1701. *December.* 10.

SIR WILLIAM HOPE *against* THE HEIRS and CREDITORS of BALCOMIE.

No. 132.
Value of drawn teind in a process of sale.

Sir William Hope pursues a sale of the lands of Balcomie, in which there being an act and a probation led, at advising of the said probation, it did appear, that the rental proven to be payable by the tenant, was only for the stock, and that the heritor was in use to draw the teinds; and there being no compearance for the defenders, the Lords did reason upon the value to be put upon the drawn teind, in order to the sale; and it did occur to them, that, albeit the common rate and estimate of teind be the fifth part of the rent in question, betwixt heritors, and titulars, and tacksmen; yet where an heritor, having right to the teind of his own lands, sets the stock only to the tenants, and draws the teinds *ipsa corpora*, the teinds are much more valuable than the fifth part of the rent, stock, and teind; as also that drawn teind is more or less valuable, according to the nature of the ground; for, if the ground be barren, the increase is less than where the ground is fertile, and that, in this case, the lands lie upon the coast-side, and have the benefit of ware, as appeared by the probation; therefore "the Lords did value and estimate the teind to a fourth part, that is to say, for each three bolls of proven rental, they added one boll for drawn teind, whereby the teind is a fourth part of the whole stock and teind; and ordered the rental to be framed accordingly."

Dalrymple, p. 38.

1706. *January* 29. The EARL of GALLOWAY *against* HUGH MACGUFFOCK.

No. 133.
Rule of valuation where parsonage and vicarage are separate.

The Earl of Galloway, as tacksman of the parsonage-teinds of the parish of Borg, pursues Hugh Macguffock of Ruscoe, one of the heritors there, for the bygone parsonage-teinds of his lands; but there being little arable ground in that parish, most of it being in grass and pasturage, the question arose, What was to be reputed parsonage, and what vicarage, in such a case; and what should be the rule and standard for estimating the parsonage teinds? The pursuer contended, That if he were seeking to value these teinds in time coming, the rule would be the fifth part of the rent, which is the tenth part of the growth, conform to the 17th act of Parliament 1633, deducting such a stock as answers to the duty paid for the vicarage; and why should not the same be followed in valuing bygone teind-duties? The defender contended, whatever might be the rule in a perpetual valuation, yet where it has been suffered to lie long over, you can only regulate the bygones by the sowing and holding for seven years preceding the pursuit; the teinds being only *debita fructuum*, and due out of the corn-rent; and if there be no corn, then there is no great parsonage-tithes. It was objected by the Earl of Galloway, against this method, that if it were allowed, parsonages might be made elusory and worth nothing; for an heritor might cast his whole lands into grass, and so diminish and elude the parson's or titular's interest, which

being done *in æmulationem* and invidiously, is not to be indulged; and at this rate, in England, their parsonages would dwindle to nothing; for in many parishes there, we know there is little corn, but all hay and grass; yet the parson gets the teind of hay, which makes his benefice considerable, besides his lamb, stirk, and wool. Answered, that, in propriety of language, *decimæ garbales* are the corn-teind, as Craig and all our lawyers hold, and is the tenth of the whole product; which uses to be divided in this manner, one third sequestrated and laid by for the seed, and live-stock; another third for the tenant's bread and maintenance, and to buy oak and iron with; and the last third for the master's rent and farm; so that the teind is indeed the fourth of the whole growth, deducting seed and bread, yet for the ease of the heritors, it is established at the fifth by our acts of Parliament. And as to the inconvenience of turning it all to grass, and so defrauding the parson, it is answered, this may be retorted as equally prejudicial to the vicar; for if the heritor shall rive out his ground which many years before was in grass, and turn it into corn, is not the vicarage as much diminished, as the parsonage in the former case? next, *qui jure suo utitur nemini facit injuriam*; who can hinder a proprietor either from grassing or tilling, as he sees most convenient for him, though *ex consequentia* it happen to prejudge the titular. *3tio*, The Lords have found heritors cannot be hindered to change their lands from grass, to corn, or from corn to grass, without regard to the titular's interest, 9th June 1676, Burnet against Gib, No.102. p.15717; and lately in the case of Sir William Bruce of Kinross, against Sir David Arnot of that Ilk, No. 131. p. 15735; and if the titular find himself prejudged, he has a remedy by pursuing a valuation, and then he gets a fixed rent conform to what it was during the seven years preceding; and vicarage might as well be defrauded as the parsonage; for though I keep my ground still in pasture, yet I may only take in horses or yell nolt upon it, which having no young, will yield no vicarage at all. The Lords, by plurality, found the sowing and holding could not be the rule here, but only the fifth of the rent, deducting a stock for the vicarage; which must be proved what it will amount to, the same being local and consuetudinary, different in several parishes according to custom and the use of payment.

No. 133.

Fol Dic. v. 2. p. 441. Fountainhall, v. 1. p. 320.

1706. *February* 27.

The EARL of ROXBURGH *against* SIR WALTER RIDDEL of that Ilk, and other HERITORS of the Parish of Lilliesleaf.

No. 134.
Effect of valuation and sale as to relief of burdens on the teind.

The Earl of Roxburgh, as titular of the teinds of the parish of Lilliesleaf, having pursued the heritors for their respective teind-duties of several years bygone; it was alleged for the defenders, That they had a depending action against the Earl