

value of the lands, by their sowing and holding, it was found, "That the fifth part of the rental must be the rule, and that the services cannot come *in compute* thereof."

No. 58.

In valuations and sales of teinds, poultry are never computed, even though the master have the option to take poultry, or so much money as the value. Neither are services ever computed in estimating the extent of teinds; and so it was determined in this case, although the rent paid was alleged to be a third lower, on account of the great services paid.

How teinds are to be valued in a sale of lands, *vide* February 23, 1749, No. 8. p. 13317.

Kilkerran, No. 1. p. 548.

1739. July 18.

HERITORS of the PARISH of CALDER *against* The COLLEGE of GLASGOW.

Where a loch was drained, at a great expense, and the soil reduced to arable land, the same was, in an action of valuation before the Lords, as Commissioners for Plantation of Kirks, &c. found not liable to teind; and that not only while the subject remained with the original drainer by personal exception till he should be repaid his expence, but that the exception was competent to the singular successor for ever; for that wherever a rent arises by an extraordinary improvement, so far the titular has no claim thereto.

No. 59.
Extraordinary
improvements.

Kilkerran, No. 2. p. 549.

1744. December 8. KATHARINE COCHRAN *against* OLIPHANT.

The Lords, Commissioners for Plantation of Kirks and Valuation of Teinds, "found, That the Patron of a Provostry had right to the teinds thereof, in virtue of the 23. act, Parl. 1690, and act 25. Parl. 1693."

No. 60.

D. Falconer, v. 1. p. 23.

1745. June 25.

MR. ANDREW CHATTO, Minister of Morbottle and Mow, and the PATRON, *against* MOIR of Otterburn.

Every man who alleges a right to his own teinds must shew that his author had a right, unless he can plead prescription; and though teinds may be conveyed, and, before the Reformation, could not otherwise be conveyed than by tack, or other personal right, yet, when the question is of prescription, it is not plead-

No. 61.
Infestment in
teinds neces-
sary for pre-
scription.

No. 61. able without infestment. For although, in one case, ——— *contra* Lord Tilli-
coultry, No. . p. . prescription was sustained upon an infestment in the
lands following on a disposition to the lands and teinds, without any infestment in
the teinds, yet that was agreed to be a judgment contrary to law.

Kilkerran, No. 6. p. 553.

* * D. Falconer reports this case :

Mr. Andrew Chatto, Parson of Morbottle, pursued his heritors in a process of valuation, modification, and locality, in which Thomas Moir of Otterburn contended he had an heritable right to the teinds of part of his lands, and produced a disposition, *anno* 1672, to his predecessor's author of the lands with the teinds, and alleged possession had constantly been had thereon.

Pleaded for the pursuer : That Otterburn's right stood upon an apprising of the lands, with all tacks and other rights of and concerning the teinds, which could carry no further right than was in the debtor ; and the defender had been always in use to pay £.5 Scots to the Minister for this piece of land, which payment might have taken its rise from a tack, and was an evidence the heritor had no heritable right ; besides, the lands lying in a parsonage, the teinds thereof were not alienable till the year 1693.

With regard to the prescription, infestment having been taken in the lands upon the disposition, there was to this day no infestment in the teinds, and, without this, there could be no prescription, the statute extending to rights of teinds ; Stair, Tit. PRESCRIPTION, p. 357. (364.) ; and these cases, *anno* 1738, The Minister of Roxburgh against Fairningtoun, and 1730, Sir William Nicolson of Glenbervy against The Viscount of Arbuthnot ; see APPENDIX.

Pleaded for the defender : The argument might proceed with some more colour, if the parish were shown to have been in a parsonage before the Reformation ; but in some cases of parishes that were no parsonages, the incumbents got into possession of the whole teinds, and so they became such. There is no other evidence of this being a parsonage than a tack, *anno* 1610, by the Parson of his teinds, for 300 merks ; which, though a pretty good evidence of his being then a Parson, at the same time shews, by the smallness of the rent, that great part of the teinds did not belong to him ; for, even in parsonages, some of the heritors might have heritable rights, as is plainly supposed by the act 1693, giving the right to the patrons, without prejudice to all other rights formerly competent to them : And there is produced an excerpt from the cess-book of the parish of Morbottle, stating the value of the lands and teinds, and, from it, it appears that great part of the teinds belonged to the heritors.

To make a real right to teinds, there is no occasion for infestment ; and so, were it necessary, the positive prescription might be pleaded upon the disposition.

Pleaded for the pursuer : The parish appears to have been a parsonage as early as 1610, and cannot be doubted to have been properly one ; and if the defender

could be allowed to plead from all possible cases of heritable rights in parsonages, and suppose some such to have happened here, it would cut off all arguing from the nature of a benefice whatever.

No. 61.

The sum of 300 merks was a considerable rent at that time, when the granters of such tacks got *grassums*; and the excerpt insisted on is from a loose schedule, and only tends to shew that several persons had rights to teinds which were valued, but these rights might have been tacks.

The reservation in the statute, in favour of patrons, of all former rights, must be understood of tacks which they were in use to take in their own favour by interposed parties.

The Lords Commissioners found, That Otterburn had not instructed any heritable right to his teinds.

Act. Ch. Binning.

Alt. H. Home.

Lord Reporter, Dun.

D. Falconer, p. 109.

1748. July 5.

DUNNING against The CREDITORS of TILLIBOLE.

Halliday of Tillibole sold the lands of Briglands, part of the barony of Tillibole, to Mr. Alexander Dunning, Minister at Abernethy, whereupon he was infeft in 1711. But as no mention of the teinds was made in the disposition to Mr. Dunning, it came to be disputed in a judicial sale of the estate of Tillibole between the creditors and Alexander Dunning his son and heir, whether the adjudications of the lands and barony of Tillibole, though posterior to the purchaser's infeftment in the lands of Briglands, did not carry the teinds as *seperatum tenementum* from the lands which only had been disposed.

No. 62.

Teinds, if carried by a disposition of the lands?

Which being reported by the Ordinary, there was in general no controverting what the creditors pleaded on that head. Yet wherever from circumstances it appeared to have been the intention to convey the teinds, the Lords have been in use to find the teinds to be implied in the disposition of the lands; thus July 27, 1672, Scot against Muirhead, No. 31. p. 15638. teinds, though not expressed, were found implied in a disposition of lands, in respect of the following circumstances which occurred in that case, viz. That the purchaser was assigned to the tenant's tack, who paid a joint duty for stock and teind; 2^{do}, That he was burdened with the Minister's stipend; 3^{io}, That the price exceeded 20 years purchase of stock and teind: And as the circumstances were pretty similar in this case, there was little doubt made, but that the teinds were intended to be comprehended, though not expressed.

But it being suggested, that possibly the heritor of Tillibole may have been infeft in the teinds, in which case the creditors might be preferable upon their adjudications; the Lords, before proceeding to give judgment, remitted to the Ordinary to enquire what the right was which Tillibole had to his teinds, whether it was an heritable right on which he stood infeft, and whether the creditors were infeft on their adjudications.