

No. 72. to challenge. With regard to the cases quoted for the pursuers, they are not similar to this case. In the case of Dun, the Minister of Maryton's possession was not founded upon a decree; and, *2do*, The interlocutor taking the teind-bolls from him was really of consent; and in the case of Inchtuir, the Minister had neither decree nor possession.

“ The Lords repelled the reasons of reduction of the decree of locality of Swinton; and also assoilzied the Minister and heritors of Swinton from the reduction.”

Act. *Pringle & D. Dalrymple.*

Alt. *Miller, Bruce, & Swinton.*

B.

Fac. Coll. No. 184. p. 272.

1756. July 24. DUKE of ATHOLE *against* The DUCHESS.

No. 73.

A proprietor who obtains a tack of his teinds from the Exchequer must communicate the benefit thereof to the liferentrix.

* * This case is No. 17. p. 7766. *JUS SUPERVENIENS, &c.*

1757. July 6.

JOHN HAY of Lawfield, and Others, *against* The DUKE of ROXBURGH.

No. 74.

Debated,
Whether, in
consequence
of the Refor-
mation, the
patrons of be-
nefices with-
out cure be-
came heri-
table proprie-
tors of the
teinds annex-
ed to these
benefices?

The Duke of Roxburgh had right, by progress, to the patronage of the prebendary of Pinkerton. In a process of valuation and sale brought by John Hay and others, the tithes of whose estates belonged to that prebendary, it was insisted for the Duke, That the price of the surplus teinds must be rated at nine years purchase; for that, as patron of this prebendary, which was not a benefice of cure, he had a full right to the tithes, prior to the acts of Parliament 1690 and 1693: That the tithes of benefices *sine cura* returned to the patrons after the Reformation *pleno jure*; but as, at that time, tithes were considered sacred, the patrons of Provostries and Prebendaries were, by act 12. Parl. 1657, allowed and requested to present bursars to such benefices; but that act of Parliament laid no positive injunction upon the patrons to apply the tithes of their benefices to these uses. In process of time, though the form of presentation was kept up, the presentee was understood to be but a name, with whom the patron, without being guilty of simony, might paction for the whole profits, for behoof of the patron himself: And at last, these forms were omitted, and the patrons of these benefices without cure were understood to have an heritable right to the tithes, Upon this footing, the teinds of Hedderwick, lying in the same parish of Dunbar, were rated, in the year 1679, at nine years purchase; and, in the year 1724, Sir Hew Dalrymple, then President of the Court of

Session, was decerned to pay nine years purchase for his teinds of Westbarns; see APPENDIX. No. 74.

Answered: The Duke had no heritable right to the tithes of this prebendary antecedent to the acts 1690 and 1693; and it is a consequence of the right which he acquired by these statutes, that he is only entitled to demand six years purchase. The patrons of prebendaries and provostries did not, by the Reformation, acquire a right to the fruits of these benefices. They continued still to present prebends or provosts; and though these were, indeed, but a name, and the patron often, by that means, indirectly enjoyed the fruits, yet this was a benefit not given to him by any law. On the contrary, it was enacted, Parl. 1567, C. 12. "That all patrons, having provostries or prebendaries at their gift and disposition, may, in all time coming, present the same to bursars, to study virtue and letters, within any of the universities of this realm,—which shall be no hurt or prejudice to their patronage, notwithstanding their foundations; and our Sovereign Lord and Estates heartily request all such patrons, to grant and dispoine their provostries and prebendaries to the bursars aforesaid."

And by act 161. Parl. 1592, the former act is ratified, with this addition, "That the said bursars, students, and titulars, lawfully provided to the said prebendaries, shall bruik, enjoy, and possess, in all time thereafter, the hail rents, profits, and emoluments, contained in the ancient foundations made by the said laick patrons."—Thus, the patrons had no right to the fruits or tithes of these benefices; and if they presented bursars or titulars for their own behoof, from whom they obtained tacks, or who possessed them in trust, this was an abuse of the law, and did not constitute a right.

That the patrons were never held to be titulars, appears from act 54. Parl. 1661, which declares, "That the entry of the vassals of provostries and prebendaries, by retour, precept of *clare constat*, resignation, comprising, or otherwise, shall pertain to the laick patrons; reserving to the titulars of said provostries, &c. the fruits, rents, and emoluments of these, which are nowise to be prejudged by this present act." The entry of vassals was, by this act, for the conveniency of the vassals, given to the patrons of these benefices; but the fruits were reserved to the titulars.

The acts 1690 and 1693 gave the right of the teinds of parishes, not heritably disposed, to the patrons of all parsonages and other benefices, without exception. These statutes make no distinction between benefices of cure, and without cure; and they limit the price to six years purchase.

Debated, but not determined.

For the Duke, *Lockhart*.

Alt. *And. Pringle, Ferguson*.

W. J.

Fac. Coll. No. 35. p. 58.