"It was thought, however, in the case of vicarage teinds, though there be a *modus decimandi* with us, yet there is no such thing in parsonage teinds; and, therefore, let rental rolls have ever been so long paid, unless parties have consented and agreed to them, neither titular nor heritor are thereby tied. And so it has frequently been found between the College of Glasgow and the heritors, to whose teinds the College has right, particularly Sir John Maxwell and Roberton of Bedlay; and that is an inaccuracy what we find in Stair upon this subject.

"It has been said, that with us there is a *modus decimandi* with respect to vicarage; and it is but late that it was fixed, for several of the Lords were of opinion, where any vicarage was due, it was due of every sort of thing subject to vicarage; but the contrary opinion prevailed, which has ever since been followed, that where a certain sum has been in use to be paid in name of vicarage, no more can be demanded.

"As to the 2*d* point in this petition, that the report of the sub-commission, as being only of the nature of a proof, cannot preserve it, would have been so found if there had been no more in the matter but prescription. But as here the heritors had taken tacks for a rent in a different species from the report, the Lords considered it as a dereliction, and, therefore, adhered."

1753. *July* 27. CREDITORS of SIR JAMES CAMPBELL of Auchinbreck *against* The EARL OF LAUDERDALE.

THIS case is reported by Elchies, (*Competition*, No. 13.) It was reported to the Court by Lord KILKERRAN as Ordinary. The report is in the following terms:—

"There was in November, 1713, an agreement between Charles, then Earl of Lauderdale, and Sir James Campbell of Auchinbreck, for the purchase by Sir James of the barony of Glassery, belonging to the Earl in Argyleshire, which, because of the incumbered circumstances of the family of Lauderdale, was executed in the manner you see from the copies thereof annexed to the informations.

"By this agreement, the price of the lands was settled to be L.27,739 Scots, and a fraction, which Sir James was to apply towards the payment of certain debts therein mentioned, *viz.* an adjudication, at the instance of Mr. Alexander Maitland, the Earl's uncle; *item*, another adjudication, at the instance of Mr. William Maitland, his other uncle, and Mary, Countess of Southesk, the Earl's aunt; and, 3*dly*, an heritable bond, granted by his father, John, Earl of Lauderdale, to Sir Robert Blackwood, on the lands of Glassery; and which creditors, Sir James, by the agreement, undertakes to pay, after the extent of their debts are adjusted between the Earl and them, and which the Earl is to do by a writ to be passed between the said creditors and him, betwixt and the term of Whitsunday 1714; and they being paid, and their diligences transmitted to Sir James, Sir James is thereupon to possess the estate of Glassery in all time coming, without being quarrelled by the Earl or his heirs. And his entry to the possession was to be at the said term of Whitsunday 1714; at which term he is to pay the one-half of the price, and is to give security for the other half, payable at the term of Martinmas 1715; and both payments to be made at the sight of the Earl; and

in case the sum at which the price was settled shall not be exhausted by the payments to be made to these creditors, Sir James is to apply the surplus to other creditors, or to pay it to the Earl himself; and Sir James is to discharge all action competent against the Earl for the debts conveyed to him, except in case of eviction. And, *lastly*, the Earl is to cause John Corse, in whose person several adjudications stand, to renounce the same, *quoad* the lands of Glassery.

" This is the substance of the agreement 1713, which was deposited in the hands of Mr. Alex. M'Leod, who seems to have been umpire, chosen by the parties; and it remained in Mr. M'Leod's hands till his death, and was lately recovered from Mr. John M'Leod, his successor.

" It appears that, pursuant to this agreement, the sums payable to Mr. Alexander and Mr. William Maitland were settled, for of the 18th June, 1714, Sir James, as the creditors say, grants bonds to them for the sums adjusted to be paid them, and obtained from them a conveyance to their adjudications; but in respect these adjudications were exceptionable, they, of the same date, became obliged to lead new adjudications, which, accordingly, they did in the year 1720.

" It further appears, that in the year 1718, Sir James Campbell acquired right to Sir Robert Blackwood's heritable debt.

" It has been said that Sir James Campbell's entry to the possession was, by the agreement, to be at Whitsunday 1714, and, accordingly, he did then enter to the possession; and his estate being adjudged by his creditors, they brought a ranking and sale of his estate, and *inter alia* of the barony of Glassery.

" The Earl of Lauderdale not being able to discover that ever there had been a total clearance between his father and Sir James Campbell, but finding an account among his father's papers, holograph of Sir James Campbell, which states the sums paid to the several creditors whom he was bound to pay by the agreement, and which comes short of the price he was to pay by the said agreement, in the sum of L.2086, he was advised to compear in the ranking of Sir James Campbell's creditors, and to produce two adjudications, one led by Paton, and the other by Callender of Craigforth, which are the diligences referred to in the agreement 1713, as standing in the person of John Corse, for the Earl's behoof, and are diligences preferable to Mr. Alexander and Mr. William Maitland's adjudications; and thereon pled a preference, but to this effect only, that he might draw the said L.2086, the resting balance of the price which, by the agreement 1713, Sir James had undertaken to pay; at the same time admitting, that the account was but a presumptive evidence that such was the balance; and whether the Earl is entitled to be ranked upon his preferable adjudications for that balance, is the question now to be determined?

" It is said for the Earl, that the agreement 1713 was, in other words, a minute of sale of the lands of Glassery, whereby Sir James agreed to pay L.27,639 as the price, and to apply the same towards purchasing the debts therein mentioned, to be stated in extinction of the price, no further than he paid; and this being the import of the minute, Sir James became thereby trustee for the Earl in the purchase of these debts, to be applied in extinction of the price, in so far only as he actually paid; and it was a consequence of the trust, that he should take and preserve documents of the sums really paid, because he became bound to pay to the Earl the superplus, after paying the three debts; and, therefore, the Earl takes it for granted, that, were the question with Sir James himself, touching the implement of the agreement, it would be no defence to Sir James that he had

paid these three debts, but he behoved to prove how much of the price he had applied to these purchases, either by the settlement between the Earl and them, which, if any such was, falls to be in Sir James's hand, as the warrant of his payment, or otherwise, as he best can: and to pay the Earl the residue, if any was. And if such would be the case in a question with Sir James, the Earl contends that it makes no difference in the case, that the question is not with Sir James, but with his creditors, who have affected the lands by legal diligence; for, as Sir James's right to the lands depends upon the agreement 1713, and that as he could not transfer this contract by voluntary deed, so neither can the law by legal diligence transfer it, without subjecting the claimer under the contract to fulfil the mutual prestations in it. And as, with respect to Sir James, so with respect to his creditors, this account holograph of Sir James, might be held as a presumptive evidence what the balance was.

"It is ANSWERED for the creditors, that how the case might stand were the question with Sir James, they have no occasion to inquire; and as little have they occasion to inquire how the case might even stand with them, did Sir James's title to the lands depend only on the contract or minute of sale in the 1713, for that now *res devenit in alium casum*, by another deed that passed between the Earl and Sir James in June 1714, a copy whereof you have also subjoined to the information.

"This deed recites, that Sir James Campbell having acquired real right and diligences affecting the lands and barony of Glassery, with his own proper money, to the full avail of the said lands and barony, and in such manner as we and our other estate are to be freed of all action for the said debts; therefore, we oblige us never to quarrel or impugn, as in the deed.

"By this deed, say the creditors, the matter no longer stands upon the footing of that deed 1713; in so far as, 1*st*, It is an instruction that the agreement 1713 was implemented, when it bears that Sir James had, with his own proper money, acquired rights and diligences to the full avail of the lands, and, therefore, were even the question with Sir James, he would be entitled to plead this as an evidence of full implement of the agreement 1713.

But 2*do*, be in that what will, and supposing the unsigned account produced by the Earl, and said to be holograph of Sir James, to be evidence against Sir James that L.2086 is at this day resting, the effect of that could be no other than to afford to the Earl a personal action against Sir James, but cannot entitle the Earl to compete with them after this deed in the 1714, whereby the Earl obliges him never to quarrel or impugn the said rights and diligences, which must be sufficient to the creditors who have adjudged them from Sir James, however the question may stand between the Earl and him with respect to the price.

"It is REPLIED for the Earl, that this deed 1714, will not bear the construction put upon it by the creditors. The occasion of granting this obligation appears to have been this:—You have heard that, upon the 18th June, 1714, Sir James had acquired Mr. Alexander and Mr. William Maitland's adjudications. You have further heard, that of even date, they had, in consequence of Mr. M'Leod's advice, in whose hands the agreement 1713 was deposited, granted their obligation to obtain a new adjudication, as the adjudications they had conveyed were informal; and that appears to have been the reason why he also directed this obligation to be granted by the Earl, which was done the very day thereafter, whereby the Earl was made to oblige himself not to quarrel either the said rights

and diligences already acquired by Sir James, or that hereafter he should acquire, which was rather the effect of too much caution, than that it was necessary; as the same was in effect implied in the spirit of the agreement 1713, whereby Sir James was to possess the lands upon the diligences already led, without being quarrelled by the Earl and his heirs, and, therefore, can have no other nor stronger effect, than if it had expressly been part of the original minute.

" For as to the narrative of this obligation, which recites that Sir James had acquired real rights and diligences, with his own proper money, to the full avail of the barony of Glassery, which the creditors plead as an acknowledgement that the price was paid, and the minute implemented on Sir James's part; if that had been the case, the following part of the deed had been a discharge of the minute, whereas what follows this narrative, is no other than a ratification of the diligences acquired, and to be acquired: and, therefore, this narrative cannot import more than this, that the sums contained in the adjudications which he had acquired with his own proper money, were to the full avail of the lands; and, therefore, the Earl obliges himself not to impugn these adjudications as a title to the lands, especially when that had been to assert an untruth, to have said that the price was then paid, when, 1*st*, it was not wholly payable in a year and a half thereafter, viz. Martinmas 1715; and, in fact, Sir Robert Blackwood's debt was not paid till May 1718. And if there had been any doubt in this before, it is now removed, says the Earl, by the two letters from Sir James to the Countess Dowager of Lauderdale, that have been put in your boxes since the informations were drawn, and which fully do prove the construction which the creditors put upon this deed 1714.

" It remains, therefore, says the Earl, true, that, were the question with Sir James, he behoved to instruct and prove that the balance of L.2086 remaining after payment of the creditors, was paid to the Earl, this deed 1714 being no evidence of it.

" And the only point that remains is, whether the creditors are in a better case, as having carried by their adjudications the diligences affecting the lands which the Earl has ratified and obliged himself never to quarrel or impugn, leaving the Earl to his personal action against Sir James?

" And on this point, it is observed for the Earl, that the argument for the creditors is out of the case, when they plead the real right to be in them, in virtue of the debts and diligences which Sir James Campbell has acquired, the Earl ratified, and which they have acquired by their adjudications; and that all that remains for the Earl is a personal action against Sir James, suppose a balance to be due, with which they have nothing to do. I say it is pled for the Earl that this argument is out of the case, and could only apply, were the Earl founding a preference upon a personal agreement, which is not the case, for the Earl pleads his preference upon Paton and Craig for adjudications, which are diligences admitted to be of their nature preferable to Mr. Alexander and Mr. William Maitland's adjudications; and neither Sir James Campbell nor his creditors can get the better of this preference, but by resorting to the agreement 1713. And though by this contract, the diligences acquired by Sir James were ratified by the Earl, and the Earl further obliged to cause John Corse renounce these very adjudications on which he now pleads his preference; but still, how was the Earl bound to perform those things only as his part of a mutual contract,

which the other party cannot demand implement of without implementing his part? And as little can his assignee, whether voluntary or legal. And upon this point a decision was referred to between *Graham of Greigston* and the *Creditors of Trail*, in the year 1747, as concluding *a fortiori* to the present case. I will not trouble your Lordships with repeating it. You have it fully set forth in the Earl's information.

" As to the extent of the balance of the price due, the Earl only founds upon this account which he found among his father's papers, as a presumptive evidence that such was the balance, unless Sir James or his creditors prove it to have been less."

[Lord Elchies states that " the Lords found the Earl preferable for the balance yet resting of the price."]

1753. *August* 12. MAJOR FORBES *against* MISS MAITLAND.

THIS case is reported in *Fac. Coll. (Mor.* p. 14431.) The following is the opinion delivered by Lord KILKERRAN, who was against the judgment:—

" I gave my opinion when this case was formerly before the Court, that this retour, which bears no more than this, that Mrs. Jean Maitland was heir of provision to her brother, Sir Charles Maitland, without specifying the deed under which she claimed to be served, was altogether inept, void, and null, and I remain of the same opinion.

" But when I say this, I do not mean to say that every service in general of an heir of provision is void and inept, where the deed by which the provision is made is not produced before the inquest, and specified in the retour; far from it, for I have no doubt but that in many cases a general retour of an heir of provision may be effectual to carry the provision, albeit the deed in which the provision is made be neither laid before the inquest, nor specified in the retour; and the question will be, whether the present retour be one of those or not? And in order to answer that question, I cannot do better than first to state these cases, and then compare them with the case in hand.

" Where there is a general service of an heir of provision, which specifies the character under which one serves, to be as heir of line, or as heir male; in that case, though the retour do not specify the deed of tailyie by which the subject is provided, I think it a good service, and that it will carry every subject to which the heir of line, or the heir male, shall appear to be provided.

" And the reason is plain. A man can have but one heir male, and, therefore, a service of heir male and provision is a proof that no other person is at this day existing, who at any time before could have claimed that provision as heir male: in other words, as a man can have but one heir male, the service, as heir male and provision, is a proof that none other can claim the provision in that character.

" Nay, I may carry the matter a little farther, that a service as heir male in general, though not adding *and of provision*, will carry every subject that shall appear to be provided to the heir male; for the same reason I have given that as a man can have but one heir male, such service is a proof that if any other did