were fully apprised of the action, and might have appeared and pleaded for their interest if they had thought fit. Never, before the appellant's case, was any person obliged to summon all to whom the defender might think fit to make over his right, during the dependance of a suit: and, by the civil law, defenders are expressly disabled from conveying their rights to a greater or more powerful party, during the suit.

(The appellant also gives a statement of facts, said to be proved on his side, which are traversed or totally denied on the other side.)

Heads of the Respondents' Argument.

All the parties having interest, and particularly the respondents, who by virtue of their said contract and lease were in possession of the said teinds, and to whom the appellant had paid the same, not having been made parties to the appellant's action of valuation, the decree pronounced therein was null and void. And though it might not have been proper to have named them in the summons of wakening, yet since their right was sufficiently known to the appellant he ought to have cited them by another process. And their contract was so far from being a faculty or letter of attorney, that it was an absolute lease; and in all actions of this nature lessees are to be called. In the present case there were no persons who had any right to defend but the respondents; the minister was not concerned how the teinds might be valued, for the respondents were obliged to pay him the same rent or stipend during his incumbency, without regard to any valuation, and therefore the minister never made any appearance to the appellant's action. Though one of the baillies of Montrose did execute the commission in that action, he did it not as one authorized by the respondents, or as a magistrate of the burgh, but as a private person without their concurrence; and therefore this ought not to prejudice the respondents.

(The respondents also give a statement of facts, said to have been proved on their side; as nothing can be given distinctly of these, the statements are not detailed on either side.)

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutors or decrees therein complained*

plained of be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the respondents the sum of 40l. for their costs in this House.

For Appellant, - *Edw. Northey, John Pratt.*
 For Respondents, *Rob. Raymond, P. King.*

Grace and Rachel Douglas, Daughters of the deceased James Douglas of Earnslaw, for themselves and as Assignees of Mr. Alexander Douglas their Uncle, and Lieut. Robert Douglas their Brother, - *Appellants ;*
 John Montgomerie, Hugh Paterfon, James More, and others, Creditors of the said James Douglas deceased, - - *Respondents.*

Case 27:
 Dalrymple,
 21 & 29
 Nov. 1705.
 Fountain-
 hall,
 29 Nov.
 1705.
 Forbes,
 21 & 29
 Nov. 1705.

18th June 1714.

Fiar.—An estate being settled by an heiress to her husband and herself in conjunct fee and life-rent and the heirs to be procreated between them in fee, whom failing to the husband, his nearest lawful heirs and assignees; the husband was *fiar*.

Donatio non præsumitur.—The fee taken up by a daughter as heir to her father, where a disposition had been made to a son (deceased), upon which investment had followed, but never cloathed with possession nor recorded.

Aljudication.—A charge being given to a son to enter heir to his uncle and mother, and adjudication being led thereon; but the father being afterwards found to be *fiar*, the first adjudication is reduced.

The said son refusing to subject himself to his father's debts, has no title to quarrel the adjudication led of his father's fee.

JOHN GRADEN of Earnslaw, in the county of Berwick, the grandfather of the appellant, executed a disposition of that estate to his son John in fee, with a clause of redemption on payment of a sum of money. Upon this disposition to John the son, *faisin* was taken, but never recorded; and he died before his father, under age and without heirs of his body.

The father dying also, Grace Graden his daughter served herself heir to him as last vest and seised in the estate, and was thereupon invest on the 1st of January 1664. Afterwards, by contract of marriage, dated the 27th of January 1668, between Mr. James Douglas, and the said Grace Graden, in consideration of a marriage intended to be had between them, James Douglas obliged himself, his heirs, &c. to lay out 20,000 merks in lands or other securities, to be settled to himself and the said Grace in conjunct fee and life-rent, and to the heirs of their two bodies: and the said Grace Graden also thereby disposed the said lands of Earnslaw, "To Mr. James Douglas in life-rent and to the
 " heirs to be procreated between the said Grace Graden and him
 " in fee, whom failing to the said Mr. James Douglas, his own