No. 6.

Accordingly, the following judgment was ultimately pronounced:

'Find the teinds belonging to the Deans of the Chapel-royal were originally, and still continue to be, teinds destined to pious uses, and are therefore 'not subject to sale, or to be localled upon, while there are teinds belonging 'to lay titulars in the same parish unexhausted: But, in terms of the former 'interlocutor, find, That in this parish there are two distinct titularities; and 'therefore find, that the augmentation of stipend to the minister, allocated in 'the former process of locality, *anno* 1787, and the augmentation granted in 'this present process, fall to be divided proportionally between the two titularities effeiring to their respective proven rentals, and that each titular may allocate their proportion within their own right: Find, That the heritors who 'have paid the stipend in terms of the locality 1787, shall have no claim against 'the other heritors, for repetition of any part thereof so paid, or for any 'other payment which may appear by the present locality to have been made 'by them, but that the new locality shall only regulate the payment of the 'former stipend, due and payable from and after the term of Martinmas last, 'and in time coming.'

For the Deans of the Chapel Royal and their Lessees, *Ar. Campbell*, junior.
Alt. *Cha. Hay, Wm. Robertson.*

R. D. *Fac. Coll.* (APPENDIX,) *No.* 9. *p.* 15.

1800. *January* 15.
The REV. JAMES BADENACH, *against* Colonel FOTHERINGHAM OGILVIE and Others.

No. 7.
To exempt lands from payment of stipend, as being held *cum decimis inclusis*, it is necessary that the lands and teinds should have been feued together for a *cumulo reddendo*, by a churchman having right to both, and that the oldest titles produced, which must be prior to the act

IN the locality of Kingoldrum, several heritors, nearly in the same circumstances, claimed exemption from payment of the additional stipend obtained by the minister, as having right to their lands *cum decimis inclusis*, though they paid part of the former stipend by locality in 1635. In particular, Colonel Fotheringham Ogilvie claimed this for certain lands belonging to him, on a feu-charter from the commendator of Arbroath, with consent of the chapter in 1558, of half of the lands of Baldovie, 'Una cum decimis garbalibus, dict. 'dimidietatis terrarum et villæ prædict. semper et hucusque per prædecessores, 'nostros tenen. prædictarum terrarum conjunctim, et pro indiviso ultra me- 'moriam hominis assedatis et locatis,' &c. reddendo 'summam duodecim lib- 'rarum, et sex solidorum, usualis monetæ regni Scotiæ, ad duos anni termi- 'nos,' &c.

The Reverend James Badenach, minister of the parish, objected, and produced a copy of a lease of the lands and teinds by the Abbot and convent in 1550, taken from the copy of the Cartulary of Arbroath, in the Advocates' Library: 'Reddendo inde annuatim, pro firma dimidiæ partis villæ prædict.

No. 7.
1587, C. 29. should bear, that the lands were held *cum decimis inclusis, et nunquam antea separatis,* or equivalent expressions, as presumptive evidence that the lands and teinds had never been separated, or had been united at a very early period.

'quinque libras, et pro decima ejusd. dimidiæ partis villæ antedict. tres libras 'sex solidos et octo denarios.'

He further

Pleaded: Infeudations of teinds to laymen, consolidating stock and teind, were prohibited by the Lateran Councils in 1180 and 1215; as also by the Provincial Councils of Perth in 1242 and 1296, C. 19, 20, 21. These prohibitions, however, did not affect rights previously granted, and attempts to alienate were frequently made afterward. In order to conceal the date of the right, it became usual to insert, in subsequent titles, that the lands were held '*cum decimis inclusis, et nunquam antea separatis,*' or similar expressions. These therefore, create only presumptive evidence of the fact stated by them, and may be redargued by production of prior titles, which establish that the stock and teinds were formerly held separately; and this is proved in the present case by the lease 1550, in which separate rents were stipulated for each; Stair, B. 2. Tit. 8. § 10; Mackenzie, vol. 2. p. 308; Forbes, p. 256; Bankt. B. 2. Tit. 8. § 206; 13th July 1678, Monymusk against Pittodels, No. 38. p. 15644; Heritors of Colessie against Miss Scott, No. 82. p. 15694; 21st November 1798, Colville against Balfour, No. 91. p. 15707.

Answered: All that is necessary to give the exemption claimed, is a charter from a churchman having right to stock and teinds, conveying both for a cumulo reddendo, prior to act 1587, C. 29; Craig, Lib. 1. *D.* 15. § 9; Ersk. B. 2. Tit. 10. § 16. Even the clause, *Nunquam antea separatæ* is not indispensable; Stair, B. 4. Tit. 24. § 9; Minister of Tulliallan against Colvill, No. 101. p. 15717. as is evident from the act 1587, which admits the legality of feus, *cum decimis inclusis*, and does not mention the clause, *Nunquam antea separatæ.* It indeed holds it necessary, that a cumulo reddendo be paid for both; but this applies only to the charter on which they are held by the vassal, and not to subordinate rights granted with regard to them.

In the present case, the lease in 1550, founded on by the minister, is not authenticated, and is rendered suspicious by the rent stipulated for the teinds being £3. 6*s.* 8*d.* while that for the stock is only £5. Besides, as the terms of it do not appear from the charter on which the lands are held, it does not constitute the separation referred to by the act of annexation.

Memorials had been ordered by Lord Swinton.

At advising them, it was

Observed: The history of the exemption in question is very obscure, and our law writers are not agreed with regard to it. It appears necessary for giving the exemption, that the grant to stock and teind should be of great antiquity, and that no traces of their ever having been separate should now be perceptible. In this way, the expression, *Nunquam antea separatæ*, or the like, becomes essential, though their effect may be removed by evidence of prior separation. In the present case, there is evidence of the stock and teind being held as separate subjects, which is fatal to the claim.

The claim of exemption was repelled. A petition for Mr. Fotheringham Ogilvie was refused, 21st May 1800. No. 7.

For the Minister, *W. Robertson.* Alt. *Hay.*

D. D. *Fac. Coll. No. 153. p. 344.*

The cases, Wemyss against Heritors of Newburn, and Melville against Heritors of Leslie, were decided on these grounds on the same day.

Mr. Wemys's later titles bore, that his lands of Lathallan were held, 'cum 'decimis inclusis, et nunquam antea separatis.' But there was likewise produced a charter, in 1577, from the Archdeacon of St. Andrew's as perpetual Commendator of the Monastery of Dunfermline, conveying the lands with the teinds: 'Quas nos, tenore præsentium, cum dict. terris *includimus*,' &c. 'quæquidem terræ de Lathalland, extenden. in nostro rentali ad summam octo 'librarum monetæ regni Scotiæ, una cum octodecim pultreis, et decimis gar- 'balibus ejusdem, extenden. etiam in nostro rentali ad summam sex librarum; 'quæquidem terræ, cum suis pertinen., pro hujusmodi firmis, proficuis, divoriis, 'temporibus elapsis semper assedatæ et locatæ fuerunt: Reddendo inde an- 'nuatim,' &c. 'pro hujusmodi terris de Lathalland, summam octo librarum 'monetæ currentis Scotiæ, una cum octodecim pultrearum, nunc et de cætero 'annuatim solvendo, pro quinque in grassuma summam trium librarum et 'quatuor solidorum; et etiam annuatim solvendo in rentalis nostri augmenta- 'tionem, summam quadraginta solidorum; nec non annuatim solvendo nostro 'conventui, seu magistro suorum parvorum communium, summam tredecim 'solidorum dictæ monetæ; et similiter solvendo annuatim pro præfatis deci- 'mis garbalibus dictarum terrarum, summam sex librarum; item solvendo 'pro augmentatione rentalis ejusdem, summam quinque solidorum, monetæ 'præscriptæ, plus quam unquam dictæ decimæ garbales nobis aut predecessori- 'bus nostris antea persolverunt, et sic in integrum annuatim solvendo, nobis 'et successoribus nostris præscript. pro hujusmodi terris de Lathallan et suis 'pertinen., cum decimis garbalibus earundem inclusis; summam viginti li- 'brarum et duorum solidorum, monetæ currentis Scotiæ, una cum octodecem 'pultrearum,' &c.

The heritors further referred to the cartulary of Dunfermline, vol. 1. p. 41, as containing an older charter in 1556, in which the lands were conveyed without mention of the teinds.

The old stipend was paid in terms of an interim locality in 1720, by which Mr. Wemyss was exempted.

The Court repelled the claim.

Mr. Melville produced a charter in 1550, from the Commendator and Convent of Inchcolm, having right both to stock and teinds, conveying his lands 'liberas ab omni solutione decimarum garbalium rectoriæ nostræ ecclesiæ pa-

No. 7.

'rochialis de Leslie, sicuti Naper, relicta quond. Johannis Martinle de 'Raith militis terras, virtute suæ assedationis de præsenti gaudet, 'et per alios tenentes earundem ultra hominis memoriam perprius 'gavis. et possess. fuerunt extenden. annuatim, nostro in rentali, in firma et 'grassum a omnibusque aliis proficuis, decimis garbalibus, etiam in iisdem in- 'clusis et computatis, existen. ad summam decem librarum usualis monetæ 'regni Scotiæ: Tenendas et habendas, totas et integras prænominatas terras, 'liberas ab omni solutione decimarum garbalium,' &c.

The minister of the parish had been in use to draw 8*s.* $6\frac{6}{12}$*d.* of vicarage, but no further stipend from the lands.

Lord Glenlee Ordinary, repelled the claim of exemption. Melville reclaimed, and further produced a charter in 1568, confirmed by the Crown in 1584, conveying the lands 'cum decimis garbalibus earundem inclusis, quæ 'adhuc nunquam a stipite separatæ fuerunt, sed junctim cum fundo locaban- 'tur.'

The Court considered the charter 1550, particularly when explained by the subsequent production, as sufficient to support the claim, and gave judgment accordingly.

D. D.

1800. *March 5.*

SIR RALPH ABERCROMBY, *against* JOHN FRANCIS ERSKINE.

No. 8.

One heritor in a parish has no title to insist in a reduction of a decree of valuation obtained by another, although, in consequence of it, an additional burden of stipend has fallen on the pursuer's lands.

IN the locality of the parish of Alloa, John Francis Erskine produced a valuation of his teinds by the sub-commissioners in 1630, and an approbation by the Court of Teinds in 1782.

His teinds, according to this valuation, were exhausted by the old stipend; and in a scheme of locality for proportioning an augmentation, no part was laid on him, while a considerable burden was imposed on Sir Ralph Abercromby.

Sir Ralph objected, *inter alia*, that the report of the sub-commissioners was null, as the minister of the parish had not been made a party to their proceedings, and as it had been afterward derelinquished.

The Lord Ordinary sustained the objections.

In a petition, Mr. Erskine disputed the pursuer's title.

The Court (8th February 1797) '*in hoc statu*, found the decree of approba- 'tion and valuation must be the rule for allocation.'

Sir Ralph reclaimed, and at the same time raised a reduction.

The defender still objected to his title, and the Court ordered the question to be argued in memorials.

The defender.

Pleaded: The only parties having a proper patrimonial interest in teinds are the heritor of the lands, the titular, and minister, or rather they belong to