1733.

EASTON
v.
STIRLING.

ROBERT EASTON, *et alii*, Feuars of Denny, in name and behalf of their Tenants, - - - - - - - - } *Appellants;*

WILLIAM STIRLING of Herbertshire, Esq. - - - - - - - - - } *Respondent.*

27th February, 1733.

TEINDS.—*BONA FIDE* CONSUMPTION.—An heritor possessing his teinds by virtue of a grant from another as tacksman, found to be *bonâ fide* possessor until interpelled by the titular.

Payment of a certain rate in name of teinds to the minister for 40 years without challenge from the titular, found to be a *bona fide* payment *quoad* the whole teinds, and to exoner the heritor of all bygones.

PROOF.—It was found by the Court of Session, that in a claim for bygones, the present rental is the presumptive rule *retro*, except in so far as the heritor can prove a less rental. No judgment upon this point was pronounced in the House of Lords.

[Fol. Dict. I. p. 110. Mor. Dict. p. 1717.

No. 21. THE barony of Denny, belonging to the Earl of Wigton, was divided into about fifty farms, which, in 1660 were converted into so many feus.

In 1723, Mr. Stirling, having right by a crown charter to the lands and barony of Herbertshire, with the teind sheaves, as well parsonage as vicarage of the kirk of Denny, raised an action against the feuars of Denny, for recovering from them the full teinds payable for all their lands for forty years bypast.

In defence, it was stated, that the teind had never been uplifted or claimed by the pursuer or his ancestors within the memory of man; that, on the contrary, six of these feus had immemorially paid a certain rate in satisfaction of parsonage teinds to the Earls of Wigton; six others had paid a similar rate to the pursuer and his ancestors; and that a like rate had been paid out of the remaining thirty-eight to the successive incumbents of the parish, to whom also a certain rate of money had past all memory been paid out of the whole fifty feus in satisfaction of vicarage teinds.

In the feu-rights granted by the Earl of Wigton to the six feuars who paid a rate for their parsonage to that family, the tithes were granted along with the lands, and the particular rate anciently paid was reserved as tithe duty.* But in the other forty-four feu-rights, the lands only were granted, and the teinds were left to those who have best right to them.

A proof of the value of the teinds claimed was allowed. February 15, 1727.

The mode of proof proposed was, with respect to part of the lands which were held in lease to assume, in terms of the statute, one-fifth of the rent as the teind; and as to the rest, to ascertain by the examination of witnesses its estimated value.

To both of these methods it was objected, that although they might be an equitable means of fixing the value with regard to the present or future payment of the teinds, yet in a question of bygones

* It appears from the interlocutor of the 31st December 1730, that the Earl had a tack of the teinds; but the fact is not otherwise instructed by the appeal papers.

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during forty years, it would be most unfair to compute them according to the present improved state of the lands.

Various interlocutors were pronounced, of which it is only necessary to detail the following:

January 7, 1730. The Lord Ordinary found, "that the rents payable to the defenders by their tenants, is the rate "for determining the *quota* of their tithes; that "the value of the houses let with small farms, or "the annual expense of upholding them, ought "not to be deduced from the rent, nor the feu-"duty payable to the superior; that there ought "to be no deduction where cottars houses are not "upheld by the masters; that there ought to be "no deduction on account of the expense of lim-"ing; and that where butter, cheese, and poultry "are valued at a price certain, it is to be taken as "part of the rent."

February 7. Adhered to former interlocutors, and "repelled "the defence of *bona fide* possession and consump-"tion, and found the defenders liable for their "tithes to the pursuer for forty years preceding "the date of their citation in this process, except "as to such as have made annual payment to the "pursuer in name of teind, who are found liable "only for arrears from and after the date of their "discharges."

July 4. "Repelled the defence of *bona fide* possession, "as it was insisted on in the general; but in so far "as it did appear that any of the defenders had paid "their teinds to the Earl of Wigton, prior to this "suit, that such payments should be deducted "from their tithes; and that the payments made

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" to the minister should be deducted in the same " manner."

" Found that it did not appear from the proof " that the payments made to the Earl of Wigton " was teind, but that the defenders are by their " contract expressly bound to pay the teind to " those having interest thereto yearly; and there- " fore that there ought to be no deduction on that " account," &c.

Dec. 31. Upon a petition against these interlocutors, " the " Lords sustained the defence of *bona fide* payment " as to such as uniformly paid to the minister of " Denny a certain sum in name of tithes, to ab- " solve them from surplus tithes preceding the " citation in this process; and as to such as by " their feu-contracts from the Earl of Wigton their " superior, have right to possess their teinds during " the tack his Lordship had of them, found that " the payment of teinds to him was made *bona* " *fide*, and is relevant to assoilzie such of the de- " fenders from bygones during the years of the " tack or tacit relocation, and remitted to the Or- " dinary to proceed accordingly."

June 25, 1731. The pursuer petitioned against this interlocutor, when the Lords found " that the sums paid to the " minister did not exoner such of the defenders " who made those payments from paying the re- " mainder of their teinds to the titular, and found " them liable for the same for forty years preceding " the citation; and sustained the defence of *bona* " *fide* payment in favour of such as by their feu- " contracts from the Earl of Wigton their superior, " have tacks of their teinds from him, and have

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"made payments conform, until they were interpelled by the pursuer's citation, and remitted "to the Ordinary to consider the case of such of "the defenders as have not made payment conform to the tacks in their feu-contracts, and to "proceed and determine accordingly."

July 28. In terms of this interlocutor, the Lord Ordinary found the defenders liable for their tithes for forty years preceding the citation, and decerned accordingly against them, excepting as to six of them whom he absolved from the payment, "in "respect of the payment made by them to the "Earl of Wigton."

February 2, 1732. The Lords adhered to this interlocutor, and found "that the present rental is the presumptive "rule *retro*, except in so far as the defenders could "prove a less rental," &c.

Entered March 14, 1732. The appeal was brought from the interlocutors of the 3d December 1723; 15th February 1727, 31st January, 1st and 20th February, and 17th June 1729; 7th January, 4th and 7th February, 4th, 8th, and 10th July, and 25th November 1730; 25th June, 9th and 28th July, and 23d December 1731; 2d, 5th, and 25th February 1732.

Pleaded for the Appellants:—Thirty-eight of the appellants having paid to the incumbents a certain customary rate for the teinds of their lands for time past memory, and having received discharges from persons, who, for ought known to them, had a full title to the teinds; and the respondent never having given them the least notice of his right or pretension, they acquired the surplus by having received and made use of it *bona fide*, and therefore ought

not to be made accountable for any tithe preceding the date of the action, any more than those who paid to the Earl of Wigton and the respondents, without knowing what title was in them.

By the law of Scotland the interest of titulars is valued at only nine years purchase, and that in favour of the heritors; yet by these judgments, the interest of the respondent as titular is by his own neglect made worth forty-nine years purchase, he having right according to them to a full fifth of the rent for forty years prior to the commencement of the action.

At all events, if he has any claim for arrears, these ought to be estimated not according to the present value of the lands, but by legal proof, to be brought by himself, of the actual value of the teinds at the time they became due; for the law which makes the fifth part of the rent the rule, relates only to the value of the teinds in time to come. And although valuing by *sowing* and *holding*, which depends on the evidence of witnesses only, may be a reasonable method of estimating with respect to the time to come, because necessary, there being no other possible way of knowing future products but by estimation; yet with respect to arrears it is not reasonable, because not necessary. The actual produce of the past years is what the titular has interest in the tenth of; and if by his neglect the proof of that actual produce is defective, the loss arising from that deficiency ought to fall on him to whom alone it can be imputed, and cannot be supplied by allowing evidence from opinion or esti-

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mation only, to the prejudice of the heritors who may have kept no accounts.

Pleaded for the Respondent:—1. The respondent has produced an undoubted title to the teinds of the lands belonging to the appellants. This title was upon record, and the appellants therefore cannot be supposed ignorant of it. None of the appellants have produced or pretended any right to any part of these teinds, although those who produced a colourable title under the Earl of Wigton have been absolved from the claim. But the defence of *bona fide* consumption can never have place without a colourable title; and the appellants having none, must have known that the right was in some other person, and consequently that they were accountable for them. They could not suppose that the payments which they made to the Earl of Wigton were in lieu of tithes, because in the grants which they held from the Earl, there is an express proviso that they should relieve the granter from the payment of tithes for the lands to such persons as had a right thereto.

Ministers have a right to maintenance out of the teinds, but cannot be presumed to be titulars, especially since the act 1690 giving to the patron the same share of teind that then remained to the clergy, and the receipts of teind-duty taken from the minister by the appellants destroy this presumption bearing "teinds payable to him out of the lands," so that they afford no ground for supposing that the minister was titular, or had a power to discharge the whole teinds. Therefore all the sums which the appellants paid to the minister being allowed to

them, it would be extremly unreasonable that the payment of a part of a demand to a person perhaps not properly entitled, should be held as a satisfaction for the surplus demand to the person who is rightly entitled to the same.

Judgment February 27, 1733.

After hearing counsel, "it is ordered and adjudged, &c. that the interlocutor of the said Lords "of Session, made the 31st December 1730, where-"by they sustained the defences of *bona fide* pay-"ment as to such as uniformly paid the minister "of Denny a certain sum in name of teind, be, and "is hereby affirmed with this addition, *(videlicet)* "['for forty years before the commencement of "the suit in this cause,'] and it is also ordered and "adjudged, that the several interlocutors com-"plained of in the said appeal or parts thereof, "which are inconsistent with the said interlocutor "as affirmed and amended, be, and are hereby re-"versed; and as to those several interlocutors or "parts thereof, which are consistent with that in-"terlocutor as affirmed and amended, the same "are hereby affirmed; and it is hereby further or-"dered that the said Lords of Session do proceed "in the cause accordingly."

For Appellant, *P. Yorke*, and *Dun. Forbes*.
For Respondent, *C. Talbot*, and *Will. Hamilton*.