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.

No. 62.
Teinds, if carried by a disposition of the lands?

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 disponed.

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*tio*, 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.

No. 62.

And upon the Ordinary's again resuming the report, as there was no evidence of any such heritable right in the heritor of Tillibole, and as, though the creditors were infeft on their adjudications, their infeftment was void and null, as it bore no symbol of any kind, the Lords "found the purchaser had right to the teinds, as well as to the lands of Briglands, and that they ought to be struck out of the sale."

Had the creditors' infeftments been ever so formal, it would not have altered the case; for as it did not appear, that the heritor of Tillibole had ever been infeft in the teinds, so the presumption was, that there never had been such infeftment, as originally teinds could not pass by infeftment, although afterwards the practice of infefting in teinds was introduced when they came to be the subject of laick feus. And if the right in Tillibole to the teinds was personal, then by the disposition of the lands supposed as above to imply the teinds, there was a consolidation, and therefore an effectual conveyance against all after adjudgers or purchasers.

Kilkerran, No. 9. p. 554.

1748. *July* 8. & *November* 8. and 17. SMITH *against* OLIPHANT

No. 63.
Bona fide payment of teinds.—Proved rent, if presumed *retro.*

In the process at Smith of Methven's instance as titular against Oliphant of Bachilton, for the fifth part of the free rent of his lands as teind, due for 40 years preceding the citation, at advising the proof that had been granted before answer, the defender pleaded absolvitor from bygones preceding the citation, in respect of his use of payment to the Minister of a chalder of victual, which the Minister's receipts bore to be the proportion of the teind payable by the Laird of Bachilton, and of the judgment of the House of Peers in the case of the feuers of Denny, sustaining the use of payment to the Minister to liberate from bygones; 2*dly*, That the rent was not proved for 40 years back, and could therefore be the foundation of a decree only for the years that were proved. See APPENDIX.

The Lords, on the 8th July, "Found the defender liable in the surplus teinds, notwithstanding of the Minister's receipts; and found it is to be presumed, that the rental of the lands for 40 years back was the same with the rental proved, since there appears no evidence to the contrary, notwithstanding the defender was allowed a proof for that purpose." And upon advising bill and answers on the 8th November, "Adhered as to the first point."

The case differed in many respects from that of the feuers of Denny; as not to mention that the receipts here were but few and late, so they bore not as in the case of Denny to be in full of the teinds payable out of the lands, but only of the proportion of the teinds payable by Bachilton, which was a stile more proper for a stipendiary than a titular, as indeed there was pretty good evidence that there had been a decree of modification.