

But the Lords afterwards varied the interlocutor upon the 2d point, and found, "that so far as the rental is proved, it must be the rule of accounting; but that the decree of the sub-commissioners in the year 1643, (whereof mention is made February 3. 1748. *inter eosdem*, Sect. 4. *h. t.*) must be the rule of accounting for such parts of the lands, whereof the rental is not proved for 40 years back down to the periods at which the pursuer has proved a higher rental;" and upon the 17th November, "adhered;" notwithstanding there was, as to some of the lands, a *semiplena probatio*, viz. by one witness, that the rent had been the same as at present for 40 years back.

No. 63.

It had been in many cases found, and particularly in the case of the feuers of Denny, that the present rental being proved *presumitur retro*, where the heritor does not prove the rent to have been raised; and several of the Lords could see no good reason for a different judgment in this case, not only as it had been formerly found, February 3, 1748, *inter eosdem*, that the report of the sub-commissioners could not be approved, but as in all such valuations, it is not the present rent only that is considered, but what is called the constant rent, what the lands do and may pay, and as the legal presumption was, as has been said, supported by a *semiplena probatio*.

But the majority were willing to lay hold on any thing in a case so unfavourable as the claim of the titular for 40 years bygone.

Kilkerran, No. 10. p. 555.

1748. December 4. The MARQUIS of ANNANDALE *against* IRVING.

In a sale pursued before the Commission, by Irving of Bonshaw, of his teinds in the parish of Kirkpatrick-Fleming, against the Marquis of Annandale, as patron, the Marquis alleged he was not only patron, but also titular, and, as such, entitled to nine years purchase. The right he produced was a charter in the year 1663, of the patronage, in these words: "Una cum jure patronatus ecclesie parochialis et parochie de Kirkpatrick-Fleming, et decimis tam rectoriis quam vicariis earundem."

But as in all grants of patronage there is a clause *una cum decimis*, to give the patron a title to the administration of the teinds, and as to give a right to teinds a special grant is necessary, which are not understood to be carried by such a clause as this, giving them as an appendage of the patronage, the Lords found, "That the Marquis had only right to the teinds as patron, and as such was entitled only to six years purchase."

In this same process, the patron having insisted, that, in respect of a depending augmentation, such part of the teinds of the pursuer's lands should be deducted from the sale as he might allocate in augmentation, so as he might free his own

No. 64.

Whether teinds are carried by a general grant of patronage *cum decimis*?

No. 64. lands, the Court thought the demand reasonable; but, as the *quantum* could not appear till the issue of the augmentation, they sisted farther procedure in the sale till the second Wednesday of June following.

Kilkerran, No. 11. p. 556.

1749. *January 4.*

The HERITORS of KIRKPATRICK-FLEMING *against* The MARQUIS of ANNANDALE.

No. 65.
A gift of patronage *cum decimis* found not to convey the teinds.

The heritors of Kirkpatrick-Fleming pursued the Marquis of Annandale, as patron, to sell them their teinds, at six years purchase; who produced a charter, 1663, containing this clause: "Una cum jure patronatus ecclesie parochialis de Kirkpatrick-Fleming, et decimis tam rectoriis quam vicariis ejusdem;" and contended, that, by the said charter, he had in him the title of the benefice, and consequently was only bound to sell at nine years purchase; for, at the date of this charter, the patron, as such, had no right to the teinds, and therefore the mention of them could only be thrown in on account of his being titular of erection; and the same charter contained the patronage of the Kirk of Johnston, without mention of the teinds, as he was only patron.

Pleaded for the pursuers: As patrons have not only the presentation of the Minister, but also an interest in the administration of the benefice, the stile of gifts of patronage is always, *Una cum decimis*, &c. and it has been an omission, that the patronage of Johnston was given without it; and in this same charter the clause occurs with regard to the kirk of Wamphry, which is a parsonage.

The Lords Commissioners decerned in the sale of the pursuer's teinds, parsonage, and vicarage, at six years purchase.

Act. Ferguson.

Alt. R. Craigie.

D. Falconer, p. 35.

1749. *July 19.*

DUKE of QUEENSBERRY *against* CARRUTHERS of Dormont, and Others, Heritors of the Parish of Middleby.

No. 66.
If competent to a patron to pursue a modification?

Found competent to a patron to pursue a modification and locality, though such process has rarely been pursued by a patron.

And the like process was sustained at the instance of the patron of the parish of Duffus, without any objection being made.

Kilkerran, No. 12. p. 557.