

1750. January 17. DUNBAR of NEWTON against SIR ROBERT GORDON.

In the locality pursued at the instance of Dunbar of Newton, patron of the parish of Duffus, and wherein he localled all Sir Robert Gordon of Gordonston's free teinds, Sir Robert insisted that he ought to have a deduction of the King's ease; which Newton opposed, for this reason, that such deduction is only by law allowed, where a valuation is brought by the heritor, whether in order to settle the valued teind to be paid to the titular, or to settle the price, which the titular must accept: But where an heritor has not claimed this benefit by pursuing a valuation or sale, until a locality of the Minister's stipend comes to be settled, there is no instance of any such deduction being allowed; and the act 1633, which introduces the King's ease, was appealed to, as singly concerning the valuation and sale of teinds.

To which it being answered for Sir Robert, that he admitted the case was to be judged by the rule laid down in the act 1633; which being general in these words, "That where the teinds are proved and valued separate from the stock, the rate shall be such as the teinds are proved to be, deducting a fifth for the ease of the heritor," he could not discover the foundation or reason for limiting it; nor could there be any assigned, when it is considered, that, at the date of the act 1633, and long after, a stipend could not be modified till a valuation was first closed; the Lords found, "That in stating the locality of the parish of Duffus, Sir Robert Gordon is entitled to a deduction of the King's ease out of the drawn teinds of his lands of Carsward."

This question had never before occurred, because it rarely happens, that a man's whole teinds are allocated; and where a part of the teinds only are allocated there is no place for it; and if in any case the whole teinds have been allocated, it has not occurred to the heritor to plead it.

Sir Robert made another objection to the locality: His predecessors had, in 1697, purchased from Lord Duffus, then patron, an heritable right to the teinds of his lands of Kirkton, with absolute warrandice against future augmentations, and the now patron, whose right from Lord Duffus to the patronage was posterior to the disposition 1697 had allocated the stipend on these lands, and on his the patron's own lands proportionally.

To this Sir Robert objected, that having an heritable right to those teinds, they ought not to be subjected to any part of the stipend, so long as there were teinds of the patron's own lands sufficient for it; that so the case would undoubtedly be, had Sir Robert's heritable right been prior to the acts 1690 and 1693, as the right which patrons got by these acts was no other than to the free teinds of their own and other heritors' lands, with the burden of the stipend; and that the case was here the same as if his predecessor's right had been prior to the act 1690 *quoad* the present patron, whose right to the patronage from Lord Duffus was posterior to Sir Robert's disposition.

Answered for the pursuer, That it may be true that teinds, to which the heritor had an heritable right prior to the act 1693, cannot be burdened with any part of the stipend till the teinds of the patron's own lands be exhausted; but

No. 67.

In a locality pursued by a patron, King's ease deducted.

Situation of teinds sold since 1693.

No. 67. it does not follow that teinds acquired by Sir Robert's predecessor from the patron, as having right by the statute, are in the same case : A patron is obliged to sell at six years purchase, and it were absurd that the obtainer of a decree of sale should be free, and that the teinds of the patron's own lands remaining with him should bear the whole allocation, when the patron's right to the teinds of his own lands is in him no less an heritable right than the decree of sale is in the obtainer of it ; nor can the disposition to Sir Robert have any different effect against the pursuer, a singular successor in the patronage, from what a decree of sale would have had, as the obligation of warrandice in the disposition can only affect the granter.

And accordingly the Lords found, " That the teinds of Sir Robert's lands purchased from Lord Duffus in 1697, and the teinds of the patron's own proper lands, are to be burdened proportionally in the locality."

Kilkeran, No. 13. p. 557.

* * This case is reported by D. Falconer.

The Lord Duffus, patron of the parsonage of Duffus, and possessing by tack the teinds of Kirkton, belonging to Gordon of Gordonstone, disposed in 1697, the same to him heritably, for payment of two pennies to the Minister, with absolute warrandice against all deadly ; but the disponee was not infeft : And thereafter disposed the patronage to Dunbar of Thunderton ; who pursued a process of modification and locality, and gave in to Court a scheme of locality for approbation ; to which it was objected for Sir Robert Gordon of Gordonstone, 1st, That he ought to be allowed the benefit of the King's ease, on the value of his teinds not disposed.

Answered, The King's ease is only granted to heritors, in pursuing valuations of their teinds ; but not when the proof is led in modifications pursued at the instance of the Minister or patron.

Replied, It is competent to an heritor pursued in a modification, to repeat a valuation ; and he cannot be in a worse case that, without using that form, he suffers the proof to be led in the modification.

Objected, 2dly, He has an heritable right to his teinds, which therefore are not affectable, while the patron has free teinds in his possession ; to wit, the teinds of his own lands, to which he has only right as patron, and which were granted with the burden of the stipend ; especially considering his right to them was completed, by obtaining a modification to the Minister after Gordonston's disposition, which contains absolute warrandice.

Answered, there is yet no infeftment on Gordonston's disposition ; so that the teinds still remain with the patron : But supposing them disposed, a patron, by disposing to the heritors for six years purchase, is not understood to throw the whole burden upon the other teinds of the parish ; which, by his disposing the whole, must at last light on himself : And with regard to the clause of warrandice, it does not affect this pursuer, who is a singular successor.

The Lords commissioners found Sir Robert Gordon was entitled to have deduction of the King's ease; and found that his teinds ought to be proportionally burdened with the teinds belonging to Dunbar of Newton.

No. 67.

D. Falconer, v. 2. No. 124. p. 140.

1750. June 27. DUKE of ROXBURGH *against* DICE.

The Duke's Chamberlain having pursued William Dice, schoolmaster at Selkirk, before the Commissary of Peebles, for certain sums due by him as the teinds of some lands belonging to him in and about Selkirk, payable to the Duke as titular; Dice proponed compensation upon the proportion of the salaries due to him as schoolmaster forth of the said teinds.

No. 68.
If school-
master's sala-
ries affect
teinds?

Which the Commissary having sustained, the Duke presented a bill of advocacy on this ground, That, by law, schoolmasters' salaries do not affect teinds, as the burdens affecting teinds are known and defined in law, whereof schoolmasters' salaries are none. So, by act 5. Parl. 1. Charles I. entitled, "Ratification of the act of council anent plantation of schools," these salaries are to be laid on the plough or husband-land, and a titular of teinds as such has neither; and by King William's act "For settling schools," the burden of the schoolmaster's salary is laid on the heritors, that is, heritors of land in contradistinction to those who have right to teinds, who are called titulars, tacksmen, or teind-masters, but are no where called heritors. And in the same act the heritors are allowed relief from their tenants, which will never apply to titulars who have no tenants. Nor was it of any importance, that the Duke's teinds are valued in the cess-books, as the acts of convention and acts of Parliament appoint the land-tax to be levied out of titulars' teinds as well as lands.

The Lords would have remitted with an instruction to repel the defence, and it was only in respect the point merited a judgment of the Court that the bill was passed.

Kilkerran, No. 14. p. 558.

1751. February 13.

ANSTRUTHER *against* The OFFICERS OF STATE and MARQUIS OF TWEEDALE.

Captain Philip Anstruther of Inverkeithing, proprietor of certain lands within the Abbacy of Dunfermline, brought a process of valuation and sale of the teinds thereof before the Lords, as commissioners for plantation of kirks, &c. wherein he called the Officers of State and the Marquis of Tweedale, who has a tack of the Abbacy from the Crown.

No objection was made to the valuation; but as to the sale, it was alleged for the defenders, That the teinds of the Abbacy of Dunfermline, lying on the north

No. 69.
Teinds be-
longing to
the abbacy
of Dunferm-
line.—Im-
port of the
act 1633,
Cap. 17.