but cases occur where necessity must get the better of the objection. From the number of witnesses, no proof arises that there is not a *penuria* as to a particular fact. Many of the witnesses may know nothing of this crime, in its own nature most occult. The examination sought, is now restricted to a fact, which, if not proved by Lady Maxwell, cannot be proved at all. As to her having been an agent, perhaps there were improprieties in her conduct, but not enough to set her aside altogether.

PRESIDENT. The objection of *relation* is nothing, because the fact sought to be proved by her depends altogether upon her testimony. *Proditio testimonii* nothing, because she spoke of it to the defender's father. As to the objection of *Agent*, it is the only material one. It was natural for Lady Maxwell to be intrusted in the inquiry concerning a fact said to have happened under her own roof. The inquiry commenced in presence of the defender's aunt. There lies no objection to her taking down, in writing, what the witnesses said, and reading it to them. This was necessary, in order to come at the truth: *interest reipublicæ ne crimina maneant impunita.*

PITFOUR. The objection flies off when the examination is restricted to the fact, already mentioned in Miss Henderson's oath.

On the 21st June 1771, "the Lords allowed Lady Maxwell to be examined as to the fact in Miss Henderson's oath, reserving all exceptions to her credibility; and remitted with this instruction to the commissaries."

Act. A. Lockhart, *Advocate.* *Alt.* J. Swinton, H. Dundas.

Reporter, Kennet.

Diss. Stonefield, Monboddo.

Non liquet, Kaimes.

1771. *June* 27. CHARLES HOPE VERE, Esq. *against* MR ALEXANDER BRUCE.

MEMBER OF PARLIAMENT.

Reduction of a decree of division of valuation, by which a freeholder's qualification was reduced below L.400 Scots, found to be a sufficient ground for striking him off the roll, though he had been upwards of four months enrolled.

[*Faculty Collection, V. p.* 217; *Dictionary*, 8824.]

MONBODDO. I have no doubt as to the merits. I would doubt of the competency were it not for judgments pronounced by this Court. It is plain that this special case has been omitted in the statute. Neither are there any general words which give us jurisdiction to supply the omission. Nevertheless, I would go on in the error until we are corrected by superior authority.

ALEMORE. I doubt how far we are tied down by precedents, when we are satisfied that they have interpreted the statute beyond its purview.

On the 27th June 1771, "the Lords ordained the name of Mr Bruce to be expunged;" adhering to interlocutor 14th February 1771.
Act. R. M'Queen. *Alt.* D. Rae.

1771. *June 27.* JOHN SINCLAIR of Freswick *against* SIR JOHN SINCLAIR of May.

PRESCRIPTION—TEINDS.

An heritable right to Teinds, not acquired by the Positive Prescription by possession upon tacks only.

[*Fac. Col. V.* 269; *Dict.* 10,836.]

KAIMES. I am not fond of the precept of *clare constat*, 1662; it bears a rasure, vitiation, or superinduction: but I must not determine merely on my liking or disliking. It is certain that the Bishop of Caithness was not titular: we are not to presume that he would confer a right which he had not. The sense of the precept, when freed of the superinduction, is thus:—"I give you such *decimæ garbales* as are *inclusæ et nunquam separatæ*." It lies upon the holder of the precept to show that more was understood. I do not see possession upon the precept 1662: The very idea of possessing upon it, was relinquished till the means of proving the contrary was cut off. I doubt of prescription at any rate: the estate was sold in 1694, upon the supposition that there was no right to the teinds. The apprisings containing a right to the teinds were not the cardinal rights of the estate.

AUCHINLECK. I thought possession was very dark, but I had a bias for the proprietor against the titular. *Now* we are relieved. The exception of Byrelandlorne is plainly a superinduction. The most I can do for a vitiated deed, is to hold the superinduction *pro non adjecto*, and when I do so, I see no difficulty in the clause, which Lord Kaimes has rightly explained; at any rate, I see no possession.

HAILES. I see the force of the argument for this interpretation of the precept 1662. I cannot explain it in another sense, when the after conduct of parties is considered: if the clause, without the manifest superinduction, could not aid May. I cannot allow him to draw an argument for the superinduction in his own favour; this would be allowing a party to profit by the defect in the deed on which he claims. The sale 1694 satisfies me that the parties concerned either conceived the precept 1662 as insufficient for the purpose of establishing an heritable right to the teinds, or otherways informal; for the teinds, in 1694, were supposed not to have belonged to May. I have no doubt that the sale 1694 was held to be the cardinal right on which the family of May continued to possess, for it was a much better right than the collateral clampers of adjudication. But what puts the matter beyond doubt with me, is the