

where they were born, or if that do not appear, where they last resorted for three years. Formerly such had no provision made for them at all, but were to be punished, act 74th, Parl. 6th, Ses. 6th, James VI., but were afterwards charged on their place of birth; and then by act 18th, Parl. 2d, Ses. 3d, Charles II., on the place of their resort, preferably to that of their birth.

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2dly, *Pleaded* for Dunse, If residence is to be the rule, it must be fixed at seven, not three years residence, by the above mentioned act of James VI., and the proclamation and act of King William, and these acts of King Charles II., as appears by their rubricks, relate only to vagrants.

Answer'd, It were absurd that a vagrant should by ordinary resorting, gain a title to maintenance in less time than a settled inhabitant; and the acts of King Charles give rules in the body of them concerning the settled poor: The proclamation could not affect these statutes, and the act of King William refers to, and confirms them; so that it cannot be thought to have confirmed the proclamation any further than it was agreeable to law.

THE LORDS adhered.

Pet. Swinton, sen.

Resp. Williamson.

Clerk, Forbes.

D. Falconer, v. I. p. 92.

1749. June 15. POOR GRINZEAN against GIBB.

A PERSON being on the poor's roll found not liable in expense, although he appeared to have been litigious, and was admitted to have some subjects pertaining to him; in respect it was not thought consistent with the rules and constitution of the Court, that a person on the poor's roll should be decerned in expense.

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Fol. Dic. v. 4. p. 86. Kilkerran, (POOR.) No 2. p. 407.

* * * A similar decision was pronounced 20th November 1772, Paton against Adamson, No 374. p. 7669, *voce* JURISDICTION.

1751. February 15.

The HERITORS of the parish of Humbie against The MINISTER and KIRK-SESSION of Humbie.

THE kirk-session of Humbie is possessed of a stock of poor's money, said to have from time to time been saved out of usual collections for the poor, to the extent of about 11,000 merks: And certain of the heritors being informed of some inaccuracies in the present management of this fund, after enquiry made, first before the Justices of the Peace, and afterwards before the presby-

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Found, That the heritors have a joint right and power with the kirk-session in the administration of all

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the funds belonging to the poor, as well collections as sums mortified, and have right to be present and join with the session in their administration, distribution, and employment, of such sums; without prejudice to the kirk-session to proceed in their acts of administration, though the heritors be not present.

tery of Haddington, wherein they had not got the satisfaction they had proposed, at last brought a process before the Court of Session, for having it found and declared, that they and the other heritors have right, jointly with the kirk-session, to the overseeing and disposing of the funds given for the use of the parish, or any other way belonging to them; and that all deeds done by the minister and kirk-session without the advice and consent of the heritors or major part of them, should be void and null.

The ORDINARY, before whom this question came, found, "That the pursuers had right to call for and take inspection of the kirk-session's books, with respect to their administration of the funds belonging to the poor, and upon any mismanagement therein to insist for redress; but found that they have no joint right with the kirk-session in the application and distribution of the funds; and assoilzied from the conclusion of the declarator as to that point."

In the first part of this interlocutor, parties acquiesced; but against the last part of it, the heritors reclaimed: And when the bill and answers came to be advised, as there was therein set out a history of the public laws which concern the maintenance of the poor and management of their funds, the case appeared to be of that consequence, as to merit a hearing in presence, which was accordingly appointed.

And after informations upon the hearing, the LORDS found, "That the heritors have a joint right and power with the kirk-session in the administration, management, and distribution, of all and every of the funds belonging to the poor of the parish, as well collections as sums mortified for the use of the poor, and stocked out upon interest, and have right to be present and join with the session in their administration, distribution, and employment of such sums; without prejudice to the kirk-session to proceed in their ordinary acts of administration and application of their collections to their ordinary and incidental charities, though the heritors be not present nor attend. But for the better preventing the misapplication or embezzlement of the funds belonging to the poor,* they found, That when any acts of extraordinary administration, such as uplifting of money that hath been lent out, or lending or re-employing the same, shall occur, the minister ought to intimate from the pulpit a meeting for taking such matter under consideration, at least ten days before holding of the meeting, that the heritors may have opportunity to be present and assist, if they think fit; and declare accordingly."

The case had been carefully argued on either side. It was for the pursuers *pleaded*, That as the maintenance of the poor rests in effect upon the landed interest, the heritors, in the nature of the thing, fall to be entitled to have at least a joint management of the poor's funds with the kirk-session, especially as the kirk-session is a body of men, who as such bear no part of the burden, and where they happen to be guilty of mal-administration, redress may be dif-

* A style more suitable for a statute than for an interlocutor.

ficult. That as this therefore is a natural right in the heritors, it must remain with them, unless the defenders can show some express statute depriving them of it. But that no such statute can be shown. And they endeavoured to evince, from the old statutes and proclamations since the Revolution, ratified in Parliament, that on the contrary, the defenders' pretence for excluding the heritors from any share in the management and disposal of the poor's money, was groundless.

On the other hand, the defenders made the like appeal to the statutes: And to the general argument from the nature of the thing answered, that it proved too much; for it would go thus far, that the administration was to be committed to the whole inhabitants, as the tenants as well as the heritors bear a share: That further, at no rate was the argument from the nature of the thing of any force: That similar instances occur in the law. The Magistrates and Council of a royal burgh are vested with the administration of the common good, and in case of shortcoming of the common patrimony, every burghess is liable *in subsidium*; yet it was never thought that for this reason every burghess was to be admitted to a share in the administration, though they may have inspection of the administration, which never was refused to the pursuers.

But more particularly, as to the statutes, it was for the pursuers *observed*, That the first civil institution we had touching maintenance of the old and indigent poor, was the 74th act, Parliament 1579, which, after statuting, that the poor should resort or be sent to the respective parishes in which they were born, or where that cannot be known, wherein they resorted the last seven years, enacts, "That the inhabitants of each parish were to be stented in so much as should be sufficient to maintain them at home:" The execution whereof is committed to the Magistrates of burghs, and in landward to persons to be commissioned by the King, without giving any management thereof more or less to the clergy: That by the 38th act, Parliament 1661, the management of the poor is intrusted to the Justices of the Peace, who are appointed to take up lists of the poor in every parish, to call for the weekly collections, or other sums appointed for the maintenance of the poor, to be distributed among them as their necessities shall require. The 16th act, Parliament 1663, after making certain regulations with respect to vagabonds, and appointing correction-houses for receiving them; again, appoints the heritors to make up the lists of the poor, and which they are to renew every year, and pay the one half of their said maintenance, and the tenants the other half. The act 18th Parliament 1672, ratifies the said act 1663 with respect to vagabonds, who are to be maintained as therein directed, by the respective parishes in which they were born. And to the effect it may be known what persons are to be maintained in correction-houses, and who are to be maintained by the contributions at the parish kirk-doors, the ministers of each parish, with some of the elders, and in case of a vacancy, three or more elders are appointed to make up lists of the poor, condescending upon the particular circumstances in

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which they are, and particularly in what parish they were born, and in what parish they have resided for the last three years, intimation being made to the heritors to be present, and see the lists made up; and that the heritors who, with their tenants, are to bear the burden of the maintenance, shall condescend upon such as are unable to work, and appoint them places wherein they are to abide, that they may be supplied by the contribution at the parish-kirk; and if the same be not sufficient, that they give them a badge to beg within the parish, and that the rest be sent to the correction houses, for whose entertainment the said heritors shall cause collect the said contributions, (that is, the contributions to be made, one half from the heritors, the other half from the tenants, the application of the contributions at the kirk-doors being directed by the preceding clause to be given to such as are not to be kept at home) and send them along as therein directed.

By the proclamation of the Privy Council in 1692, the above lists are to be taken up by the heritors, minister and elders, who are to cast the *quota* of what may entertain them, the one half upon the heritors, the other upon the householders in the parish; and to collect the same in the beginning of every week, month or quarter, as they shall think meet, and the heritors are to provide houses for such as have none, at the expense of the parish; which proclamation appoints, where there are mortifications, that the interest thereof be applied by the said joint body for the use foresaid; and though it speaks nothing particularly of the collections at the kirk doors, yet these are therein supposed to fall under the direction of the said joint body of heritors, minister and elders, as they must be supposed only to stent the parish for what may be wanting for the maintenance of the poor. And this was said to be put out of doubt by a subsequent proclamation in 1693; where so far an alteration is made, that it is appointed, for preventing of any question that may arise between the heritors and kirk-session, in the several parishes, about the *quota* of the collections at the church-door, and otherways to be made by the session; to be paid in to the heritors for the end foresaid, that it be the half of the said collections; and the kirk-session are directed to pay in the same to the heritors, or any to be by them appointed.

And from these statutes and proclamations the pursuers *observed; first* in general, That the providing for the poor is a matter of police, subject to regulations at the discretion of the Legislature, in the same way as all other things that concern the public, as every new act contains a different regulation, far from supposing any inherent power in the kirk-sessions to manage the poor's funds; and *2dly*, By the statutes before the 1692, the kirk-sessions and the heritors are the persons intrusted with the disposal; and the utmost that the kirk-session can say, is from the proclamation 1692, that gives the disposal to the joint body of heritors and kirk-session, which is what the pursuers contend for; for though by the proclamation 1693, the half of the collections at the kirk-doors be to remain with the kirk-session, which was a wise regulation, as

besides providing for the enlisted poor, there must be a good deal of occasional charity, for which there should be a fund that may be proper to assist a decent family out of the poor's box, who would not chuse to be upon the poor's roll; nevertheless, the proclamation does not say, that even of that fund the kirk-session is to have the uncontrolable management.

On the other hand, the procurators of the kirk-session formed a very different plan, agreeably, as the contended, to the law.

They *observed*, in general, That before the Reformation, no provision was made for the indigent, other than that those who through age or infirmity were unable to work, were allowed to beg; and punishments were enacted against other beggars, as appears from the 25th act 1424, Parliament 1. Ja. I. and from the 42d act of the said King's 2d Parliament, and other acts in the reigns of Ja. IV. and Ja. V. to the same purpose.

That upon the Reformation, in the end of the reign of Queen Mary, and beginning of Ja. VI. though divine service was performed by Protestant ministers, yet the revenues and government of the Church continued with the Popish clergy, and they were still considered as the Church of Scotland, and the Protestant clergy were no part of our civil constitution, except in so far as they were allowed mean stipends out of the thirds of benefices assumed by the Crown.

That though the reformed clergy had no proper civil constitution at this period, yet even before they were authorised by any civil constitution, as they had General Assemblies, synods or provincial assemblies and presbyteries, so they had in every parish a kirk-session, consisting of the minister and elders, by which weekly collections were made for the poor, and which were from time to time distributed to them, in which they followed the practice of the Apostles, who appointed particular officers for collecting and distributing what contributions they made for the poor.

And of this they pleaded as legal evidence upon the act 1st Parl. 12th Ja. VI. in 1592, which is the first civil institution of presbytery, whereby, as the Parliament approved of the General Assemblies and synods, and particular sessions in the manner mentioned in the act, so they ratified &c. and then these words were added: "That it appertains to the eldership to take head, that the Word of God be preached within these lands, &c. and ecclesiastic goods uncorruptly distributed," which they insisted could intend nothing else but the charitable contributions made by the parishioners at their meetings for divine service, as at this time, nor at no time thereafter during this reign, had the Presbyterian clergy any other ecclesiastic goods. And the same practice has been followed universally in all the Presbyterian kirks in Scotland to this day; a practice taken from the example of the Apostles upon Scripture authority, and when they obtained this civil constitution, by this statute continued under the authority of the civil-law of the land. That it is therefore no purpose to argue, as the pursuers do, from the act 74th, Parl. 1579, the exe-

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cution whereof, was committed to persons to be appointed by the King's commission, &c. for; not to mention that it gives no power to heritors, and so no-ways supports the pursuers in their present claim, it was an act made before the civil establishment of presbytery, and so there could be no mention of kirk-sessions in it; but as soon as presbytery was established by the act 1592, which is the 114 act, there is an act in that same Parliament, viz. act 147th, which gives the execution of that same act 1579 to the kirk-session, and consequently explains what was meant by the act 1592, when it gave to the eldership as kirk-session, the power of distributing ecclesiastic goods, and which execution is yet more amply given to the the kirk-session by the act 268th, Parliament 1597.

And to as little purpose was it said to be, to argue from the powers given to the Justices of the Peace by the foresaid act 1661, or from the act 1663, which gives the power to the heritors, or from the act 1672, as at all these several periods presbytery was abolished.

It may be true, that even in the time of Episcopacy, though the bishops were restored by the act 1606, yet, as the statute 1592 was not repealed, the Episcopal Church continued to have kirk-sessions; their powers, however, suffered material alterations from time to time.

But how soon presbytery was restored, and the kirk-sessions re-established, first by the act 1641, afterwards repealed, and again by the act 1690, the powers given by the act 1592 revived, and all acts contrary to the Presbyterian Church-Government established, were rescinded; and upon that footing, matters stand at this day.

For as to the proclamations 1692 and 1693, as it is not to be presumed that it was intended by the Privy Council to alter the statute-law, whereby the distribution of the weekly collections and others doted for the use of the poor was vested in the kirk-session, which they had no power to do; such construction is not to be put upon their proclamations where they can bear another consistent with the acts of Parliament. And such they can bear, namely, that where the poor's funds under the administration of the kirk-session, are not sufficient to answer the necessities of the poor of the parish, in that case the heritors and elders were to meet and stent the parish for their subsistence, as is directed by the proclamation; and in such case the heritors were to join the session in the distribution of the stent, and in that case also the joint body was to have under their management the interest of the mortifications. But where the poor's funds, committed to the administration of the kirk-session by law, were sufficient to answer the exigencies of the poor, in such case, as there was no occasion for a stent upon the heritors and householders as provided by the proclamation, so there was no place for the proclamation; and this was said to be confessedly the case of the parish of Humbie.

Notwithstanding all which, the LORDS found as above.

N. B. It is remarkable, that the framer of these proclamations has not duly adverted to the public law, when the proclamation 1692 supposes, and so enacts, that a seven years residence in a parish is required to fix the poor upon that parish; whereas by the act 1663 the former law requiring seven years is altered, and three years made sufficient. *Vide supra* 6th June 1745, Overseers of the Poor in the parish of Dunse, *contra* the Heritors and Inhabitants of the parish of Edrom, No 3. p. 10553. Nor does the framer of the proclamation 1693 seem to have duly considered the proclamation 1692, when it supposes, that the heritors were the sole disposers of the funds appointed for the poor, and therefore grants the half of the collections to be paid into the heritors for the end aforesaid, when yet by the proclamation 1692, the disposal was in the joint-body of heritors, minister and elders.

Fol. Dic. v. 4. p. 85. Kilkerran, (POOR.) No 3. p. 407.

* * D. Falconer reports this case :

JAMES HEPBURN of Humbie, and certain other heritors of that parish, brought an action against the Minister and kirk-session, to have it found and declared, that the heritors had an equal right with the session, in the management of the funds belonging to the poor of the parish; and that all acts of the session relating thereto without their concurrence, were null.

THE LORD ORDINARY found, That the pursuers had right to call for, and take inspection of the books of the defenders, the kirk-session, with respect to their administration of the funds belonging to the poor; and upon any mismanagement therein, to insist for redress thereof, as accorded of the law: But found that they had no joint right, with the kirk-session, in the application and distribution of the funds.

In a reclaiming bill and answers, and hearing in presence appointed on this subject, *pleaded* for the pursuers, As when the maintenance of the poor is not sufficiently provided for by voluntary charity, the deficiency is made up by contributions imposed by law; which contributions ultimately affect the owners of land; and as these impositions have been laid on according to parishes; the natural consequence of this is, That the management of these funds falls to the heritors, out of whose pockets they come; and at least they may pretend to a joint administration with the session. It was early established by the law, that the poor were to be maintained by their own parish; by act 22d, Parl. 1535, they are permitted to beg only within the same, for which end they are to receive badges, all-beggars without which are to be punished. By act 74th, Parl. 1579, the parish is to be taxed for their maintenance; but the execution of this act is committed in landward parishes, to commissioners to be appointed by the King; and within burgh to the Magistrates. But by act 272d, Parl. 1597, in landward parishes, instead of the judges to be named by the King, it is given to the kirk-session. The act 38th, Parl. 1661, commits the management of

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the poor to the Justices of Peace, who may call for the collections of the parish, or other funds to be distributed amongst them. The act 16th, Parl. 1663, appoints the heritors to make up lists of the poor, the one half of whose maintenance is to be defrayed by them, and the other by the tenants. The act 18th, Parl. 1672, appoints the heritors and session to take up lists of the poor, who are to be maintained by the collections at the church; and they falling short, to have badges to beg within the parish; and the heritors to send the sturdy beggars to correction-houses; for which they are to collect the contributions of the parish. By a proclamation, 11th August 1692, lists are to be made up by the heritors and session; who are to liquidate a yearly sum for the maintenance of the poor, to be paid one half by the heritors, and the other half by the house-keepers; and mortifications are to be applied by advice of the heritors, without diminution of the stock. And by another, 29th August 1693, the half of the collections is appointed to be paid to the heritors, to be applied to the maintenance of the poor. These proclamations are ratified by act 43d, § 5.; act 29th, § 6.; act 21st, § 7. King William.

Pleaded for the defenders, Before the Reformation it does not appear any establishment was made for maintenance of the poor; the needy were suffered to beg within their own parishes; and sturdy beggars were punished. On the Reformation kirk-sessions were established, and made collections for the poor, in imitation of the practice of the primitive church; where the deacons were appointed for this end, Acts of Apost. chap. 6. But these had no civil establishment till 1592, when by act 1st, Parl. 12. James VI. the presbyteries, and particular sessions appointed by the kirk, were ratified. And it was declared that it appertained to the eldership to take head, *inter alia*, that ecclesiastical goods were incorruptly distributed. It has continued the uninterrupted practice to this day, in the presbyterian church, that the elders make collections, and distribute them to the poor. Bishops were restored in 1606; but as the act 1592 was not repealed, the kirk continued to have sessions, who had the collection of the charities; and when presbytery was restored by act 5th, Parl. 1690, it was confirmed as established by the act 1592; so that there were the same powers vested in the session as by that act. The act 1579 was made before the civil establishment of kirk-sessions; neither was the execution thereof committed to the heritors, but to Justices to be named by the King; and as soon as presbytery was established, the execution of this act was committed by act 114th, Parl. 1592, to the kirk-session. The act 1661 gives no power to the heritors, but to Justices of Peace; and then presbytery and its judicatories were abolished; there were no kirk-sessions; which, on the Revolution, were restored to their full powers; all acts inconsistent with presbytery being repealed. The proclamations could not repeal the law, but they may be explained consistently therewith; to wit, of the case when it was necessary to tax the parish; in which only the heritors might call for the half of the collections. The contributions given to the elders; and when charity is given indefinitely, the receiver is

thereby constituted trustee for the distribution thereof. The sums lent out are taken payable to the minister and kirk-session ; and it is to them that sums are mortified for the use of the poor.

Replied, The eldership, who are to see to the distribution of ecclesiastical goods, are not the kirk-session ; the powers of which body are mentioned distinct therefrom in this act ; neither is it clear, that by ecclesiastical goods are meant contributions for the poor. The act 1690 enforces that of 1592, in as far as the government of the church is concerned ; but it could never be the intent of that act to repeal laws not mentioned, as the acts 1661, 1663, and 1672.

THE LORDS found, That the heritors had a joint right with the kirk-session, in the administration, management and distribution of all, and every of the funds belonging to the poor of the parish ; as well collections, as sums mortified for the use of the poor, and money stocked out upon interest ; and had right to be present, and join with the session, in their administration, distribution and employing such sums ; without prejudice to the kirk-session to proceed in their ordinary acts of administration and application of their collections, to their ordinary or incidental charities, though the heritors were not present, or did not attend. But, for the better preventing the misapplication or embezzlement of the funds belonging to the poor, they found, That when any acts of extraordinary administration, such as uplifting money that had been lent out, or lending or re-employing the same, should occur, the minister ought to intimate from the pulpit a meeting for taking such matters into consideration, at least ten days before holding of the meeting ; that the heritors might have opportunity to be present and assist if they thought fit.

Act. H. Home.

Alt. R. Craigie.

Clerk, Justice.

D. Falconer, v. 2. No 197. p. 204.

* * This case is also reported by Lord Kames :

The funds for the poor in the parish of Humbie, being above L. 7000 Scots, were for many years managed solely by the minister of the parish, cloathing his acts and deeds with the specious name of the kirk-session. The heritors, after frequently in vain demanding an account from the minister of his administration, brought a process before the Court of Session, concluding, *1mo*, That the minister and kirk-session should be obliged to give an account of their past management of the poor's funds ; and to this end, to produce in this Court, the record, session-books, and other writs concerning the said funds ; *2do*, That the heritors of the parish are entitled, jointly and equally with the minister and kirk-session, to the management and distribution of the poor's fund ; particularly, that of levying sums from one hand, and lending them out to another. The first point was given for the pursuers by the Lord Ordinary, and his interlocutor acquiesced in. But as to the second and capital point, it was *pleaded* for

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the defender, That the poor's funds are ecclesiastical goods, the management of which belongs to the church and the kirk-session of every parish; and the Lord Ordinary having found that the heritors have no joint right with the kirk-session in the management, a reclaiming petition, on the part of the pursuers, produced a hearing in presence. The arguments urged for them were what follow.

In order to form a just notion of our acts and regulations concerning the poor, it is proper to examine what light we can obtain from rational principles. Charity is undoubtedly a moral duty, as well as fidelity and justice; and where the poor are not provided for by law, every particular man stands bound to contribute according to his ability. In christian countries, the principal fund for providing the poor, are the weekly collections at the parish churches: And the poor of every parish being more immediately objects of charity to the parishioners, it came justly to be held a rule, that each parish should maintain its own poor, and that the weekly collections should be applied to the poor within the parish. But this fund being precarious, several acts were made in this country, appointing lists of the poor to be made in every parish, and the heritors and kirk session to stent the parish for their maintenance. A tax thus imposed, is directly or ultimately a burden upon the land-holder; and accordingly, the maintenance of the poor, by such regulations, resting in effect upon the heritors, it follows from the nature of the thing, that they chiefly ought to have the management and distribution of the poor's funds. If mortified sums, if weekly collections, or any other of the poor's funds fall short by mismanagement, the heritors are the only sufferers, for they must make up all deficiencies. How then can it be doubted, if there be no law to the contrary, that the heritors are entitled to the superintendency of the poor's funds, both as to distribution and management?

At the same time, a distinction ought to be admitted betwixt administration and distribution. With regard to the ordinary course of charity, or even singular cases which cannot bear a delay, the minister alone, an heritor alone, or an elder alone, may give directions. But as to the more solemn acts of administration, which ought to be carried on in a joint meeting, or at least by express deputation, to be submitted afterward to a joint meeting, there can be no occasion for giving exclusive powers to the kirk-session, who have not a peculiar interest, as the heritors have, that the poor's funds be regularly and carefully managed. Every argument that can be drawn from utility, from interest, or from the nature of the thing, lies against such pretensions.

This brings the argument within a narrow compass; and in this light the pretensions of the defenders shall be examined. But first a view of the statute law must be given; which, instead of supporting these pretensions, will be found to be against them.

It appears clearly to have been adopted into our law, that every parish should maintain its own poor. Accordingly, by act 22d Parl. 1535, none are allowed

to beg except in the parish where they were born ; and the headsmen of every parish are directed to give badges to the beggars who are to be supported by the parish, and alms not to be given but to those who have badges. By the 74th Parl. 1579, very judicious regulations are made for the maintenance of the poor ; the management was not trusted to the clergy ; but magistrates within burghs, and the Judge constituted by the King's commission in every landward parish, are appointed to take up lists of the poor, and the whole inhabitants of the parish are to be taxed for such weekly contribution as shall be thought sufficient to sustain the said poor people, and collectors are yearly to be appointed for ingathering the same. In place of Judges in landward parishes named by the King, execution of the above act was entrusted to the kirk-session in every parish, act 272, Parl. 1597 ; and a penalty of L. 20 Scots imposed upon every kirk-session as oft as they are found negligent, act 19, Parl. 1600. The preamble of act 38, Parl. 1661 is, that the poor have not hitherto been regularly maintained, but have been necessitated to seek their living with hardship and difficulty by scandalous vaguing ; which shows that the kirk-sessions had totally neglected their duty. Therefore the management of the poor is entrusted to the Justices of Peace, who are appointed to take up lists of the poor in every parish, to call for the collections of the parish, or other sums appointed for the maintenance of the poor, to be distributed by them among the enrolled poor, as their necessities shall require. The act 16, Parl. 1653, lays the burden upon the heritors of making up lists of the poor, the one half of their maintenance to be paid by the heritors, the other half by the tenants. The act 18, Parl. 1672, appoints lists of the poor who cannot work, to be made up in every parish by the heritors, minister, and elders ; such poor to be maintained by the contributions at the parish kirk, and, the same falling short, to be allowed badges to ask alms within the parish ; the poor who can work to be sent to the correction-houses, by the heritors, who shall cause collect the contributions, and appoint a quarter's allowance to be sent along with them. By a proclamation of Privy Council 11th August 1692, the said lists are to be made up by the heritors, minister, and elders, who are to liquidate a yearly sum for maintenance ; the one half to be paid by the heritors, the other half by the other housholders. In this act a penalty of L. 200 Scots monthly, *toties quoties*, is imposed upon every parish which fails to maintain its own poor. And there is a further regulation very material to the present point, ' That if there be any mortifications already, or if any hereafter shall accrue to any parish, the same shall be applied by the advice of the heritors and elders to the use foresaid, but without diminution of the stock of the said mortification.' By another proclamation of Privy Council, 29th August 1693, the half of the collections at the church door is to be paid to the heritors, or to any by them appointed, to be applied toward the said maintenance.

The arguments to be drawn from these statutes are obvious. The pursuer shall only suggest one observation in general, which is, that the providing for

No 5. the poor is a matter of public police, subject to regulation at the direction of the legislature, as all other matters are that concern the public; far from supposing an inherent power in kirk-sessions to manage the poor's funds, every new act contains a different regulation. These acts freely dispose of the weekly collections, of mortified sums, and of other funds appropriated to the poor, and put all under such management as was thought most proper, without at all regarding the kirk-session more than others.

It is very true that the half of the weekly collections are left in the hands of the kirk-session, and not appropriated as part of the constant fund for maintaining the inlisted poor. And that this is a wise regulation must be apparent from the following consideration, that, beside providing for the inlisted poor, there must be a good deal of occasional charity in every parish, for which there should be a fund; a good workman may break his leg or his arm, and in that event has a demand for occasional charity without being inlisted; a man who labours for his bread may die without leaving sufficiency to bury him; upon some occasions it may be proper to assist a decent family out of the poor's box, who would not chuse to be put upon the poor's roll. For these occasions and such like, the half of the weekly collections are left unappropriated in the hands of the kirk-session. But then the acts do not say, nor insinuate, that the kirk-session is to have the uncontrollable management of this fund. It is a fund collected in the parish; and the parish have a right to see it distributed, and to have a vote in the distribution; unless they chuse of their own accord to leave the distribution to the kirk-session, through the good opinion they may have of their management. The kirk-session have not a single argument to urge for this assumed power, if it be not that they happen to be collectors, and that the money is once lodged in their hands; at that rate the overseers appointed by the parish for collecting the poor's rates, might as well pretend to the distribution. This circumstance concludes against them; for it is in every case a bad regulation, that the same person should be both collector and distributor, especially of a precarious fund where there can be no regular check, and where there can lie no precise challenge for mismanagement or misapplication.

But, in opposition to all arguments that can be drawn from our statute-law, and from the nature of the thing, the kirk-session assume a proposition, that the poor's funds are ecclesiastical goods, which it is their province to manage; not only as being an ecclesiastical judicature, but as expressly entitled to this privilege by the act 1592, establishing presbyterian church government; which declares, 'That it appertains to the eldership to take heed, that the word of God be purely preached within their bounds, the sacraments rightly ministered, discipline entertained, and ecclesiastical goods uncorruptly distributed;' which act is ratified in the whole heads thereof by the act 5th, Parl. 1690. And to fortify this argument they observe, that this constitution is the same with what is laid down in the 6th chapter of the Acts of the Apostles, that the con-

tribution for the poor should be under the management of deacons, who are ecclesiastical officers.

In answer to this argument, it may be observed in the *first* place, that the sense of the act 1592, is totally misapprehended. The clause cited does not at all relate to kirk-sessions; their powers are handled in a subsequent clause; and all that is said about them, is in the following words: 'Anent particular kirks, gif they be lawfully ruled be sufficient ministry and session, they have power and jurisdiction in their own congregation in matters ecclesiastical.' Not a hint of poor's money here, nor even of ecclesiastical goods, supposing the poor's money to be such. The clause cited for the defenders has quite a different sense than what they endeavour to impose upon it; the eldership in this clause is put in direct opposition to the ministers upon whom they are intended to be a check by the fundamental constitution of presbyterian church government; therefore it is declared to pertain to them, that the word of God be purely preached within their bounds, the sacraments rightly ministered, and discipline entertained. And as at that period the reformed clergy had, for the most part, neither regular stipends nor parishes, but depended, in a good measure, for their living upon voluntary contributions; therefore it is declared to be also the province of the eldership, that ecclesiastical goods should be uncorruptly distributed, that is, among the ministers preaching the word of God who were not otherways competently provided. Whether this be a just interpretation of the clause, will best appear from a thorough knowledge of the history and circumstances of these times. But one thing is extremely evident from the statute itself, without the aid of history, that by the eldership in this clause, is meant the whole body of the laic elders, in opposition to the ministers or clergy, and by no means the kirk-session; and therefore, at any rate, that this clause gives no privilege to kirk-sessions to manage the poor's funds.

In the *second* place, the pursuers can find no ground for classing the poor's funds under ecclesiastical goods. Is it because charity is a christian virtue or duty? But so is justice, performing promises, payment of debts, abstaining from crimes, &c. At this rate all jurisdiction, civil and criminal, ought to center in the kirk-session, as well as the administration of charitable funds. But supposing charity to be in some peculiar manner a christian duty, does it follow that charity-funds are to be understood as ecclesiastical goods, and to be under the management of the clergy? This is too wide a step to be relished by protestants; though, in many instances, as slight a connexion has been sufficient for the popish clergy to draw very extensive consequences from. For example; being generally employed about dying persons, they consider it as their privilege to see last wills and testaments executed; and where there was no testament, they also assumed the privilege to oversee the distribution of the effects of persons deceased, among their nearest relations. What at first was considered as advice only, was converted in process of time to a right of distribution, and from that at last to a right of property; at least of distribution unaccount-

No 5. able, which in effect comes to the same thing. Words were put in place of things, in that case; and so they are in the present argument; because charity is a christian virtue, therefore, charity-funds must be christian or ecclesiastical funds: and because, by a stretch, they may bear that name, therefore they must be under the management of the clergy, or of the kirk-session. This legerdemain reasoning may pass in superstitious times, but never in days of liberty and freedom of thought. And there is the more reason to oppose this very singular doctrine in its infancy, because it may have deeper consequences than the defenders at present think proper to adopt. Willing at present to soften matters, they yield to a review of their management in this Court by way of process. But if their exclusive privilege of managing the poor's funds gain once a firm establishment by practice and the authority of this Court, the heritors will be told that the kirk-session are not accountable for their management of the poor's funds, more than the popish clergy were for the management of the goods of those who died intestate; at least, if they are accountable, that it can only be before their own church judicatures, as being a matter purely ecclesiastical.

And in the *last* place, whatever be the construction of the act 1592, which was abrogated, and afterward revived by the act 1690, it certainly could never be the meaning of the act 1690, to revive that statute further than as it concerned presbyterian church government, by assemblies, synods, presbyteries, and kirk-sessions. It was never meant by any general clause, of reviving 'it in the whole heads thereof,' to rescind at one blow the whole statute-law concerning the maintenance of the poor. Among others, the act 18th Parl. 1672, was at that time in force, giving power to the heritors, in conjunction with the kirk-session, to apply the weekly collections partly to the infirm poor within the parish, and partly to support those who were sent to correction-houses. And therefore, one of two things must be admitted, either that the act 1592 was not revived as to the management of the poor's funds, or that it did not relate to that management. And that this really is the true interpretation of the statute 1592, does not only appear from the act 1690, considered in the light now mentioned, but more directly from the subsequent proclamations of the Privy Council. Had it been understood, that by the act 1690 reviving the act 1592, in the whole heads thereof, an exclusive privilege was given to the kirk-sessions to manage the poor's funds, the Privy Council would never have taken upon them to transgress the public law, by appointing first the management of mortified sums to be in the joint body of the heritors, minister, and elders; and next, that the half of the weekly collections should be accounted for to the heritors, for maintenance of their inlisted poor.

The defenders in vain endeavour to support their argument with the authority of the Apostles, which is most express against them. The Apostles, far from considering it as a privilege to have the distribution of the poor's funds, did remonstrate against it, and directed the brethren to chuse seven of their

own number for this management; which was accordingly done, and Stephen, with six others, were chosen. The Apostles upon this occasion took the opportunity to declare it unreasonable, 'that they should leave the word, and serve tables; but that it was their province to give themselves continually to prayer, and to the ministry of the word.' Matters, it would appear, are now wonderfully changed; the kirk-session of Humbie, upon what account they know best, claim that as a privilege; which the Apostles considered as an unreasonable burden; and show themselves more willing to have the fingering of money, than to give themselves continually to prayer and to the ministry of the word.

At the same time it must be owned, that this text can have no great weight either way; an interim regulation with regard to unsettled times, can never, by any good reasoning, be drawn as authoritative with regard to an established constitution, where the circumstances vary in every respect. Nor, in general, can we suppose that the Apostles, in propagating the Christian religion, ever intended to break in upon the police of any government with regard to matters purely civil, like the present; or to establish rules of government to be strictly observed by all those who adopted Christianity. It is absurd to maintain such a proposition; the form of civil government and all things that fall under it, are left free to the legislature in every country to be regulated as they see most convenient; these are matters which Christianity does not encroach upon.

And to show that we never had any notion of this new invented popish doctrine, for it may well bear that name; when we look into the acts of the Town-Council of Edinburgh, the capital of the kingdom, which no doubt were a pattern for the other boroughs, we find the Magistrates, ever since the reformation, taking upon them the management of the poor and of the poor's funds. Nay, they go so far as, by acts of the Town-Council, to regulate the constituent members of the kirk-sessions, to appoint the deacons and elders to be chosen by the Town-Council, and to declare the Magistrates to be constituent members of every kirk-session. Further, the Town-Council elects the kirk-treasurer, an officer who has long been in use, and whose province it is to collect the weekly contributions, and to distribute the same by appointment of the Magistrates.

With regard to the present case in particular, it is a matter which deserves well to be considered, whether it be expedient or safe to trust so great a fund in the hands of a kirk-treasurer, chosen *ad libitum* by the minister, without finding caution. A sum of L. 7000 or L. 8000, all in bonded money, which may be uplifted in one day, is a violent temptation for a poor man to retire with the money out of the country. In that case, the minister and kirk-session would think it hard to be made liable; possibly, there is no law to make them liable, and probably it might turn to little account were there such a law.

"Found, That the heritors have a joint right and power with the kirk-session, in the management and distribution of all and every of the funds belong-

No 5.

ing to the poor of the parish, as well collections as sums mortified for the use of the poor, and money stocked out upon interest, and have right to be present and join with the session in their administration, distribution, and employing such sums; without prejudice to the kirk-session, to proceed in their ordinary acts of administration and application of their collections to their ordinary and incidental charities, though the heritors be not present nor attend. But for the better preventing the misapplication or embezzlement of the funds belonging to the poor, found, that when any acts of extraordinary administration, such as the levying bonded money, or lending or re-employing the same, shall occur, the minister ought to intimate from the pulpit a meeting for taking such matters under consideration, at least ten days before holding of the meeting, that the heritors may have opportunity to be present and assist, if they think fit."

Rem. Dec. v. 2. No 121. p. 250.

1752. November 23.

GABRIEL HAMILTON of Westburn *against* The MINISTER and KIRK-SESSION of Cambuslang.

No 6.

Any of the heritors of a parish are entitled to call the kirk-session to account for their management of the poor's money. What are proper articles of discharge in the kirk-sessions' accounts?

THE pursuer brought his action as an heritor of this parish against the Minister and kirk-session, for exhibition of the accounts and count-books of the money and funds belonging to the poor of said parish; with a conclusion, that, in case it should appear that the defenders had misapplied the poor's money, to other ends and purposes than the law directs, they might be decreed to repeat the same to such persons as the Lords should appoint for behoof of the poor.

Upon production of the accounts, the following articles appeared stated to the discharge of the poor's money:

1. To a new tent for the field-preachings.
2. To the expense of repairing said tent from time to time.
3. To communion forms, tables, and table-cloths.
4. To rent for a preaching-field.
5. To constables and officers for attending to keep the peace at the sacrament.
6. To damages done to an heritor's dike, adjacent to the preaching field.
7. To the presbytery and session-clerks.

To these it was objected for the pursuer, that they were all misapplications of the poor's money, and could not be allowed to the minister or kirk-session, as proper articles of discharge of that fund.

Answered for the defenders; The minister and kirk-session, as well in their legal capacity of administrators of the poor's money, as from the implied consent of the charitable givers, have some discretionary power in the administration and disposal of what is collected at the places of public worship within the