No. 35. were hard that it should be in his power to prejudge the parson to the advantage of the Vicar; but in that case the small teinds would be considered as great and parsonage teinds, *quia surrogatum sapit naturam surrogati:* And far less it ought to be in the power of an heritor to prejudge altogether the titular or the Minister, who is provided out of the teinds, as in the case in question, by inclosing ground formerly arable, and making that use of it, that neither the titular nor Parson can have any benefit of teind; it being unjust, that the titular should be prejudged, and that the heritor should advantage himself, and by his own deed should free himself of teind; and albeit, by the custom in some places, teind is not paid for carrots and roots in yards, the same being looked upon as inconsiderable, and the bounds where the same are sown or planted being small parcels of ground, for the private use of the heritor's own family; yet, when a considerable tract of ground is inclosed and parked, so that the heritor has the same if not more profit than he has of his other laboured ground, by selling the roots and fruits of the same, as about Edinburgh, or other great cities where great parcels of corn land are taken in, and inclosed to the use foresaid; as by the common law teind is payable, even for such fruits and profits; so by our law the titular ought not to be prejudged; and the custom that teind is not payable for roots and such like, ought to be understood of such as grow in yards about houses as said is, for the proper and domestic use of heritor or tenant, but not where a great parcel of ground is taken in, and destinated for profit and advantage, by sowing or setting, and selling herbs and roots.

Dirleton, p. 169.

1677. *July* 13. The EARL of ERROL *against* HAY.

No. 36.
Extent of the patron's right in the teinds.

In anno 1649, all presentations were taken from patrons, and in place thereof they were declared to have right to the teinds, over and above the competent stipend to the incumbent; but by the 9th act Parl. 1661, That whole Parliament 1649 was rescinded, and particularly that act anent patronages; but it was declared, "That it should be lawful to laic patrons or heritors, to agree with the beneficed persons for tacks of their teinds, according to the laws of the kingdom, being but prejudice of the stipends modified, or to be modified to these beneficed persons: Declaring also, That the present Ministers, during their service, shall claim no right or possession to the teinds of their said kirks, more than they had formerly before this act rescissory, they having a sufficient maintenance." By a posterior act *in anno* 1662, "All Ministers who came in without presentations, by virtue of the act of Parliament 1649, were ordained to call for presentations from their patrons, otherwise to be excluded from their benefice." Mr. William Hay being admitted Minister of Cramond *in anno* 1655 did, according to the act 1662, obtain a presentation from the late Earl of Errol, and gave him a back-bond, "That he should give such right to the Earl of the teinds of his own lands as

No. 36.

was consistent with the laws of the kingdom, and that by the advice of three advocates, it being always given within a year thereafter." The Earl continued to possess his teinds without any duty, and no application was made by either party to these advocates. This Earl of Errol pursues a declarator upon the act of Parliament 1661, That this present parson hath no right but to his modified stipend, which he was in possession of before this act, and that the remainder of the teinds belonged to him as patron by that act of Parliament 1649; and the *salvo* in the act 1661 bearing, That the present Ministers should only have right to the teinds, as they had before the act rescissory, *Ita est* before that, they had only right to their stipend before the act, and the patron had right to all the rest of the benefice. The defender alleged absolvitor, because, after these acts the matter was agreed and settled betwixt the late Earl and the defender, that the Earl should give him presentation to all the fruits, which he did without reservation, except by the Minister's back-bond, and so this Earl can found nothing upon the act of Parliament, in respect of his unlimited presentation; neither can he found upon the back-bond, because it is but a submission limited to a day, within which it took no effect, whereupon the Ministers granted tacks to the several heritors of their own teinds, and cannot be urged to give a tack to the Earl. It was answered for the Earl, That in the back-bond there is an obligement and reference as to the manner and extent, viz. How far the Minister might lawfully give a right to the Earl of his own teinds, which related rather to the former, which was referred to lawyers, than to the obligement to give the Earl a right?

The Lords found, That the Earl granting a presentation to all the fruits, without limitation, did exclude him from the benefit of the prior act of Parliament, except in so far as the same was reserved by the back-bond, which they found yet effectual, and decerned the Minister to give him a tack, but prejudice of his present stipend; and found the reference was only, how far by law the Minister might do the same, seeing there was a probable pretence of a simoniacal paction in this case, where the statute obliges the Earl to give a presentation; but the Lords did not determine that case, whether a tack granted to the patron by the entrant when he got his presentation, limiting his power to improve his benefice, were a simoniacal paction, or were valid by the law of the kingdom, as to which the act of Parliament hath only allowed tacks consistent with the law of the kingdom; so that unquestionably a beneficed parson after his establishment by collation and institution, may set tacks of the whole or any part of his benefice, without consent of the patron for his life-time, and five years thereafter: But the only question is, If he set such tacks to the behoof of his patron before his entry, when it is in the patron's power to reject him unless he grant such tacks, whether such a tack be lawful, or unlawful and simoniacal, which, if approved, would evacuate almost all the benefices in Scotland, and turn them stipendiaries, and that in favours of the patrons, who had no right to the teinds during the incumbency, and in prejudice of the Church, and discouragement of piety and learning, there being

No. 36. only a few parsonages in Scotland, which may be an encouragement to persons of better spirits and quality in the Ministry.

Stair, v. 2. p. 538.

1677. *July 25.* HAY *against* DOUGLAS.

No. 37.
What precludes the right of drawing the *ipsa corpora* of the teind-sheaves?

Mr. John Hay pursues Sir James Douglas for contravention of law-burghs, because Sir James his son in his family hindered the pursuer's servants to draw the fourth part of the teind-sheaves of Smithfield, whereunto he hath right, and was recently in use to draw *ipsa corpora*. The defender alleged *non relevat*, unless the pursuer had been in use to draw the teind the year preceding this in question; but he set his fourth part of the teind to the tenants of the ground for a silver-duty, which hath discontinued his drawing, so he could not *brevi manu* thereafter come to draw, even though he had used inhibition, which albeit used in former years, might interrupt the tacit relocation of the tenant, and make him and his master liable for the fifth of the rent, yet would give him no warrant to draw the teind, and therefore the defender's son did no wrong to hinder him.

The Lords found the defence relevant, that the pursuer was recently in possession of drawing, though thereafter he had set the teind for some few years, if only he had used inhibition this very year whereupon the contravention is founded, which would have inferred spuilzie, if he had offered to draw, and was hindered, and consequently contravention; but an inhibition used in a former year, would neither infer spuilzie nor contravention, by hindering the drawing of the teind in subsequent years.

Stair, v. 2. p. 549.

1678. *July 13.*
The LAIRD of MONIMUSK *against* The LAIRD of PITFODDELS.

No. 38.
That the teinds were included, was not inferred by an infeftment having two distinct *reddendos*, one for the stock, and another for the teind, though it bore the teind included.

Monimusk being infeft in the one half of the Barony of Torrie, and Pitfoddels in the other half, the Minister of Nigg pursued for a locality before the commission for plantations against them both, but Pitfoddels producing his infeftment of his half, bearing *cum decimis inclusis*, before the act of annexation 1587, although it bore a distinct *reddendo* for the stock and teind, the commission finding it a point of law, would not determine, but allocated the whole upon Monimusk, reserving him action of relief before the Lords as accords, for his share; whereupon he pursues declarator, that Pitfoddels' rights did not exeem him from the burden of stipends, though it bore *cum decimis inclusis*, because it was clear by the charter, that before the same, his predecessors had been tacksmen for the teind, and paid twenty-eight bolls of victual therefore, and therefore the charter hath one *reddendo* for the land, and another for the teind, expressly converting the twenty-eight bolls; but *decimæ inclusæ* are only where church-men had right both of stock and teind,