

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.

No. 69. side of the Forth, of which those in question are a part, were not saleable : For that by the act 189. (190.) Parl. 13. James VI. *anno* 1593, all and whole the kirks, teinds great and small, &c. pertaining to the said Abbey, lying by-north Forth, are united and annexed to the Crown, to remain therewith as property in all time coming : And by act 245, Parl. 15. *anno* 1597, no part of the annexed property can be alienated, without a previous dissolution or subsequent ratification in Parliament, expressly dispensing with the annexation, neither of which had been obtained.

The pursuer answered, *1mo*, That the defenders misapprehend the meaning of the act 1593, when they suppose the teinds of the Abbacy of Dunfermline to have been thereby annexed to the Crown ; for whereas, by the act 1587, annexing the temporalities, and the teinds in the case where the teinds had been set together with the stock, there was an exception of the whole lands within the Abbacy of Dunfermline, so all the intention of the act 1593, was to recal that exception, and to put the lordship of Dunfermline on the same footing with the other temporalities : And lest the teinds being contained in the annexing clause, should occasion a mistake, and which were therein contained, because, by the act 1587, teinds were annexed where they had been set together with the stock, it is explained by an after clause in the act, which bears a special provision, that the teinds of the said lordship shall be understood to be annexed after the form and tenor of the act 1587, as all the teinds of the remanent prelacies in the realm are annexed to the Crown ; which particle *as* is omitted in the printed copy of the statute, though it is in the record, and shows the design of the act to have been no other than to annex the teinds of the lordship of Dunfermline in the same manner as the teinds of other kirk-lands had been annexed by the general act of annexation, that is, where they had been set together with the stock.

2do, That *esto* the teinds of the lordship of Dunfermline had been annexed by the statute 1593, they would have been disjoined by the King's charter in March 1594 of the whole lands and teinds of the lordship of Dunfermline granted to the Queen, and erecting the same into a temporal lordship in favour of her Majesty, and the heirs procreated or to be procreated between the King and her, whereby the Queen's daughter by the King would have succeeded to the lordship, although the King's son by another marriage had succeeded to the Crown.

This charter is thereafter ratified by an unprinted act in that same Parliament 1597, which was equal to a previous dissolution, agreeably to the printed statute of that same Parliament 1597 for securing the annexed property, which declares that no alienation thereof shall avail without either a previous dissolution in Parliament, or a ratification subsequent to the grant, dispensing with the act of annexation : And accordingly, the said unprinted act not only dispenses with the annexation in 1587, which was unnecessary, as the lordship of Dunfermline was not thereby annexed, but with all other laws, statutes, and ordinances made to the contrary.

And in consequence of this charter to the Queen so ratified, and by several subsequent statutes supposed to be ratified, King Charles I. took up the right to the

lands and others in the Abbacy, not *jure coronæ*, but as heir served and retoured to the Queen his mother, as we are informed by Sir George M'Kenzie in his Observations on the 189 (190) act, Parl. 13. James VI. *anno* 1593. And King Charles I. in his general revocation, Parl. 1633, distinguishes this estate from the lands annexed to the Crown, and by a particular clause revokes all grants thereof made during his minority, &c. And it could only be upon the footing of this ratification and titles so made up, that King Charles granted a tack to the family of Tweedale of the revenues of this abbacy for fifty-seven years in the year 1639, which was renewed by King William to the late Marquis for twenty-seven years, and has again been renewed by his present Majesty to the present Marquis; all which grants would be void if it were still annexed property, whereof long tacks are as little allowed as alienations.

Stio, That *esto* the teinds in question had been ever so much annexed and not disjoined, yet by the act 1633 and subsequent statutes, all teinds belonging to the King, as well as to others, are become liable to valuation and sale.

The intention of all the acts of annexation is only to prevent private grants from the Crown, but not to restrain future regulations that may be made by Parliament for great, seen, and reasonable causes of the realm; and the statute 1633 is general as words can be, that there shall be no teinds drawn, but that every heritor shall have the drawing and leading of his own teinds, the same being valued, and he paying therefor the price therein after specified, in case he be willing to buy the same.

And that there was no view of excepting teinds belonging to his Majesty, farther appears from the the regulations laid down in the King's decree-arbitral, upon the plan whereof the statute 1633 proceeded: Thus, particularly in the first decree-arbitral, the decerniture has these words: Where *we* or any other have right to teinds, *we decern*, &c. that in regard to the right which *we* or they shall be found to have, such a part, &c. shall be ordered to be applied to our or their use, &c. And the like general intention is expressed in the next decree, which bears, *We* being resolved to have an *universal order* within our ancient kingdom, that every heritor shall have the drawing of his own teinds, &c.

And upon all these grounds, which, to the generality of the Court appeared to be separately relevant, the Lords " Found the teinds of the pursuer's lands saleable."

This case is of little other use than as a piece of history, farther than concerns the abbacy of Dunfermline, especially as there are no teinds now that can be pretended to be annexed, other than those in question. The teinds of Orkney and Zetland were indeed once annexed: That they were so from the year 1612 to the year 1641 is certain, and from the year 1669 till within these few years; and yet they were found liable to valuation and sale, and instances there are of their having been sold accordingly, particularly in the year 1733, at the instance of Bruce of Symburgh against the King, as titular, and Sinclair of Quendal, tacks-

No. 69. man from the Crown, which fully confirms the construction that has been put upon the act 1633.

Kilkerran, No. 15. p. 559.

* * This case is reported by D. Falconer :

Captain Philip Anstruther pursued a valuation of his tiends of Inverkeithing, &c. belonging to the abbey of Dunfermline, against the Officers of State for the King's interest as titular, and the Marquis of Tweedale, tacksman of that part of the abbacy lying north of Forth, and no objection being made, obtained decret; after which he insisted in a process of sale.

Objected, These teinds were annexed to the Crown by act 190, P. 13. James VI. *anno* 1593, and never dissolved.

2dly, They are not affected by the statutes enacting that each heritor shall have the leading of his own teinds; these acts being founded on the submissions of the titulars, and the King's decreets-arbitral thereupon, and concerning only teinds comprehended in the said submissions and decreets.

Answered : Those objections were equally good against the decret of valuation, which the pursuer has already obtained as the sale : But they are good against neither ; for, *1st*, the teinds of Dunfermline are not annexed : All lands belonging to abbots and priors were annexed to the Crown, Act 29. Parl. 11. James VI. 1587, excepting the abbey of Dunfermline, which was annexed 1597, where teinds are mentioned, with lands, mills, &c. but with special provision, that they are annexed after the form and tenor of the general act ; and as all the teinds of the remanent prelacies are annexed ; in the general act teinds are not comprehended, except where teind and stock were set together ; and the annexation of the teinds of Dunfermline is to be understood in the same sense ; that is of those, if there were any, which had been, by the abbot, feued out with the stock : But, if teinds were comprehended in the annexation of the abbey, this annexation was dissolved. King James VI. 7th March, 1593-4, granted a charter thereof, erected into a temporal lordship to his Queen, and the heirs-procreated betwixt them : And, in act 208, Parl. 14, 1594, entitled, General dissolution of the property, whereby that King was empowered to set his annexed property in feu, it is statued the act should extend in favour of the Queen, that she might have such rights and infeftments of whatever lands pertaining to her, as she had before. And whereas, it was after enacted by the acts 236 and 247, P. 15, 1597, That dispositions of the annexed property should not be valid, unless made on a previous dissolution, or that a subsequent ratification were obtained, containing a special dispensation with the act of annexation, though the Queen's grant was good, as legally made before these acts, yet, for more security, an act was passed that same session, which is not printed, ratifying the Queen's charter, notwithstanding the act of annexation 1587, or any other act made to the contrary ; and so this estate being vested in the Queen, her son was, upon her death, served heir to her therein ; and

King Charles I. in his revocation past, Act 9. Parl. 1633, particularly distinguishes it, revoking grants made in his minority of the lordship of Dunfermline, to which he succeeded as heir to his mother : The said King also, in the year 1639, granted a tack of the revenues of this abbey to the Earl of Dunfermline, as did King William to the Marquis of Tweedale, and King George II. to this Marquis ; all which tacks would have been void if the estate were annexed, as being long tacks within the rental made without dissolution.

2dly, Supposing them annexed, this does not excude the process ; acts of annexation are an impediment to private grants ; but not to public regulations by statute ; whereby it is declared, that each heritor is to have the leading of his own teinds : And the regulations laid down in the decreets-arbitral, and statutes confirming them, regard by their tenor, as well teinds belonging to the King, as to the titulars who submitted ; and the contrary doctrine would exeem these teinds, not only from sale and valuation, but from being subject to stipend, which is imposed in consequence of the decreets-arbitral.

Replied, The teinds are annexed by the act 1593 ; for, though the act says, after the form of the general act of annexation ; and adds, “ And all the teinds of the remanent prelacies are annexed ; ” the mistaken reference to another act, and affirmation that the other teinds are annexed, which is also a mistake, does not hinder the effect of the direct annexation of these teinds in this act ; neither are they dissolved : The grant to Queen Anne needed no dissolution, as it was not an alienation, being to her and her heirs procreated by the King ; which failing, to his heirs in the Crown ; and accordingly, as there had formerly been a grant made to her for her life-time, the very next act to the act of annexation 1593, is, notwithstanding thereof, a confirmation of the said grant : The principality is part of the annexed property, which does not hinder its belonging to the Prince, when there is one, notwithstanding which it may not be alienated : And, in like manner, the Earldom of Ross was annexed to the Crown, with power to grant it to a younger son of the King, Act 7. Parl. 9. James IV. which estate is understood as annexed, as appears by the Act 30. Parl. 1587 : The ratifications of this right are consistent with the annexation ; or, if they are not, are ineffectual ; that by the 243. Act 1597, referring specially to the general annexation, and not to the act 1593, whereby the teinds of Dunfermline were annexed : King Charles’ service to his mother is of no import, as the estate being annexed, he might have held it *jure corona*.

2dly, The acts of Parliament made in consequence of the decreets-arbitral, however generally expressed, do not comprehend these teinds, as they were unalienable without special acts of dissolution, or special reference to the acts of annexation ; and therefore are not to be understood as falling under the purview of the subsequent general laws, according to the maxim, *in jure generi per speciem derogatur*. The exeeming the teinds of Dunfermline will be of no general consequence, they being the only teinds in the kingdom annexed.

No. 69. Duplied : The grant to the Queen was to her and the heirs of the marriage ; whom failing, to the heirs of the Crown ; by which means, if there had been only heirs-female of the marriage, and the King had had a son by another, the estate would have gone from the Crown, so that there was an alienation : The teinds are annexed by the act, as all the remanent teinds are annexed, which has been explained ; and though the word *as* has been omitted in the printed act, it is in the record. The teinds of Orkney were formerly annexed to the Crown, during which time Ministers got modifications ; valuations were obtained ; and at least one decret of sale, 24th January, 1733, Bruce of Symburgh against The King and Sinclair of Quendal.

The Lords Commissioners found the teinds were saleable.

Act. Ferguson & Boswel.

Alt. Advocatus & R. Craigie.

D. Falconer, v. 2. No. 195. p. 233.

1753. July 20.

SPALDING of Bonnymills *against* SMALL of Dirnian, and other HERITORS of the Parish of Kirkmichael.

Nc. 70. A grant in the following words, “ Nec non advocacionem, donationem, et jus patronatus ecclesiæ parochialis de Kirkmichael, rectoriæ et vicariæ ejusdem,” conveys the patronage only of the parsonage and vicarage teinds. But it was found, that the teinds were conveyed by a grant in the following terms : “ Una cum advocacione, donatione, et jure patronatus ecclesiæ parochialis, et parochiæ de Kirkmichael, cum decimis, rectoriis et vicariis ejusdem.”

Sel. Dec. No. 48. p. 55.

* * This case is thus reported in the Faculty Collection :

By charter under the Great Seal, dated in the year 1615, David Spalding of Ashintully had right to the patronage of the church of Kirkmichael. In the year 1678, Andrew Spalding of Ashintully obtained, upon his own resignation, a charter under the Great Seal, containing a *novodamus* of the lands of Ashintully, and of the patronage and teinds of the said parish, in the following words : “ Una cum advocacione, donatione et jure patronatus ecclesiæ parochialis et parochiæ de Kirkmichael, cum decimis, rectoriis et vicariis ejusdem.” This charter proceeds upon a signature superscribed by King Charles II. and subscribed by the Officers of State ; and there is a docquet subjoined to the signature, signed by the proper Officers, and addressed to his Majesty ; setting forth what was the import of the signature, and particularly mentioning, that it gave right to “ the patronage of Kirkmichael, teinds, parsonage, and vicarage thereof ;” and the charter was ratified in Parliament *anno* 1681.