

No. 86. be converted according to its value in the year 1772, and not according to that which it now bears.

On advising memorials, the Court unanimously thought, that the pursuer had still a right to purchase his teinds, but were a good deal divided in opinion as to the rate at which the grain should be converted.

The Lords "repelled the defence stated by the defender Mr. Maule, that the pursuer is not entitled to insist in a sale after the lapse of two years from the date of the decret of valuation, and found the pursuer entitled to a decret of sale of the teinds of his lands libelled, notwithstanding the decret of valuation being obtained in the year 1772; but found, That the victual-teind must be converted at a medium of the fiar prices of the shire of Forfar, within which the lands lie, for these last seven years."

A petition for the pursuer, reclaiming against the last branch of the interlocutor, was refused without answers.

Act. Gillies.

Alt. Ar. Campbell, jun.

D. D.

Fac. Coll. No. 115. p. 256.

1795. February 25.

SIR JOHN SCOTT *against* The HERITORS of the Parish of Ancrum.

No. 87.

When a titular or patron brings an action, in order to have his right to teinds ascertained, and claims arrears for forty years back, a colourable title of possession is sufficient to defend the heritors against payment of those which became due prior to the decree in the process of declarator.

Sir John Scott having brought an action against the heritors of the parish of Ancrum, concluding to have his right to the teinds ascertained, and also claiming arrears for forty years back, he produced as his title, *1mo*, A contract of marriage in the year 1675, in which John Scott of Ancrum conveyed to Patrick Scott, his son, the lands and barony of Ancrum, "with the advocacion, donation, and right of patronage of the kirk and parochin of Ancrum, parsonage and vicarage teinds thereof;" *2do*, A Crown charter in the year 1676, confirming the contract, and conveying the lands, "cum advocacione, donatione, et jure patronatus ecclesie et parochie de Ancrum, decimis rectoriis et vicariis ejusdem." He farther stated, that a similar clause occurred in all the subsequent titles to the estate; that he or his predecessors had, for a century back, uniformly presented the Minister on every vacancy, though, for time immemorial, no demand had been made by them against the heritors for payment of teinds.

The defenders, on the other hand, produced a number of discharges from the different Ministers of the parish. The style of these discharges was by no means uniform: In some of them, the payment was accepted in full of the stipend or teind due to the Minister; in others, as in full of "the teinds of the lands; and in three discharges granted to one heritor, as "in full of the tack-duty." There was, however, no other evidence that a tack had ever existed.

The heritors farther maintained, *1mo*, That from the decision 29th February, 1680, Scott against the Archbishop of Glasgow, No. 1. p. 9339. it appeared, that in the year 1676 the patronage of the parish of Ancrum belonged to

the Archbishop, and consequently that the Crown charter, granted to the pursuer's predecessor in that year was null; and that as, at the Revolution the rights of the Bishops had been annexed to the Crown, the pursuer could not have acquired any right subsequent to that period, unless by act of Parliament, or at least a new grant from the Crown.

2do, That the charter 1676 was meant to convey the patronage, but not the teinds of the parish; 4th December, 1748, The Marquis of Annandale against Irving, No. 64. p. 15661.

3tio, They founded on the authority of Keith; the decision, 29th February, 1680, reported by Stair; a decree of reduction of certain valuations obtained at the instance of Mr. James Scot, designed "Parson of Ancrum," dated 24th July, 1667; and the discharges produced; as establishing, that the parish of Ancrum was a parsonage; and they, therefore, contended, that the pursuer, who at best was only patron of the parish, had no right to the teinds, as he had not complied with the regulations of the acts 1690, C. 23; 1693, C. 25. by getting a competent stipend modified to the Minister.

4to, They insisted, that whatever might be said as to the pursuer's right to the teinds in time to come, the circumstances of the case were sufficient to put them *in bona fide* to believe, that their teinds were liable to no other burden than the accustomed payment to the Minister, and consequently that the claim for arrears was ill founded; Bankton, B. 2, Tit. 8. § 141; Earl of Athole against Robertson, No. 34. p. 7804; 25th June, 1731, Sterling against the Feuers of Denny, No. 1. p. 1717.

The pursuer

Answered: *1mo*, The decision between Scot of Ancrum and the Archbishop of Glasgow relates to the patronage, and not to the teinds of the parish. At any rate, the pursuer's progress since the Revolution is sufficient to give him a title to both; for, as patronages and teinds were not annexed, the Crown may make grants of them without the authority of Parliament; 8th January, 1755, Donaldson against the Officers of State, No. 16. p. 9926; 22d February, 1783, Murdoch against Gordon, No. 26. p. 9942; Erskine, B. 2. Tit. 10. § 23.

2do, Except in the case of Kirkpatrick-Fleming, which was an erroneous decision, charters containing clauses similar to that in the charter 1676, have been uniformly understood to convey the teinds as well as the patronage of the parish; 1753, Spalding against the Heritors of Kirkmichael, No. 70. p. 15670; January, 1763, Heritors of Dalry against Blair, (not reported, See APPENDIX;) 6th June, 1792, Ogilvie against Scott. No. 83. p. 15695.

3tio, Admitting that the parish of Ancrum was at one time a parsonage, the regulations of the acts 1690 and 1693, apply only to those cases where the teinds have not been heritably disposed away from the parsons prior to their dates, and where the person claiming the teinds derives his right altogether from those statutes, and not to cases like the present, where the pursuer had a right prior to, and in-

No. 87. dependent of them : and even if he were claiming under these acts, it would be *jus tertii* to the defenders to object, that a stipend had not been regularly modified to the Minister of the parish. They have no interest in the matter, farther than that they pay no more than the amount of their teinds. Even the Minister could not state the objection ; for, provided he have a sufficient stipend, it can make no difference whether it is derived from immemorial use of payment, or from a regular decree of modification and locality.

4^{to}, A colourable title of possession will no doubt liberate from a claim of arrears ; but the defenders have no such title. They have no right themselves to the teinds ; and from the payments made the Minister, they had no reason to believe that they were exhausted. The greater part of the discharges bear, to be for stipend or teinds due to the Minister : And although it may be true, that where a titular or patron has been accustomed, for a series of years, to receive from the heritors an annual payment, inferior to the real value of the teinds, no claim for arrears will be competent at his instance, although his right to a higher sum should be afterwards ascertained, because the heritors had good reason to believe that no such claim lay against them ; yet a payment made to one person cannot hurt the interest of another claiming on a different ground ; 30th June, 1698, Bruce against Arnot, Sect. 4. *h. t.* ; Smith against Oliphant, No. 63. p. 15660.

The Lord Ordinary found, "That Sir John Scott is titular of the parish of Ancrum, and that he has a right to the bygone teinds of that parish for thirty-nine years last past, except in so far as the defenders can instruct that they have paid over the same to the Minister of the said parish."

Upon advising a reclaiming petition and answers, it was

Observed on the Bench : The pursuer has right to the teinds in question, either as titular or patron. It will be time enough to determine under which character he holds them, when a sale of them is brought in the proper Court.

Claims for arrears of teinds are extremely unfavourable. If the demand had been made in proper time, the heritors would, in all probability, have purchased their teinds. Any title of possession, therefore, sufficient to put them *in bona fide* to suppose that they were not liable to a claim of this nature, is always sustained as a valid defence against it ; and such the circumstances of this case, and particularly the terms of the discharges produced, afford to the defenders. The only difficulty is, Whether the pursuer's right should commence from the citation in this action, or only from the date of the judgment pronounced in it ? In the case of the Earl of Selkirk against Macmorran, No. 214. p. 15324. the Court at first found, (8th December. 1763,) that an heritor possessing his teinds on tacit relocation, was liable for their full value from the date of the citation in an action brought by the titular in order to interrupt it. A reclaiming petition was, however, presented against this interlocutor, and the Court found, (1764) that the interruption only took place from the date of the judgment, A similar decision was given, 14th November, 1765, Earl of March against Leishmans, No. 214. p. 15324.

Even when the heritors have no such defence as occurs in the present case, it is always very difficult for the titular, in an action for arrears, to ascertain the extent of his right. It is incumbent on him to establish what was the actual amount of the teinds each year; for he is not entitled to substitute, in its place, those calculations and conversions which have been introduced in favour of heritors, in processes of valuation.

The Lords unanimously "Found it unnecessary, *in hoc statu*, to determine whether the respondent (pursuer) is titular or patron of the parish of Ancrum: Found the petitioners (defenders) liable to the respondent in payment of the teinds of their lands from and after the date hereof; but sustained the defences in so far as regards bygone teinds previous to the date of this interlocutor.

Lord Ordinary, *Henderland*. Act. *Tait*. Alt. *G. Fergusson*. Clerk, *Pringle*.

D. D.

Fac. Coll. No. 161. p. 368.

1797. February 15.

MARY, &c. STEWARTS, *against* SIR JOHN SCOTT and Others.

Sir John Scott having prevailed in an action for having it declared, that he had right to the teinds of the parish of Ancrum, (See the case above.) Miss Stewarts, heritors in that parish, brought a sale of their teinds, in which Sir John demanded nine years purchase as titular, and produced a Crown charter conveying certain lands to him, "cum advocacione, donatione, et jure patronatus ecclesie et parochie de Ancrum, decimis rectoriis et vicariis ejusdem."

The pursuers, on the other hand, maintained, that this clause made him only patron of the parish, and as such entitled only to six years purchase of the teinds.

The circumstances of the case, and arguments of the parties, are stated at length in the report of the decision in the declaratory action.

Upon advising memorials, it was observed, that the decision, 4th December, 1748, Marquis of Annandale against Irving, No. 64. p. 15661. has not been since followed.

The Lords unanimously "found Sir John Scott has right to the teinds of the pursuer's lands libelled, as titular, and as such is entitled to nine years purchase."

Act. *Geo. Fergusson*.

Alt. *Tait*.

D. D.

Fac. Coll. No. 18. p. 41.

No. 87.

No. 88.

A clause in a charter from the Crown conveying lands to a person, "cum advocacione, donatione, et jure patronatus ecclesie et parochie, decimis rectoriis et vicariis ejusdem," makes him titular of the teinds.