

## S E C T. XV.

Forstalling.—Simoniacal Practices.—Obligation by a Minister not to bring an Augmentation.

No 106.

1594. *December.* L. MERTON *against* TOWN of LAWDER.

VICTUAL once presented to the market, being thereafter housed, the LORDS found, that, if any forstaller bought it betwixt market days, the Magistrates might escheat it, without incurring spuilzie.

*Fol. Dic. v. 2. p. 19. Haddington, MS.*

\* \* \* See this case, *voce* SPUILZIE.

1759. *February 20.*ROBERT STEVEN *against* STEWART LYELL, JOHN GARDINER, and ROBERT PEIRSON.

No 107.

The friends of a clergyman bound themselves, by a letter, to the heritors of a parish, of which the Crown was patron, to procure a gift of a year's vacant stipend for reparation of the church and manse, provided that, by the interest of these heritors, their friend, the clergyman, should obtain the presentation. The Court found that no action could lie on this obligation, but fined the defenders in L. 10 to the poor.

THE parish of St Vigian's, of which the Crown is patron, became vacant. Two several candidates solicited the heritors, in order to procure, by their interest, a presentation. The friends of one of the candidates offered to the heritors a year's vacant stipend for repairing the kirk, kirk-yard dykes, and manse, provided they would procure the presentation for him. John Gardiner and Robert Peirson, who were the friends of the other candidate, were constrained, by some of the heritors, to agree to the same terms; and gave power to Stewart Lyell to enter into an agreement to that purpose; which he did by a letter in the following terms: "Gentlemen, In consideration of certain favours granted me by you, I hereby oblige myself to procure you a gift to a year's vacant stipend of the parish of St Vigian's, on occasion of the present vacancy, or otherwise to pay you the same, or what part thereof I do not procure you a gift to, out of my own pocket, and that how soon a year's stipend becomes due, after the widow of the last incumbent has got her *ann*, to be applied by you in repairing the church and manse, &c. Addressed, To Mess. Stephen and Strachan, and the other heritors of the parish of St Vigian's.

The presentation was obtained, and an application was made to the presbytery by the heritors to delay the settlement, that some vacant stipend might arise. The presbytery having heard of the transaction, refused this; but though they completed the settlement, they commenced a process against the

minister, as guilty of simony; in the course of which it appeared, that the minister was not privy to the transaction made by his friends; and therefore he was acquitted.

The reparation of the church having afterwards amounted to a considerable sum, Robert Stephen brought an action before the Sheriff, against Stewart Lyell, upon the above obligation, for payment of L. 38: 5s. Scots, as Stephen's share of these repairs; and Stewart Lyell, on his part, brought an action against Gardiner and Peirson, to relieve him of the consequences of Stephen's action.

The Sheriff "found Lyell liable for Mr Stephen's share of these repairs, and for expense of process; and found Messrs Gardiner and Peirson liable to relieve Lyell."

The cause was removed from the Sheriff Court by advocacy. It was argued for Lyell, Gardiner, and Peirson, That no action could lie upon this obligation, because it had been granted *ob turpem causam*; that it had been unduly extorted from the defenders by the heritors, and in particular by Mr Stephen the pursuer, and Mr Strachan, in order to relieve themselves, at the expense of the minister, of a burden to which by law they were subjected; and that it would be of dangerous consequence to give support to such transactions, by which the small revenues of the clergy of Scotland might in time be reduced below what was necessary for their absolute subsistence.

*Answered*, The obligation was not elicited by the pursuer; it had been insisted for, indeed, by Mr Strachan; but, so far as the pursuer was concerned, it had been voluntarily granted; for the pursuer had agreed to support this candidate long before the date of this obligation, though he signed the petition in his favour only of the same date.—That there was nothing improper or simoniacal in the transaction; for as, upon such occasions, settlements are often postponed on purpose that vacant stipends may arise, which are, for the most part, granted by the Crown as patron, for repairing the kirk and manse, there could be nothing wrong upon the part of heritors, to make it a condition of their supporting a particular candidate, that they should not be deprived, by hastening his settlement, of the vacant stipends, of which they would otherwise have had the benefit.

THE LORD Shewalton Ordinary, found, "That the obligation was granted *ob turpem causam*; and that no action could lie upon it; and in respect of Lyell's concurrence in the unlawful paction, which was the cause of granting the obligation, found no expenses due to him; but amerced the pursuer in L. 10 Sterling to be paid to the poor."

"THE LORDS adhered; and imposed a fine upon Gardiner and Peirson."

Act. *W. Stuart.*

Alt. *Scrimgeour.*

*W. J.*

*Fol. Dic. v. 4. p. 25. Fac. Coll. No 174. p. 310.*