

1751. July 3. CHRISTIAN BEG against MR THOMAS RIG.

THE Earl of Loudon, as in right of the abbot of Melros, granted to Cuningham of Enterkin, a charter 1671, of the lands of Lochlie and others, *una cum decimis garbalibus cum iisdem inclusis*; the vassal paying a separate feu-duty *pro decimis garbalibus* of part of the lands, and relieving the superior of the localled stipend to the minister of Mauchline; and for the teinds of another part, paying a feu-duty, and relieving him *de annualibus regis, et albis firmis ejusdem debitis, secundum proportionem valuationis ejusdem*. This was not an original charter.

Enterkine disposed these lands 1718, to Mr Thomas Rig advocatè; whom Christian Rig, relict of Mr Thomas Lindsay, minister of Dalgain or Sorri, within which parish the lands lie, as disponee from her husband, pursued for the whole stipends, from his purchase, to Mr Lindsay's death in 1738.

The defence was *bona fide* possession and consumption, the lands being held *cum decimis inclusis*; for so was found, 19th July 1669, Douglas against Wedderburn, No 29. p. 1750.; 25th June 1731, Stirling against the Feuars of Denny, No 1. p. 1717.

Pleaded for the pursuer, The decisions were betwixt titular and heritor, which does not apply to the case of a minister: The rights of titular and heritor are exclusive of each other; but an heritor's right to teinds does not exclude a minister's stipend. The defender's right could give no *bona fides*, as it is not a charter from a churchman, of lands with the teinds included, which had never been formerly separated, but both possessed by the beneficiary; for it is only such teinds that are not affectable by stipend: Here the titular, whether having right to the lands, and originally feuing them out, or confirming a former feu of the abbot, has added a grant of the teinds; which, however, still make a separate subject, as by the charter produced there is a separate *reddendo* for stock and teind; and the vassal is burdened with stipend to the minister of Mauchline, and with the King's annuity. The lands lay originally in the parish of Mauchline; and the titular who was burdened with the whole stipend, when he disposed these teinds, laid part of it upon them: Afterwards, about 1650, the new parish of Dalgain was erected, by disjoining part of the lands of the old parish, the stipend whereof was localled on the heritors, and did not fall to enter their charters.

Mr Rig could be in no *bona fides*, in respect Mr Lindsay charged Enterkine the former heritor, in 1695, on a horning, proceeding on another in 1688, on the decret of erection; and Enterkine, in 1702, raised a declarator of immunity from stipend, or teind-duty, and obtained decret in absence; which Mr Lindsay in 1703 suspended, and Mr Rig was lawyer for Enterkine; but the suspension was never discussed: However, Mr Rig accepted his disposition to the teinds with warrandice from fact and deed.

No 3.

An heritor whose charter bore, *cum decimis inclusis*, and a separate *reddendo* for teinds, and was burdened with the payment of minister's stipend, was pursued for bygone stipend. He pleaded *bona fide* perception, the lands being now disjoined and annexed to another parish. *Bona fides* found to be excluded; the defender's predecessor having pursued a declarator of immunity, in which the defender himself was counsel.

No 3.

Pleaded for the defender, His lands are held by charter and *saſine cum decimis inclusis* ; which at leaſt is a good title of *bona fides* : Nor is there any thing in his rights inconſiſtent with this claim ; he is burdened with ſtipend to the miniſter of Mauchline, that is to ſay, the titular, when he granted the feu, made this a part of the *reddendo* ; and that it was the ſame thing to the vaſſal, whether he paid it to his ſuperior, or an aſſignee ; but there is no ſtipend impoſed on him to his own miniſter, which was the natural burden upon his teinds, if they were liable in any. Mr Rig cannot be ſuppoſed to have remembered the procedure betwixt Mr Lindſay and Enterkine, or if he did, it would have ſerved rather to perſuade him the lands were free, as there was a decreet of that import ; and Mr Lindſay neither diſcuſſed the ſuſpenſion, nor a reduction which he raiſed thereof.

THE LORDS, 5th February, ſuſtained the defence of *bona fide* poſſeſſion, founded on the charter *cum decimis inclusis* : And, on bill and anſwers, they repelled the defence. See PERSONAL OBJECTION.

Act. Boswel & J. Grant.

Alt. Ar. Hamilton.

Clerk, Forbes.

Fol. Dic. v. 3. p. 97. D. Falconer, v. 2. No 117. p. 260.

1752. November 24.

CAPTAIN HAMILTON BLAIR of Blair, *againſt* LAURENCE SCOTT of Baviſaw, and his Curator *ad litem*.

No 4.

Lands were adjudged, with teinds, &c. and expoſed to judicial ſale. There was no title to the teinds in the perſon of the common debtor. The purchaſer, from circumſtances, knowing that the ſale did not in fact include the teinds, being purſued for bygones, found not entitled to plead *bona fide* perception.

THE lands and eſtate of Kerſland, with the teinds, parſonage, and vicarage thereof, were brought to a judicial ſale before the Lords, at the inſtance of a creditor upon the eſtate, by an adjudication which adjudged both lands and teinds ; and William Blair of that ilk was called as a defender in the proceſs ; and in the year 1738, William Scott of Baviſaw became purchaſer of the lands and teinds, as expoſed to ſale before their Lordſhips.

Captain Hamilton Blair of Blair, as patron and titular of the teinds of the pariſh of Dalry, within which the lands of Kerſland lie, brought an action againſt Laurence Scott, ſon and heir of William Scott, the purchaſer of Kerſland, for payment of the bygone teinds of theſe lands ſince the time of the purchaſe. Sundry objections were moved to the purchaſer's title ; which being over-ruled :

It was *pleaded* for the defender, That the title under which the ſale proceeded, contained the teinds, parſonage, and vicarage, of the whole lands ; and the decreet of ſale adjudges and diſpones to the purchaſer the lands, with the teinds, parſonage and vicarage ; and therefore, had he continued to poſſeſs the teinds under this title for 40 years, he would have acquired an abſolute right to the teinds by poſitive preſcription : And as the defender has poſſeſſed the teinds for twelve years before the date of this action, he is entitled to plead that he is a *bona fide* poſſeſſor, and that they are *fructus bona fide percepti et conſumpti*, more eſpe-