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a glebe, which, according to law, should consist of four acres; if upon measuring half an acre more appear to have been designed, the designation is null.

THE LORDS, before answer, ordained the land to be measured.

Harcarse, (MINISTERS.) No 696. p. 196.

1751. February 13. & 15.

ROBERT MACKINTOSH *against* The TOWNS of Perth and Linlithgow.

No 34.

It was found there was no charge of third minister in Perth, nor second in Linlithgow.

BY an act 17th George II. for raising and establishing a fund for a provision for the widows and children of the ministers of the church of Scotland, a method is laid down for raising the said fund by yearly contributions, to be paid by the ministers having right to benefices in the church, and by every benefice that should become vacant before the 24th of March 1744, being subject and liable to the sum of L. 5 Sterling for every half year that the vacancy should continue; and every benefice that should become vacant after the said 24th of March 1744, being liable to the sum of L. 2 : 10s. for every half year during the vacancy; which is ordained to be paid in to the presbytery, within whose bounds the benefice lies; and it is enacted, 'That such ministers of the church of Scotland, as were or should be ordained or admitted assistants and successors to the minister having right to the benefice, should, as to all the purposes of the act be held as admitted to a benefice in the church of Scotland, only from the time that any such assistant was or should be married, or when he should come to have right to the full benefice.'

Robert Mackintosh, as commissioned by the presbyteries of Perth and Linlithgow, brought an action against these burghs, for payment of the quota out of their vacant benefices of the second minister of Linlithgow, and third of Perth, in terms of the act.

Answered, There are no such benefices in the church, as those of the second and third ministers respectively, of these burghs; there is not any decret of the Commission for the plantation of kirks, establishing any such benefices; and those who have officiated, were only in the nature of assistants to the beneficiary, employed and voluntarily provided for by the burgh, with the assistance of others in the parish; and their stipends no charge on the teinds; the Magistrates could not dilapidate the town's common good, by subjecting it to any such constant burden; and as the other funds had failed, they had discontinued the calling of any minister in these places, there being no necessity for them.

Pleaded for the pursuer, The act appointed the quota to be levied out of every vacant benefice; and it is plain it considered every minister, settled in a stipend as in his own right, as having a benefice; and the said stipend as one, however made up; as it takes notice of assistants to another beneficiary, ordained as successors to him in the benefice; most of the erections of ministers,

more than one in burghs in Scotland, were made by acts of Council, without decreets of the Commission; which was only empowered, by the statute 1693, to establish second ministers in parsonages; and here the defenders have only discontinued the calling ministers to these benefices; but there has been no step taken, by which it might appear that they were suppressed; so that they may fill them when they please, and the ministers may claim the benefit of this fund; which will not have received any thing during the vacancy. The second minister of Dumfermline, erected after the same manner, obtained an augmentation of his stipend out of the tithes; and the patron of Haddington was found patron of the second minister thereof; and a patron is a correlate to a benefice.

For the burgh of Perth, This kirk having belonged to the abbey of Dumfermline, the patronage thereof was by Queen Anne granted to the town; but the teinds being mostly set in tack, the minister was slenderly provided; and in 1616, at a visitation by four bishops, it was ordered that the lands of Blackfriars and Charterhouse, which had been granted to the minister and elders, for the direction and sustentation of an hospital for the maintenance of the poor, and for other pious uses, should be applied to the maintenance of a second minister, until another fund should be found; from which time, till 1715, there have been two ministers; the town having acquired the tacks to the teinds, came in 1708 to have a surplus of teinds in their hands, after paying the two ministers; whereupon they resolved to apply the rents of Blackfriars and Charterhouse to the maintenance of a third minister; having consulted the then Queen's Advocate, and been advised by him that it was in their power so to do, as that was a pious use; and this matter being communicated to the kirk session, was laid before the presbytery, and by them referred to the Commission for advice; who were of opinion that these lands, which had been allocated to an hospital, and possessed by the town for their second minister, could not be allocated to a third minister; the Town, however, continued to possess them, when by act of Council, 14th February, 1715, they agreed to assign the sum of 1000 merks Scots yearly out of the Town's common good, to a third minister; 'until another fund for the payment thereof should be found out; and with express condition and provision always, that in case the inhabitants of the parish of that burgh should so far diminish, that one church would contain and accommodate them, to hear the gospel preached, that then the foresaid maintenance and provision of 1000 merks should revert and return back to the common good of the burgh;' and Mr William Wilson was in 1716, ordained third minister. The Town possessed the Blackfriars and Charterhouse till 1731, when it was evicted from them by the presbytery, as overseers of the hospital. On the death of their second minister 1733, the Town endeavoured to have Mr Wilson settled in his place, but could not prevail with the presbytery; and so they continued to have three till 1740 that he was deposed; since which they have had no third minister, and do not con-

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ceive they are obliged to call one, since the Charterhouse and Black-friars have been evicted from them, which was the original fund they proposed to maintain him with; and since by the act of Council his provision was to revert to the town on the decease of the inhabitants; and there is now no occasion for a third minister, considering the number of Parishioners that have adhered to Mr Wilson in his secession; a minister settled in this manner cannot be considered as a beneficiary of the church, and could not pursue for an augmentation of stipend; as was found in the cases of the second minister of Inveresk and Kirkcaldy. The teinds of the parish which have been valued, do not amount to more than the stipends of the two first ministers.

For the pursuer, It does not appear when a second minister was settled in Perth; His stipend, as well as that of the first and third, is settled by acts of Council, and he might as well be discontinued as the third; the Council, in 1708 agreed that the rents of Black-friars and the Charterhouse should be applied for a stipend to a third minister; so it was not intended he should be barely a helper; and though this was the fund originally intended, yet when the settlement was actually made in 1715, it could not be depended on, as they had got advice it could not be applied to that purpose; and, by after acts of Council, in 1720 and 1722, the stipend was augmented; because that the charge of so numerous a people was too great for two ministers, and it was indispensably necessary to have a third; and where the work was the same, there should be no difference in the reward. On a vacancy of the second minister in 1733, the town brought Mr Wilson their third minister into his place; and called Mr David Black to be third minister; but the presbytery not agreeing to settle Mr Wilson, they reversed the act, and called Mr Black as their second minister; they cannot at present take any advantage of the condition of the first constitution, for the number of inhabitants is not decreased; and notwithstanding the secession, the adherents to the church cannot be accommodated without two churches.

' THE LORDS, 21st December 1750, sustained the defence made by the town of Perth, that there was no vacancy, the third minister being now suppressed.' And, on bill and answers, 13th February 1751, adhered.

Pleaded for the burgh of Linlithgow, The minister, in 1637, obtained a decret of augmentation, making his stipend 620 merks money, and eight chalders three bolls victual, to be paid ay and while a second minister should be placed in the said kirk, to his help and assistance; and then he should quit the new augmentation of 350 merks granted to the second minister, if any should be; there was no second minister placed, in consequence of this decret, only at several times the minister got helpers, who were maintained by contribution, until that, in 1699, the Guildry agreed to pay 200 merks, the incorporated trades, severally, certain sums, amounting to 200 merks, the inhabitants of the town 250 merks, by subscription, and those of the country 200 merks, and afterwards the Magistrates granted bond to pay, during the space that the church government should be presbyterian allanarly, and no longer, 650 merks.

of stipend, with L. 40 for house mail, by and attour 350 merks payable by the heritors in the landward parish, and 200 merks payable by the tenants in the country part of the parish; which 350 merks was to be uplifted by the colleague himself, and the 200 merks by the landward elders; providing that so soon as the landward heritors should agree to pay 2 merks upon each L. 100 of their valued rents, as they were in use formerly, which made 250 merks, the tenants were to be free of their 200 merks, and the Town of 50 merks, under the express provision always, that the town should noways be liable to pay the foresaid stipend and house mail, during the vacancy of the ministry; on this bond Mr Barclay was settled second minister in 1701. There was no erection of a second minister by the decret of augmentation, though it was supposed, one might after be erected; there was not even any erected when the bond was granted, which is by its construction conditioned to the subsistence of the present church government; and the fund itself hath failed by the failure of the subscribers; the magistrates did not undertake for those in the country, and have been brought into great difficulties, by the failure of those in the town, and obliged to attempt new subscriptions, which have not succeeded; and therefore on the transportation from them, in 1743, of Mr Spiers, who succeeded Mr Barclay, they forbore to call a second minister. It appears by a tract of acts of Council, that the Town never intended to lay this stipend as a burden on their common good; neither, at any rate, can there be any thing paid as out of a vacant stipend, as by the bond itself there is no stipend due during a vacancy.

Pleaded for the pursuer, It appears by the records of the presbytery, that second ministers were uniformly placed from the year 1639, to the revolution; there is here an erection authorised by the commission, and there was a formal renunciation of the additional stipend made by the first minister; the Town and heritors agreed to pay, viz. the Town 600 merks, and the heritors 250 merks, to which purpose there is an act of council 1695, as also another that year, by which the treasurer was to collect the Town's part of the stipend; and other two in 1699; by the last of which they were bound to pay 50 merks more, in case the heritors should not pay the two merks on the L. 100 for which they granted bond that year; and it appears they got relief from the inhabitants and corporations of the town; the acts of Council contain no condition of the continuance of church government; the act of Parliament pursued on makes the *quota* payable out of every vacant benefice, and suppose the Town's part of the stipend could not be affected, there is a sufficient fund of the 350 merks modified by the commission; the Town have a grant of two pennies on the pint of ale, vended within it, burdened with the payment of their minister's stipends, and cannot deny this to be a benefice, while they enjoy that grant.

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THE LORDS, 21st December 1750, repelled the defence for the Town of Linlithgow ; but, on bill and answers, sustained it.

Act. *Ferguson & Lockhart.*Alt. *R. Craigie.*Clerk, *Kirkpatrick.**D. Falconer, v. 2. No 196. p. 235.*

S E C T. II.

Feus granted by Churchmen.

1566. *April 26.*DAVID ERSKINE, Archdean of Brechin, *against* DAVID PITCAIRN.

No 35.

Kirk lands were sold by the Chapter, with consent of the vicar-general, there being at the time no bishop. The sale was reduced, as the vicar-general could only, *sede vacante*, authorise necessary, not voluntary deeds.

DAVID ERSKINE, Archdean of Brechin, intented a reduction of David Pitcairn's infeftment of the lands of Drummies, because they were set in feu to him without consent of the Bishop. *Excepted*, There was no bishop the time of the giving the said infeftment, and the Vicar-general consented thereto, with the most part of the Chapter, who by law might have given any benefice vacant, there not being a bishop. *Replied*, It is true that benefices vacant might be given by the Vicar-general, *sede vacante*, and the Chapter, sicklike as sages of lands vacant by decease, and other things *quæ necessaria sunt jurisdictionis, quia alias coacte datur possessio vel beneficium*; yet selling of lands, as in this case, being voluntary, could not be; *quia nemo cogitur alienare (ut in C. ne sede vacante al. innov.)*—THE LORDS found the infeftment null, and reducible for the cause foresaid. Further *alleged*, That the defender's infeftment was confirmed by the Queen, who was both in the Bishop's place and the Pope's, by the act of Parliament, whereby the want of the Bishop's consent was supplied. *Answered*, That the Queen's confirmation was only *in communi forma*, not making mention of supplying of the said defect, and also it was given after the intending of the pursuer's action of reduction; so that it ought to be esteemed purchased surreptitiously, *super re litigiosa, et in præjudicium tertii interesse habentis non vocati*, and so could not *supplere defectum consensus Episcopalis*.—THE LORDS found the reason of reduction relevant, notwithstanding of this last allegation also.

Fol. Dic. v. 1. p. 529. Spottiswood, p. 187.