

## BONA FIDE CONSUMPTION.

### SECT. I.

#### *Bona Fide* Possession of Teinds.

1731. *June 25.*STIRLING of Herbertshire *against* FEUARS of Denny.

**I**N a pursuit against feuars, at the titular's instance, for the teinds of their lands intromitted with by them; the defence *pleaded* for by-gones was, That they had been in use, past memory of man, to pay a certain duty, in name of teind, to the minister of the parish, presumed to have had a title, since no other titular appeared; and therefore *quoad* the residue they were *bona fide* possessors. — *Answered*, Ministers have a right to maintainance 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 with the clergy; and the receipts of teind-duty taken from the minister by the heritors, destroy this presumption, bearing 'teinds payable to him out of the lands;' so that the receipts do not so much as insinuate, that the minister was titular, or had a power to discharge the whole teinds. Found, that the sums paid to the minister do not exoner the heritors from paying the remainder of their teinds to the titular, and found them liable for 40 years preceding the citation.

This decision was reversed by the HOUSE of LORDS, and payment to the minister for 40 years, was sustained as *bona fide* payment *quoad* the whole teinds; which seems to be reasonable, for the heritor must uplift the teind, to save it from perishing in the tenants hands; and it would be hard to oblige him to be another man's factor without a salary.

In this case it was likewise found, That an heritor possessing his own teinds by virtue of a tack from another, as tacksmen, is a *bona fide* possessor until interpellated by the real titular.

*Fol. Dic. v. I. p. 110.*

*See* The particulars *voce* TEINDS.

1748. *November 8.* SMITH of Methven *against* OLIPHANT of Bachilton.

DAVID SMITH of Methven, and Katharine Cochran his mother, titulars of the provostry of Methven, pursued David Oliphant of Bachilton, for the teinds of his lands due within the years of prescription, as lying within the provostry: To which it was *answered*, That Bachilton had paid during these years a certain

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#### No 1.

An heritor possessing his own teinds, by virtue of a tack from another as tacksmen, found to be *bona fide* possessor, until interpellated by the regular titular. Payment to the minister for 40 years, without challenge from the titular, found to exoner the heritor of all by-gones.

#### No 2.

Where the heritor knew the minister to be stipendiary, payment to him of the teinds

No 2.  
did not free  
him at the  
hands of the  
titular from  
bygones.

quantity of victual to the minister of the parish, as the proportion of teind payable out of his lands; which payment behoved to liberate him of the superplus as to bygones, according to the determination in the case of the Heritors of the parish of Denny.

*Pleaded* for the pursuers, The minister of Methven has always been a stipendiary, which the defender must have known; so that he could not *bona fide* imagine he was paying a *modus* to him, as having right to the whole teinds; the minister having obtained a decret of modification and locality 1650, whereby the very quantities paid are localled upon the defender's lands; who also has for another purpose produced a decret of suspension 1659, by which this appears; and the receipts taken by him from the minister, bear to be for the proportion of teind payable by him.

The case of Denny (*supra*), in which the opinion of the Lords was for the pursuer, though reversed by the House of Lords, differed from the present, in that there was no decret of modification. The parson continued titular till the statute 1690, and had right to continue his possession, until the patron procured him a decret; and his discharges bore complete payment of the teinds and vicarage.

*Pleaded* for the defender, He was in *bona fide*; and the terms of the receipts are to be understood of the proportion of the teinds or stipend of the whole parish, not of the teinds of his lands. Partial payments of this sort are presumed to have commenced upon a tack; and the defender has produced a decret of suspension and multiplepointing, at his predecessor's instance, against the provost and minister, mentioning a tack set to him, the duty whereof has probably been assigned to the minister. And whereas it is *argued*, that this suspension shewed his knowledge of the minister's not being titular, it is *answered*, That so old a document, found and produced on occasion of this process, could not interpel him in consuming the superplus teinds, after paying the *modus* to the minister, as he or his predecessors knew nothing of it; neither could the minister's decret, obtained, as it bears, 'in absence of the heritors.'

For the pursuer, The mention of a tack in a suspension, is no evidence there ever was any; but rather the contrary, as no mention is made of it at discussing.

THE LORDS, 8th July 1748, found the defender liable in the superplus teinds, notwithstanding the minister's receipts; and, on bill and answers, adhered.

Reporter, Kilkerran. Aft. R. Craigie. Alt. Ferguson. Clerk, Murray.

Fol. Dic. v. 3. p. 96. D. Falconer, v. 2. No 4. p. 4.

See 8th December 1744, Cochran *contra* Oliphant, D. Falconer, v. 1. p. 23. *voce* TEINDS; and 13th July 1748, Oliphant *contra* Smith, D. Falconer, v. 1. p. 367. *voce* TEINDS.