

1800. *May 21.*

EARL of MANSFIELD, *against* The DUKE of QUEENSBERRY, and other Heritors of the Parish of Dornock.

IN February 1793, the minister of Dornock got an augmentation of his stipend

In May 1793, the Lord Ordinary appointed a common agent to carry on the locality.

On the 25th January 1794, a scheme of locality was given in by the Duke of Queensberry as titular. The Duke is, besides, a considerable heritor in the parish.

The Earl of Mansfield, who is also an heritor, brought a summons of valuation and sale of the teinds of his lands. The summons was dated 9th December 1793. It was executed against the Officers of State on the 10th December 1793, and against the minister of the parish on the 24th February 1794. The execution against the titular having fallen aside, its exact date could not be ascertained. The summons was called in Court on the 9th November 1794, and decree of valuation was pronounced on the 3d February 1796.

By the scheme of locality given in by the titular, a proportion of the augmented stipend was allocated on the Earl of Mansfield's lands, on the footing of his teinds not being possessed under heritable titles.

The Earl objected to this allocation, on the ground that he was *in cursu* of obtaining an heritable right, and

Pleaded: It is settled by the case of Lamont, No. 90. p. 15706. that a proprietor who purchases his teinds during the pendency of a locality, is liable for stipend only *pari passu* with those heritors who have previously acquired heritable rights to their tithes. Now, the only difference between that case and the present, is, that in the former, the opposition arose from the other *heritors* of the parish; whereas here it is made by the *titular*, who is himself an heritor. But it is obvious, that in the character of titular he has no interest to object to the Earl's getting a decree of sale during the pendency of the locality; and the case of Lamont demonstrates, that as an heritor he has no right to do so, consequently the case of Lamont must rule the decision of the point at issue.

Answered: In the case of Lamont, the titular had no interest, and therefore it was decided on principles wholly different from those which must regulate the present case. Prior to the act 1693, C. 23. the titular had the power of appropriating the whole free teinds to the payment of the minister's stipend, in whatever manner he thought proper, which was liable to this abuse, that whenever a process of sale was brought by an heritor, the titular allocated the whole of his teinds to the minister, after which they were no longer saleable. To remedy this, the act 1693 provides as follows: 'And because the

No. 9.

An heritor's raising an action of valuation and sale, during the pendency of a locality, will not prevent his tithes from being allocated proportionably with others not heritably disposed, if the competition arises between him and the titular of the tithes, who is also an heritor in the parish.

No. 9. ‘ buying of teinds in favours of heritors hath been much hindered by patrons, ‘ titulars and tacksmen of teinds, their offering to allocate the teinds of the ‘ heritor pursuing for a sale after citation given, it is hereby statuted and or- ‘ dained, that, after citation, it shall not be in the power of the foresaid patrons, ‘ titulars or tacksmen, to make any allocation of the pursuer’s teinds solely, ‘ but only proportionally, of his and the other teinds within the paroch, and ‘ within his right, excepting always, that the teinds of the lands belonging in ‘ property to the said patron, titular or tacksmen, shall be free of any part of ‘ the said allocation, if there be sufficient teind beside.’ By this clause, there- fore, the titular is prohibited from the total allocation of the tithes of any heritor, after citation in a process of sale; but it was not intended to give the citation the same effect with a decree of sale. It was only meant, that after citation, the pursuer’s teinds should be allocated proportionally with the other free teinds, which is precisely what the titular has done by the locality in question; 10th July 1785, Locality of Moffat, 18th June 1783, Sommerville and Others against the Earl of Lauderdale, 23d February 1785, Locality of Tynron, (these cases not reported.)

The Court at first (7th February 1798) ‘ found it competent for an heritor ‘ to obtain an heritable right to his teinds during the dependence of a process ‘ of locality, and remitted to the Lord Ordinary to rectify the locality accord- ‘ ingly.’

But afterward, in consequence of a reclaiming petition for the titular, the Court ordered memorials; and on advising them, it was

Observed on the Bench: Where the question occurs between the pursuer of a sale and co-heritors, the latter have no title to object. This is settled not only by the case of Lamont, referred to by the Earl of Mansfield, but by two later cases, 9th July 1798, Dr. Bryce Johnston against Murray, (not reported;) and 5th March 1800, Sir R. Abercromby against Erskine, (No. 8. *supra.*) A different rule, however, takes place, where the question occurs between the pursuer of the sale and the titular, if he be also, as in this case, an heritor of the parish. By the act 1693, C. 23, he is entitled to exempt his own teinds, as long as there are other free teinds in the parish; so that he has thus a valuable patrimonial interest, of which it is clearly implied in the words of the statute, that he cannot be deprived, even although he should be called in a process of sale, where no locality is previously depending; and still less can he be deprived of it, if the process of sale is not raised till after the dependence of the locality. For although it be true, that the maxim, *pendente lite*, &c. does not preclude competing parties from completing their own rights, it implies, that the defender cannot take any step which will defeat the pursuer’s action.

The Lords ‘ found, That in this case it is not competent for the Earl of ‘ Mansfield to obtain an heritable right to the teinds by a decree of sale during

‘ the dependence of the present process of locality, and in so far altered the
‘ interlocutor complained of.’ No. 9.

Lord Ordinary, *Ankerville.*
Alt. *W. Robertson.*

For the Earl of Mansfield, *H. Erskine.*

R. D.

Fac. Coll. No. 178. p. 403.

1800. *December 3.*

The SOLICITOR of TITHES, *against* JOHN HEPBURN BELSCHES, and Other
HERITORS of the Parish of DUNNING.

THE Minister of the parish of Dunning obtained a decree of locality, by which a portion of his stipend was laid on the lands of Easter and Wester Rossies.

The officers of state not having been parties to the locality, the Solicitor of Tithes, in 1792, brought a reduction of it, on the ground that the tithes of Easter and Wester Rossies were now in the hands of the Crown, as in right of the Arch-dean of the See of Dumblane, and that, being formerly the tithes of an Arch-dean, like Bishops' tithes, they enjoy the privilege of not being called upon till all the other tithes in the parish are exhausted.

The heritors, on the other hand, contended, That tithes belonging to the Arch-dean and other members of the Chapter, were not vested in the Crown, but belong to the patron of the parish, and enjoy none of the privileges of Bishops' tithes.

The arguments of the parties were nearly the same with those detailed in the case 23d May 1797, The Solicitor of Tithes against the Earl of Moray, No. 89. p. 15704.

The Lord Ordinary ‘ reduced the locality of the stipend of Dunning in the year 1773, and found, That no augmentation of stipend can be allocated upon the lands of Rossies Easter and Wester, until the whole other teinds of the parish are exhausted.’

But, upon advising a petition for the heritors, with answers, the case of the Earl of Moray was held to be decisive of the present; and the Court accordingly altered the Lord Ordinary's interlocutor and sustained the defences.

Lord Ordinary, *Ankerville.*

Act. *Solicitor of Tithes Balfour.*

Alt. *Rolland.*

R. D.

Fac. Coll. No. 205. p. 473.

1801. *May 20.* JAMES PETERKIN, *against* The EARL of MORAY.

THE estate of Grange, belonging to James Peterkin, and lying in the parishes of Forres and Kinloss, possessed a servitude over certain mosses in the parishes

No. 10.

Tithes formerly belonging to an Arch-Dean do not possess the privileges of Bishops' tithes.

No. 11.

In a valuation of teinds, the proprietor