

No. 172. State, with answers, this interlocutor was altered, 8th December, 1802, and the Court returned to their first opinion, finding no deduction due for liming, &c.

For Earl of Selkirk, *H. Erskine.* Agent, *R. Hill, W. S.* For Officers of
State, *Crown Lawyers & Solicitor of Tithes, Balfour.* Agent, *R. Dundas.*

F.

Fac. Coll. No. 68. p. 154.

1803. November 30. HAMILTON against COLEBROKE.

No. 173.

In an action for a sale of teinds, they were valued according to a rental formerly adjusted between the titular and heritor, by which an heritable right to them had been granted, notwithstanding the opposition of the titular's singular successor.

James Hamilton of Gilkerscleugh, (30th May, 1749,) raised a process of valuation and sale of the teinds of his lands, lying in the parish of Crawfordjohn. He called the Earl of Selkirk, the titular, as a party, and the moderator of the presbytery of Lanark, as the parish was then vacant.

In this process a proof was allowed, (7th February, 1753,) but no further step was taken in it.

On the 13th May, 1762, the titular granted Mr. Hamilton a disposition of his teinds; and to ascertain the sum to be paid, a note of the value of the teinds was made up between the parties.

Daniel Hamilton, now of Gilkerscleugh, raised an action of wakening and transference of the former process, calling George Colebrooke of Crawford-Douglas, now titular, in room of Lord Selkirk, and also the Minister of the parish, and concluding, that it "should be found and declared, that the stock and teind of the pursuer's said lands shall be now, and in all time coming, the particular sums of money above specified, and contained in the foresaid rental and valuation of consent."

In this action the Minister did not appear; but Mr. Colebrooke objected, and Pleaded: Although no decree can be pronounced in a process of valuation in which the Minister is not called as a party; yet a decree is demanded in terms of a private and extrajudicial consent between the titular and the heritor, to which the Minister was not a party, although he has an undoubted legal interest in the transaction. Teinds might thus be valued, not only without a process before the competent court, and without a proof, but even without any communication with those who have a substantial interest to object. Agreements of the nature of this, which is called a valuation of consent, are private latent deeds, of which it is impossible for the Minister to know any thing.

Such procedure is repugnant to all the enactments, which declare that teinds must be valued by a process in this Court. The law recognises no other mode; and no private agreement, when all parties have not consented, can possibly be held to regulate the rights of the whole. A regular decree before the competent court, to which the Minister has not been made a party, is insufficient, much more a private extrajudicial valuation, in which he had no concern; Colquhoun against Fergusson, No. 164. p. 15768. and No. 171. p. 15775. Besides being an heritor, the objector is titular, and has been called as such in this action. His interest to

appear cannot then be disputed; Hunter of Polmood, petitioner, 3d February, 1802*, No. 173.

Answered: The agreement between the titular and heritor was fair and equitable, as they had opposite interests; and it is just such an estimate as is required in valuations of teinds. The Minister may object because he was no party, but he has not done so. The present titular is barred from objecting, because he derives right from the party who entered into it, and followed it up by granting to Mr. Hamilton an heritable right for the sum then paid. When the approbation is obtained for it, it will not be a valuation in which all parties have not been called; for the decree itself, with the basis of the decree, have been confounded: In this action the Minister, as well as the titular have been called, and it is here only that the approbation can be obtained. It is not the agreement, which was private and extrajudicial, but the decree of the Court, which is to regulate the interest of the parties. The titular pleads in right of the Minister who may appear for himself; and he cannot object in his own name to any transaction in which his author was a party, nor as an heritor can he plead with more success; Erskine of Mar against Sir Ralph Abercromby, 5th March, 1800, (Not reported—See APPENDIX.)

The King's letter, 28th February, 1628, declares, that all rentals shall stand for a valuation, "where the parties consent, or do not object to it;" and so the Court have frequently found; Lockhart of Camnethan against Duke of Hamilton, 1793, (Not reported—See APPENDIX.)

"The Lords, (24th November, 1802) having advised the libel, with the rental and valuation of consent libelled on, and heard parties procurators; they find, that Mr. Colebroke has no title to object to the approbation pursued for, and therefore ratify, allow, and approve, the rental and valuation of consent libelled on; interpose their decret and authority thereto, and decern conform to the conclusions of the libel."

To which they adhered, (30th November, 1803,) on advising a petition, with answers, replies, and duplies.

Act. Hamilton, Connell.

Agent, James Hamilton, W. S.

Alt. Robertson, Gillies.

Agent, A. Macwhinnie.

F.

Fac. CoH. No. 125. p. 277.

* In this case a report of sub-commissioners in the year 1691, and approved of in the year 1770, was opposed by the common agent in the locality of Drummelzier, on the head of dereliction. The title of the common agent to maintain this objection was questioned, on the authority of the case of Erskine of Mar, that as none of the heritors individually had either title or interest to object to a decree of approbation, so the common agent could not state in his own name a plea which would not be competent to any of his constituents. The Court held the answer to be sufficient, that the titular was interested, and entitled to object, and that the common agent who acted for all concerned, the titular and patron as well as heritors, was entitled to plead in their right, and therefore to object.—See APPENDIX.