1756. *January* 14.

JOHN DUNDAS of Newhall *against* The KING'S ADVOCATE and JOHN MARQUIS of TWEEDALE.

No. 71.
A proprietor is entitled to purchase his tithes even where the King is titular.

John Dundas of Newhall brought an action of sale of the teinds of his lands of Ferryhill, lying in the parish of Dunfermline; and as the teinds of the abbacy of Dunfermline, of which the teinds now mentioned make a part, belong to the Crown, and are in possession of the Marquis of Tweedale by a lease, the Officers of State and the Marquis were called as defenders. The defence made for both was, That the teinds of the abbacy of Dunfermline have become part of the annexed property, and, therefore, cannot be sold by the Crown without a previous dissolution in Parliament. To prove this point, the defenders gave a long historical deduction, which was very far from making good the allegation. The case shortly stated is this: The abbacy of Dunfermline, on the north side of Forth, annexed to the Crown by act 192, Parl. 1593, was that same year disponed by James VI. to his spouse Queen Anne and the heirs betwixt them; which failing, to the King's heirs and successors in the Crown of Scotland; to be held of the Crown in free blench for yearly payment of six shillings eight pennies Scots. This deed of alienation was ratified in Parliament by act 10, Parl. 1612; and, in the same act, counsellors are named to her Majesty, by whose advice and consent deeds of alienation made by her shall be effectual in law.

With respect to this alienation, the blench-duty might indeed remain annexed; but surely the property vested in Queen Anne could no longer remain as any part of the annexed property; for it is a contradiction in terms to say, that an estate is annexed to the Crown, which does not so much as belong to the Crown. Nay, by the tenor of the settlement, this estate might for ever have remained separate from the estate of the Crown. A son of the King's second marriage would have excluded from the Crown a daughter of the marriage with Queen Anne; and this daughter and her posterity would for ever have enjoyed the abbacy of Dunfermline. *Secondly*, Queen Anne, with consent of her council, could alienate the whole. This is another inconsistency with the supposal of its remaining annexed property.

Charles I. had no right to this estate but as heir to his mother; and accordingly, he made up titles by a service and infeftment, whereby it came to be in his power to alienate without the least restraint. His mother could not alienate without consent of her council; but no such limitation was imposed upon him.

Nor is this estate in any manner to be compared to the principality, which even in possession of the heir of the Crown, is understood to be the property of the Crown; and accordingly, the Prince takes the principality without any infeftment.

But, in the *next* place, supposing this to be annexed property, it was considered that the privilege of purchasing the teinds of their own lands is given to heritors

No. 71. in general terms, without exception of the teinds of the annexed property; and, therefore, that this process appears to be well founded, supposing the teinds in question to be annexed. The King cannot alien the annexed property, but a statute may. And as to what was observed from the act 17, Parl. 1633, that certain teinds are there supposed not to be saleable; the answer was ready, that this statute obviously refers to teinds allocated for payment of Ministers' stipends.

"The Lords accordingly decerned in the sale of the teinds in common form."

Judgment was here given upon the case in general. But as it was the opinion of the plurality, that teinds annexed to the Crown are saleable, the judgment may be considered as an authority upon this point. See No. 69. p. 15665.

Sel. Dec. No. 98. p. 135.

This case, (affirmed on Appeal) is thus reported in the Faculty Collection.

The pursuer brought an action of valuation and sale of the teinds of his lands of Ferryhill, in the parish of Inverkeithing, against the Officers of State, on behalf of his Majesty, who in the right of the Abbay of Dunfermline, was titular of these teinds; and also against the Marquis of Tweedale, tacksman thereof. A decreet of valuation was pronounced without opposition; but the defenders objected against the sale, pleading, that the teinds which had belonged to the Abbay of Dunferlmine were not saleable; because, at the Reformation from Popery, they became the property of the King in place of the Abbot; and, by the act 192. of the Parliament 1593, both the lands and teinds of this Abbay, on the north side of the Forth, were annexed to the Crown unalienably; and therefore, in virtue of the acts James II. Parl. 11. cap. 43. and of James V. Parl. 6. Cap. 84. and other acts relative to annexed property, they could not be sold without a previous dissolution in Parliament.

More particularly, by the act 29. 1587, intitled, "For the Annexation of the Temporalities of Benefices to the Crown," it is declared, "That under the said annexation, the teind sheaves, and other teinds of whatsoever lands within this realm, pertaining to any parsonage or vicarage, are not, or shall not be, comprehended, except where the teind and stock are let together, *(i. e.* where there are *decimæ inclusæ)*; in which case, it is provided, that nine-tenths of the rent of the lands shall be paid to his Majesty, and the remaining tenth to the ecclesiastical person to whom the teinds belong." And the act also excepts from the annexation, "the hail lands of the Abbay of Dunferlmine, which are declared to remain with the Abbay till further order be taken."

In 1589, the lordship, lands, teinds, &c. of the Abbay, on the north side of the Forth, were, by way of morning gift, granted by the King to Anne his Queen, for her life; and the gift was confirmed by the King in 1590, and by acts of Parliament in the years 1592 and 1593.

No. 71.

By the 192d act, Parliament 1593, entitled, *Annexation of the Abbay of Dunfermline*, " The whole lordship, lands, teinds, &c. belonging to that Abbay, lying on the north side of the Forth, are annexed perpetually to the Crown, with special provision, that all the teinds of the said lands of Dunfermline shall be understood, by virtue of this act, annexed to the Crown, after the form and tenor of the said general act 1587 ; ' and as all the teinds of the remanent prelacies and kirklands of this realm are annexed to the Crown."

In 1594, the King did, *de novo*, granted " the Abbay lands of Dunfermline, and teinds thereof, to the Queen, and to the heirs of her body by the King; whom failing, to return to the King and his successors in the Crown of Scotland."

And the charter contains a provision, disabling the Queen to alienate without consent of Parliament.

In 1618, upon the Queen's death, the Abbay lands and teinds descended to Charles then Prince of Wales, her son, afterwards Charles I. by whom and his tacksmen the same were possessed during his life, and have ever since followed the patrimony of the Crown.

Upon this the defenders argued, 1*mo*, That the teinds of Dunfermline were annexed to the Crown by the said act 1593 ; and alleged, that the exception of teinds in the act 1587, related only to teinds " pertaining to any parsonage or vicarage;" and therefore the reverence which the act 1593 makes to that act as to teinds, could not imply the non-annexation of teinds *pertaining* to the Abbay, and which never pertained to any parson or vicar. Such construction would defeat altogether the annexation of teinds by the act 1593 : The reference must therefore be applied to the regulations of the act 1587, as to *decimæ inclusæ* only; meaning that these regulations should be extended to the *decimæ inclusæ* of the Abbay.

2*do*, That the grant to the Queen, and to the heirs of her body by the King, under restriction of not alienating without consent of Parliament, did not alter the nature of the estate. It still remained annexed property, and was considered as such by Parliament ; for the act of annexation, and the act confirming the grant to the Queen, passed in the same day. Similar are the cases of the principality and of the earldom of Ross, which are annexed property, though possessed by the first and second sons of the King.

But, even supposing a temporary dissolution by the grant to the Queen, yet the accession of King Charles, her heir, to the Crown, put an end to that temporary dissolution. The clause of return took place ; and these teinds *jure coronæ* sunk into the inheritance of the Crown as annexed property, and as such have been enjoyed ever since.

3*tio*, Charles I. being in possession of these teinds in the 1625, his general revocation at that time could not relate to them. The revocation was the groundwork of the subsequent proceedings of the Commissioners of the King's decree-arbitral, and of the act 1633, and other acts for " plantation of kirks and valuation of teinds," down to the Union. These acts, notwithstanding the generality of their

No. 71. words, could not be intended to go beyond the subject of the revocation. At any rate, the words of these general acts, which were made for other purposes, and where the case was not immediately under the view of the Legislature, cannot, by implication, be extended to the teinds in question, which were annexed to the Crown unalienably; " without advice, decree, and deliverance of the hail Parliament, for great and reasonable causes, concerning the welfare of the realm, first to be advised and digestly considered by the hail Parliament."

Answered for the pursuer: 1*mo*, The teinds in question seem never to have been annexed property; for the general act of annexation 1587 excepts all other teinds but *decimæ inclusæ:* and the words, " pertaining to any parsonage or vicarage," mean all teinds whatever; for all teinds are either parsonage or vicarage. And by the reference to this act, made in the particular act for the annexation of Dunfermline, the teinds of that Abbay were annexed no further, nor in any other manner, than the teinds of the other church-lands, none of which were annexed unalienably; therefore, the plea of annexation cannot bar the action.

2*do*, Supposing these teinds were annexed, yet they were again dissolved by the grant to the Queen, and confirmations thereof in Parliament. The exception of this Abbay from the general act of annexation, and the particular act annexing it to the Crown, immediately preceding the grant to the Queen, evidently show that the intent of the annexation was only to recover this estate to his Majesty, free from former alienations of parcels thereof, which could be effectually done only in this way. Thus disencumbered, it was immediately settled upon the Queen, and the heirs procreated between her and the King, as a private estate of inheritance; and the grant was ratified by repeated acts of Parliament. In virtue of this, King Charles I. succeeded to this lordship, not as being heir to the Crown, but as heir to his mother, and completed his titles as in private rights, and was infeft, and his infeftment duly recorded in 1619. Had he never existed, and had there been daughters only of the marriage, the estate must have descended equally among them; or had there been only one daughter, and the King had an heir-male of any subsequent marriage, the Crown would have gone to such heir-male, but this estate would have descended to that daughter. Thus, the estate might have been separated from the Crown for ever, and cannot possibly be construed to be any part of the annexed property. It could also have been alienated by the Queen, and any four of the Council appointed for her affairs. The heirs were under no prohibition from alienating, and could dispose of it at pleasure; and, accordingly, by several grants of parcels of the lordship, absolute grants of some parts of the teinds thereof, and long leases of other parts of those teinds, the estate is become of little or no value to the Crown.

3*tio*, The acts regulating the valuation and sale of teinds proceeded upon the general plan of the good, peace, and tranquillity of the kingdom; with the intent, " That an universal order should be established within the kingdom, concerning the matter of teinds;" and that every heritor " should have and bruik his own teinds, of whatsoever nature the said teinds are." The act 1690 extends the

regulations of former statutes for the sale of teinds, " to all teinds," except such as were appropriated for the provision of Ministers; which, although allowed to be valid, are exempted from sale. The subsequent acts proceed upon the same general plan; and when exceptions are judged necessary, they are particularly mentioned. As, therefore, no exception of the teinds of annexed property was ever made by any of the acts, such exception cannot now be introduced contrary to the general plan of all these statutes, and to the liberal construction which they have uniformly received. No. 71.

As to the objection, That the acts in 1633, and subsequent acts, ought not to be extended beyond the revocation in the year 1625, and the proceedings in 1628 and 1619, said to be the ground-work of these acts; and, therefore, that the teinds of Dunfermline being, in 1629, the King's property, could not fall within the revocation and submission; and by consequence not under the statutes relative to the sale of teinds; answered, in the *first* place, That the objection proceeds upon a mistake in fact; for it supposes that the revocation in 1625 found the whole lordship of Dunfermline in the King's possession at that time; and consequently no object of the revocation: whereas, the fact is, that the revocation expressly mentions and annuls several grants of lands and teinds, part of this very lordship, made by the King's mother and himself; and consequently, by the pursuer's own argument, the teinds of this lordship must as much be an object of the acts 1633 as any other in the kingdom. In the *next* place, even the decree-arbitral pronounced by the King, in 1627, contains a general regulation for " all teinds," and, in express words, includes " those belonging to the King." *Lastly*, The words of the act 17th Parliament 1633 are entirely general, without reference to any preceding transaction, which, not being made the ground of the act, cannot influence or restrain its exposition.

" The Lords decerned in the sale of the teinds, parsonage, and vicarage of the pursuer's land, at nine years purchase," &c.

Act. *Lockhart.* Alt. *Craigie & Grant.*

B. *Fac. Coll. No.* 175. *p.* 260.

*** This case was appealed. The House of Lords ORDERED, That the interlocutor complained of be affirmed.

1756. *February* 4.

The MINISTERS and HERITORS of EYEMOUTH, and PROCURATOR for the CHURCH, *against* The OFFICERS of STATE, as Patrons, WILLIAM EARL of HOME, and the HERITORS and MINISTER of SWINTON.

No. 72.
A Minister of one parish

The parishes of Swinton, Paxton, and Eyemouth, were parts of the erected priory of Coldingham; and the stipends of these parishes were allocated in