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not, are exhausted; and remit to the Lord Gardenstone to rectify the locality accordingly.

Lord Ordinary, *Gardenstone*. For the Officers of State, *Advocate Montgomery*.
Clerk For Campbell of Lochnell, *A. Lockhart*.

R. H. *Fac. Coll. No. 29. p. 74.*

1772. *July* 22.

MR. JOHN KNOX, Minister of Slamannan, *against* HUNTER, and Others, Heritors of the Parish of Falkirk, annexed to the Parish of Slamannan.

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Annexation *quoad sacra* found not to subject the heritors of the lands annexed, in payment of stipend to the Minister of the parish whereto they are annexed.

In a process of augmentation and locality, brought by Mr. Knox, Minister of Slamannan, an objection being made by eighteen heritors, whose lands had formerly been part of the parish of Falkirk, from thence disjoined, and annexed to Slamannan, that the annexation being only *quoad sacra*, their lands were not liable in payment of any stipend to the pursuer, Minister of Slamannan, but remained, *quoad* every thing else, in the parish of Falkirk, from which they were disjoined; memorials were ordered on the point, "How far the annexation is *quoad civilia*, or *quoad sacra tantum*."

The decree founded upon bore date November 18, 1724, and was in these terms: "Disjoined the said lands of Eldrig, Easter and Wester Jaw, and Croftangry, from the kirk and parish of Falkirk; annexed the same to the parish of Slamannan; and disjoined Castlecarry from Falkirk, and annexed the same to Cumbernauld; and ordained the inhabitants of the respective bounds above mentioned to repair to the kirk aforesaid, to which they were annexed, as said is, for hearing the word, receiving the sacrament, and all other acts of public divine worship, and to subject themselves to the Minister thereof as their pastor, in all time coming; and declared, and hereby declare, the above annexation to be *quoad sacra tantum*." And the objectors set forth, that, in consequence of the foresaid decree, the heritors of the lands of Eldrig, &c. with concurrence of the heritors of the parish of Slamannan, built an aisle to the kirk of Slamannan, and have been in use of resorting thither to hear divine worship, in terms of the decree; but have been all along in use to pay their stipend to the Minister of Falkirk; and that, very lately, the Minister of Falkirk got an addition on account of deficiency of glebe; and the schoolmaster of Falkirk had his salary augmented; and the objectors were then rated in proportion along with the other heritors of Falkirk, and have paid their proportion of all the later repairs to the kirk thereof.

Argued for the pursuer: The annexation *quoad sacra tantum* means no more than a reservation of the former Minister's stipend, payable out of the lands disjoined. It has happened, in very peculiar situations, that, by ecclesiastical authority, part of an extensive parish has been transferred from the cure of the parochial Minister,

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and *quoad sacra* put under the pastoral charge of the Minister of the conterminous parish; and this, for the sole purpose of what is commonly understood by the general name of edification. An interposition such as this, is founded in that jurisdiction granted to the Church; and, if exercised judiciously, all other means being impracticable to promote the great and desireable ends of edification, this ecclesiastical remedy would be found to be legal and valid. In this case, all civil rights remain entire, and must continue so, both from the professed purpose of this species of annexation, and from the defect of authority or jurisdiction in the ecclesiastical Courts to carry it further; and, in so far, an annexation *quoad sacra* is plain and intelligible, and that it does not affect the right of the former Minister.

But an annexation of persons or parishioners, *quoad sacra*, by a civil court, for hearing the word, administration of the sacraments, and a correction of manners *per se*, exclusive of stipend, &c. or any real subject amenable to the civil jurisdiction, is altogether anomalous, a direct usurpation of the spiritual jurisdiction of the Church, and competent to no civil court whatsoever.

The negative evidence of this is very satisfactory. From the first Commission for Plantation of Kirks, &c. in the year 1617, to the last in 1707, there is no jurisdiction of this nature granted—no mention of such species of annexation *quoad sacra* being either known or competent to these numberless Commissions—no such thing mentioned by Lord Stair, or any of our old lawyers—no decision of this Court, nor even a single one of the Court of Session, giving that force and effect to such annexation, for which the objectors plead.—There is a dead silence over all, till a novel opinion has been started by very late writers, from their own fancy and imagination.

The rule of the highest authority is, "That those who serve at the altar, should live by the altar; that those who sow spiritual things, should reap temporal things." In consequence of this, it is a principle of the Canon law, *decimæ debentur parocho de jure*. This, in like manner, has been received, and is a rule of the law of Scotland.

The rules in the Commissions are clearly founded on the above principle.

In the Commission 1617, where mention is made of small parishes, but improper to be united, the statute lays down the general principle of law, "That every kirk in that estate should be planted with their own particular Minister to serve thereat, whose provision behoves necessarily to consist of the fruits of the benefice itself, how mean soever the same be;" for no power of dismembering or disjoining was granted, by which that inconvenience might have been removed, but solely a power of union, or uniting two entire parishes into one benefice, where the fruits of one (*i. e.* kirk) alone will not suffice to entertain one Minister; which clearly, too, establishes, that the Minister of the united kirks has the two benefices *pleno jure*.

In after Commissions, a power to disjoin or dismember, and annex to another parish, is granted. But still the Legislature had the above object in view, that

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the parts dismembered were annexed, with all the burdens, to the Minister of the parish to which they were annexed, as the same were competent to the Minister from whose parish they were dismembered. This is clear from the purview of the acts themselves; but expressly enacted by the 45th act, 1649—" And, further, where lesser parishes lie near to over-large parishes, it is declared, that some parts of the large parish may be taken and adjoined to the smaller parish, and thereby both the churches may be made more proportionable, and the stipend of the Minister in the lesser charge may be made competent and sufficient; which is hereby recommended and presented to the Commission for Plantation of Kirks, authorising them with power to that effect."

The act 1707, vesting the power of former Commissions in the Lords of Session, clearly goes in the same line, in establishing the above consequences of dismembration and annexation, in so far as to require the consent of the heritors of three parts of four, at least of the valuation of the parish craved to be disjoined, upon this medium; because, by such disjunction, they are, *ipso facto*, subjected to all parochial burdens of stipend, and others, to the parish to which they are annexed. But as the parish to which the dismembered partis annexed thereby receives a benefit, by a rateable relief of these burdens from the part annexed, therefore, the statute has not required any consent from the heritors of such parish; because it is their interest to receive the annexed lands, to bear with them thereafter a proportional share of all parochial burdens.

Moreover, it is clearly laid down in every commission, that ilk Minister must have his stipend modified out of that ilk, that is, his own parish. This is an universal rule, and uniformly followed by former commissions; and many instances, of very late date, could be condescended on, where, notwithstanding of particular modifications, and possession conform, of stipend out of the teinds of another parish, yet, when the Minister of that parish has insisted for an augmentation, the Court have found, that such Minister was entitled, *primo loco*, to be served and provided out of the teinds of his own parish.

Such being the law, it draws clearly the line, and gives, even in matters sacred, a jurisdiction to the commission. For the parishioners, in this respect, being *quodammodo fundo annexi*, and subject to all the burdens imposed thereon, must follow the lands dismembered to the annexed parish, and be subject to the burdens thereof; and, consequently, may be ordered, by the Commission, there to hear the word, and receive the sacraments, &c.; this being no more, as the canonist expresses it, than *temporalia spiritualibus annexa*, in which the civil courts have a competent jurisdiction; but they have not *in puris spiritualibus*, as the objectors erroneously contend, by the construction they put upon the annexation *quoad sacra*; whereas, it truly means no more than a reservation of the former Minister's stipend, which otherwise would accrue, at least, might be evicted by the Minister to whose parish the annexation is made.

Again, from the proceedings in the decree of annexation, it will appear, that it was held to be a certain consequence, that the annexation to Slamannan, as well

as to the other parishes, would have the effect set forth by Forbes, on Tithes, p. 388. "That the part disjoined, to all intents and purposes, became part of the parish to which it was annexed;" and, therefore, the greatest caution and circumspection was used to prevent that legal and necessary consequence. In the major proposition, therefore, of the libel, there appears the salvo and reservation of the present stipend modified and allocated to the Minister of Falkirk, and but prejudice thereof. Then follows the conclusion, to declare, "That the foresaid annexation is, *quoad sacra tantum*, without prejudice to the Minister of Falkirk of the present stipend payable to him."

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The pursuers seem to have been sensible, that the decree, conform to the above conclusion, would have no other effect than to secure the Minister of Falkirk in the stipend, whether localled or payable out of the parts dismembered and annexed to the neighbouring parishes; that, so far, declaring the annexation *quoad sacra tantum* might be carried, and in point of law be supported. But they had a further view, and such as the objectors now set forth,—of holding and retaining the parts disjoned, to all intents and purposes, to be part of the said parish of Falkirk, in so far as regarded future augmentations, &c. This further view, and what the pursuer contends to be most unprecedented and contrary to law, was endeavoured to be obtained by the following clause, inserted in the libel.

For, after supposing decree in the annexation, the libel proceeds: "And being so annexed, it ought to be found and declared, that, in case the Ministers of the respective parishes to which the said lands were to be annexed, as said is, should obtain an augmentation of stipend, the samen was only to affect the teinds of their own parishes, but no ways to affect the teinds of the lands there to be annexed, the samen still being to remain as a property of the Minister or Ministers of Falkirk, and of the foresaid new parish to be erected as above, as it stood before this present libel."

If the Court had decerned in terms of the above conclusion, and in the case there put and supposed, the objectors would have stood on better ground, by having a decree of the Court in their favour. The pursuer, then, would have only had to urge, that it was a void decree, *ultra vires* of the Court, and contrary to law. But as the Court have refused to give decree conform to that conclusion, and in the case there put, and have gone no further than to decern upon the former conclusion above mentioned, viz. That the annexation should be *quoad sacra*, but prejudice of the present stipend to the Minister of Falkirk, there occurs here, in some measure, a judgment of the Court, repelling the objection now pleaded by these heritors. For although the clerk has stopped with these words, "And declared the above annexations to be *quoad sacra tantum*," yet, in comparing that with the libel, it cannot, upon just interpretation, be separated from the first conclusion, or receive any other meaning than that of an annexation, but prejudice of the present stipend to the Minister of Falkirk. To presume

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more is *ultra petita*, contrary to the law, and the powers vested in the Commission.

Lord Bankton and Mr. Erskine, indeed, give their opinion, that an annexation *quoad sacra* has only respect to divine service: But these authors do not express by what jurisdiction, civil or ecclesiastical, such annexations have been made; and, if it could be supposed they meant the first, they give no reason for their opinion, much less authority; and, *salva venia*, it is a novelty, and contrary to law.

There is likewise a decision, 13th July, 1748, Park *contra* Sir William Maxwell, No. 18. p. 8503. where Sir William's lands, being annexed to the parish of Carmunnock *quoad sacra tantum*, were found not liable in a proportion of the expense of building a manse for the Minister of Carmunnock.

But, in the *first* place, this is but a single decision; *2dly*, the object and matter are entirely different. To dismember a large, and annex to a smaller parish, are powers vested in commissions, for the spiritual comfort of the lieges, and the provision of a competent stipend to their Ministers. The jurisdiction being granted for these purposes only, it might perhaps have appeared in Sir William Maxwell's case, that, *quoad ultra*, matters ought to remain, in every other respect, as if they had continued under the cure of the Minister of the old parish; as, for example, that no alteration should be made in the payment of the land-tax, in services to high-ways and bridges, and other secular prestations, exigible by particular statute, and, of consequence, not in rebuilding a manse, which is purely of that nature; an obligation, introduced by the statute 1663, upon the heritors of parishes, as then constituted. Over all these matters, as the commission of teinds have no jurisdiction, it might not have been improper for the Lords of Council and Session to have found, that the decree of the commission could not extend, or have any effect upon matters *extra jurisdictionem* of the commission. But there can be no doubt, that, as the commission have jurisdiction over teinds and stipends, that the decree of disjunction and annexation, to answer the above purposes of the statute, must have a full and absolute effect.

Pleaded for the objectors: Hitherto they have been taught, that an annexation of a parish, *quoad sacra tantum*, had no influence whatever upon the civil rights of parties; so the law is laid down, Bankton, vol. 2. p. 19, § 50. and Erskine, B. 1. T. 5. § 19.

The decision, July 1748, Heritors of Carmunnock, referred to by both these authors, arose in consequence of a disjunction of some lands belonging to Sir William Maxwell, *quoad sacra*, from the parish of Cathcart to the parish of Carmunnock; and Sir William was successful in having it established, that, on account of such annexation, he was not liable to any part of the expense of building a manse to the Minister of Carmunnock; and so little is the pursuer founded in the observation, that the case of a manse is much better founded in the argument of exemption than the case of a stipend; that, in this decision, it was taken for granted upon both sides, that the teinds continued to be part of the old benefice, although

Sir William's party endeavoured to show, that the same rule should not take place with regard to other parochial burdens.

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The pursuer does not pretend to say, that the law has not hitherto been understood as contended for by the objectors; but he says this has been altogether a misapprehension of law, which the Court should explode, and adopt a new law. The objectors must be pardoned to doubt the justness of his observations; for, first, the statutes talk, in general, of annexations and dismembrations of parishes; and, although they chiefly had in view annexations and dismembrations to all effects whatever, still there are no words to exclude the exercise of the Court's jurisdiction in those particulars, under such qualities and conditions as to the Court shall seem meet; and, accordingly, it is not contraverted, that, in various cases, the Court have exercised jurisdiction, by annexing *quoad sacra tantum*.

But, 2*do*, Although the pursuer could prove, that the court excercised a jurisdiction of annexing *quoad sacra*, which they ought not to have excercised, it is a most extraordinary inference from thence to conclude, that directly, in the face of their decree, their annexation *quoad sacra tantum* should be held as an annexation *quoad civilia*.

The text referred to by the pursuer, no doubt, deserves the highest regard, as being of sacred authority; but, it is believed, the sacredness of the authority is not the only reason which has rendered it popular amongst the clergy of every age. But it is a sufficient answer to the pursuer, who pleads upon the exclusive jurisdiction of the ecclesiastics to annex *quoad sacra*, to say, that this cannot be an indefeisible rule of the church; for, it is an admitted point, that an annexation *quoad sacra* by the ecclesiastical courts, has no effect with regard to civil rights; and, therefore, it cannot be supposed that such annexations would ever take place by ecclesiastical authority, if it was understood as an invariable rule, that those who sow spiritual things should, at the same time, reap the whole temporal things.

The argument used by the pursuer, in order to show, that the expression of annexing *quoad sacra tantum*, means no more but a reservation of the right of the incumbent of Falkirk, is incompatible with the rule just now noticed; for, if it is once established, that the objector's lands remain liable to the payment of stipend within the parish of Falkirk, it follows of course, that the lands cannot be liable in the payment of stipend to two different parishes. Indeed, the observation is repugnant to the whole strain of the proceedings before the Court; for, when they declare, that the above annexations were to be *quoad sacra tantum*, it was, in legal and technical terms, decreeing what was craved in the libel, that the lands should remain subject to all the burdens in the parish of Falkirk, and subject to none of the burdens within the parish of Slamannan; and, what is demonstration of this, is the ready consent which was given to the annexation by the heritors of Falkirk, and the opposition that was given to it by the heritors of Slamannan; for, if the annexed lands had been to bear any part of the stipend within the parish of Slamannan, no opposition could have been made on the part of the other heritors;

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and, in like manner, it will not be supposed, that a consent of the heritors of Falkirk would have been so easily obtained, if the burdens of their own lands had been to receive an increase, on occasion of the intended annexation.

"The Lords find, that the lands disjoined from the parish of Falkirk, and annexed to Slamannan, by decreet 28th November 1724, is only *quoad sacra*, and cannot be subjected in payment of any stipend to the Minister of Slamannan; and therefore ordain them to be struck out of the rental."

Act. *D. Dalrymple.* Alt. *Solicitor Dundas.*

Fol. Dic. v. 4. *p.* 299. *Fac. Coll. No.* 20. *p.* 54.

1772. *November* 25.

MR. ANDREW WILLIAMSON, Minister, *against* THE HERITORS of the Parish of ARNGASK.

No. 24.
Augmentation of stipend refused, in respect of an augmentation by a decree in 1709; but a subsequent decree of locality, not pronounced till 1715, and localling the whole stipend in money, in place of a former locality of victual in part, found no bar to a rectification in that particular—and small addition also made to the former allowance for communion elements.

A decree of augmentation, in the year 1709, gave the Minister of Arngask 900 merks Scots of stipend, and 40 merks for communion elements.

From various causes of delay, the decree of locality was not pronounced till 31st July, 1715, and thereby the whole stipend of 900 merks was localled in money, in place of a locality of 30¼ bolls of victual *pro tanto*, which had been allocated by a prior decree in 1669, and which decree 1669, in the process of modification 1709, had been found to be the rule of the Minister's payment *pro tanto*.

The present Minister of Arngask having brought a process of angmentation, the heritors objected that the pursuer was already sufficiently provided of a stipend, settled by decree no farther back than the year 1709, at which time, it appears from the decree itself, his predecessor got no less than an addition of 400 merks and that, in such circumstances, the Court is not in use to open decrees of so short endurance.

"The Lords find the pursuer not barred by the decree 1715; but find him entitled to the 900 merks modified by the decree 1709, of which, 30 bolls 1 furlot of oat-meal to be now payable in kind, at the rate of 100 merks per chalder, and modify the communion-elements to £.40 Scots; and decern and ordain the said stipend and element-money, being 30 bolls and a firlot of oat-meal, and £.473 19*s*. 2*d*. Scots, of money for stipend, and £.40, money foresaid, for communion-elements, to be paid to the pursuer, &c."

A reclaiming petition for the pursuer, which prayed the Court "to alter the above interlocutor, in so far as it only rectifies the injury which the decree of modification 1709 received in the proceedings in the locality 1715, and to give such augmentation as to the Court shall seem meet," was refused, without answers.

Act. *D. Dalrymple, et Solicitor Dundas.* Alt. *D. Græme.*

Fol. Dic. v. 4. *p.* 300. *Fac. Coll. No.* 33. *p.* 87.