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.

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 *præsumitur 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.

No. 64.
Whether teinds are carried by a general grant of patronage *cum decimis*?

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 patronatûs ecclesiæ parochialis et parochiæ 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