

valuation ; which is the only ground of the decree, without either dispute or probation ; in which reduction, terms are taken to produce ; and being prejudicial to this action, it must be first discussed. The pursuer answered, that there can be here no prejudiciality, which is only betwixt two principal actions ; but here *res est judicata*, by a decree, *et stat sententia, et dubius est eventus litis* ; neither can reduction, which is a petitory judgment, sist the pursuer's process, which is a possessory judgment, upon pretence of prejudiciality ; otherwise possession might still be inverted upon such pretences ; nor can the Earl be put from his possession thereby ; especially for the years preceding the intending of the reduction.

The Lords repelled the defence, as to the years *ante litem motam*, by the reduction, but sustained it for the years since, in respect the Earl's possession was not clear, and that the valuation was exorbitant, near as great as the stock,

*Stair, p. 67.*

No. 128.

1667. February 9.

DAME GEILS MONCRIEF *against* TENANTS of NEWTOWN and WILLIAM  
YOEMAN.

Dame Geils Moncrief being served to a terce of the lands of Newtown pursued the tenants for a third part of the duties ; who having deponed that they paid so much for stock and teind jointly for yards, parks, and the whole lands possessed by them ; compeared William Yeoman, as now having right to the fee, who alleged no terce of the teinds, because they fell not under terce ; *2dly*, Nor terce of the yards, because as the manor-place belonged to the fiar without division, so behoved the close gardens, orchards, yards, &c.

The Lords found the pursuer to have no right to the teind by her terce, unless there had been an infeftment of the teinds by erection, and therefore laid by the fourth part for the teinds ; and found that the years in question being possessed by the tenants, and there being nothing alleged nor instructed, that there was a tower, fortalice, or manor-place, having a garden, or orchard for pleasure, rather than profit, they found no necessity to decide what interest a tercer would have in such, but these being set, by appearance, as grass yards, they repelled the allegiance.

*Fol. Dic. v. 2. p. 441. Stair, v. 1. p. 440.*

No. 129.

Though the fifth part of the rent is the legal estimation in questions betwixt titular and heritor ; in other cases, where the true value is to be considered, the fourth part of the rent payable jointly for stock and teind is the rule.

1679. January 24. WINTON *against* ARCHBISHOP of ST. ANDREW'S.

In the Earl of Winton's case with the Archbishop of St. Andrew's, claiming the teind of Kirkliston, at least the tack-duty, and refusing to accept of the valued duty, Sir G. Lockhart was positively of opinion, that the valuation led of these

No. 130.  
Consequences of difference between the