

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.*

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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.

James Spalding having right by assignation from Spalding of Ashintully to certain by-gone teinds of the said parish, brought a process against the heritors for payment; and the heritors having denied that the pursuer's cedent had any right to the teinds, he contended that he had right, both *qua* patron in virtue of the 23d act Parl. 1690, and also by the charter 1678.

Pleaded for the heritors: That supposing Spalding of Ashintully to be patron of the parish of Kirkmichael, yet neither the words nor the spirit of the act 1690 gave him any right to the teinds of the parish; for the statute only gives the patron right to the teinds "which are not heritably disposed. Now, as the teinds of this parish belonged to the abbacy of Dunfermline, (as appears by a tack dated in the year 1595, granted by Q. Anne, with consent of K. James VI. her husband, to Ogilvie of Balfour, and which recites, "That he and his predecessors had been kindly tenants to the abbots of Dunfermline in the teinds of the said parish,") they were disposed by K. James VI. along with the other teinds belonging to the said abbacy, in favour of Q. Anne, and the heirs procreated betwixt his Majesty and the Queen; whom failing, to his Majesty, his heirs and successors whatsoever in the Crown of Scotland; and therefore could not fall under the words of the act 1690, granting to patrons the right of teinds not heritably disposed; neither did the teinds fall under the spirit or intention of the statute, for the patron had in effect the same right to the teinds before the act 1690 as after it; for it was lawful and usual for the patron to covenant with the person to whom he intended to grant a presentation, that, upon his admission, he should grant to a trustee for the patron a tack of the whole teinds of his benefice during his incumbency, and five years thereafter, reserving only such a tack-duty as should be a competent stipend. And as upon taking away the right of presentation by the act 1690, it was foreseen that the patron would be deprived of this benefit, therefore the act gave him the superplus teinds directly, which before he had by the circuit of tacks; but as the teinds belonging to the abbacy of Dunfermline had been disposed to Q. Anne and her heirs, the patron could no ways have right to them either before or after the act 1690.

Neither does the charter 1678 give any right to the teinds; for, 1<sup>st</sup>, the words there used are the common technical words made use of when a right of patronage, and no more, is intended to be granted; whereby, as the patronage of the kirk, so also the patronage of the teinds, is conferred. 2<sup>dly</sup>, In several of the clauses of this charter, the patronage only is mentioned, and not the teinds; particularly in the clause erecting the barony, the patronage is incorporated into the barony without any mention of the teinds in the dispensation with taking one sasine, and in the *tenendas*. 3<sup>dly</sup>, The charter proceeds upon Andrew Spalding of Ashintully's own resignation, with an express reference to the charter 1615, and therefore could give no right to the teinds, which, it is admitted, did not formerly belong to Ashintully. It is true that the charter 1678 contains a clause *de novodamus*, and it is also true that such a clause, when the signature is superscribed by the King, as the signature 1678 was, may confer a new grant; but as in this case reference is

No. 70. had to the charter 1615, it cannot be understood to do so, and is no more than a renewal of the former right.

Answered for the pursuer : That his cedent's right to the teinds is good by the act 1690 ; for the words of the act give the respective patrons right to all teinds which then remained with the Crown undisposed ; and though the teinds of the abbacy of Dunfermline had been heritably disposed by King James VI. to Q. Anne ; yet, as they had reverted to the Crown long before the act 1690, they are to be considered in the same light as if they had never been disposed.

And, independent of the act 1690, Ashintully had right to the teinds by the charter 1678 ; and the words used in that charter are such as are natural and proper, and such as are commonly used when teinds are conveyed. When a right of patronage only is conveyed, the words generally are, Cum advocacione, donatione, et jure patronatus ecclesiæ et parochiæ de A. rectoriæ et vicariæ ejusdem ; whereas, when teinds are intended to be conveyed along with the patronage, the words generally are, as in the present case, Cum advocacione, donatione, et jure patronatus ecclesiæ et parochiæ de A. cum decimis tam rectoriis quam vicariis ejusdem.

The teinds are expressly mentioned both in the dispositive clause and in the clause *de novodamus* ; and though they are not expressly repeated in some other clauses, yet they are sufficiently comprehended under the general words, viz. " The barony, comprehending the lands, patronage, and others above specified." And that the teinds were intended to be conveyed is past all doubt, from the docquet subjoined to the signature, which expressly mentions the teinds. Further, the ratification of this charter in Parliament mentions the teinds, parsonage, and vicarage, separately and distinct from the patronage. It is of no import that the charter 1678 proceeds upon Andrew Spalding's own resignation, and refers to the charter 1615, by which the teinds were not conveyed ; for the charter 1678 is no ways limited to what was granted by the charter 1615, which is only referred to as erecting the lands into a barony ; and Andrew Spalding or his predecessors might have acquired right to the teinds betwixt the date of that charter and 1678. But suppose they had not, the clause *de novodamus* in the charter 1678, proceeding on a signature superscribed by his Majesty, was sufficient to give Ashintully a right to the teinds ; for the chief purpose of a *novodamus* is to convey what did not before belong to the obtainer, or to secure against any defect in his former right. Accordingly it was found in the case of the Archbishop of Glasgow against Scot of Ancrum, that a clause of *novodamus* in the King's charter to the Archbishop in the year 1608 was sufficient to give him and his successors a right to the patronage of Ancrum, though the Archbishop could show no antecedent right in his predecessors to that patronage.

" The Lords sustained the pursuer's title."

*N. B.* As the Lords were clear that the teinds were conveyed by the charter 1678, they gave no opinion on the question arising from the act 1690.

*Act. Geo. Brown.*      *Alt. Ro. Craigie.*      Reporter, *Lord Drummore.*      Clerk *Forbes.*  
*B.*      *Fac. Coll. No. 81. p. 120.*