

1772. June 17.

ROBERTSON, PEARSON, and MITCHELL, Heritors in the parish of Logie,
against LADY FRANCES ERSKINE of Marr, and her husband.

In a process of augmentation, &c. at the instance of the Minister of Logie, Lady Frances Erskine gave in a scheme of locality, of the sum modified for furnishing the communion-elements in this parish, localing the whole upon Robertson, Pearson, and Mitchell, proprietors of certain parts of the lands of Corntoun, and such other proprietors of the said lands of Corntoun as had not purchased their teinds; and a note was subjoined, bearing, that Lady Frances having been in use to furnish elements for the communion in this parish, the Court had, by a former interlocutor, modified £.60 Scots for furnishing thereof, and ordained the same to be paid yearly to the Minister, by her and her successors in the right of titularity of the said parish;—therefore, the above locality of the communion-elements, which is laid proportionally on those teinds still in her hands, was presented by her for approbation; and the scheme having “been reported, the Court approved of the locality, and decerned accordingly.”

All the heritors acquiesced, except Robertson, Pearson, and Mitchell who, reclaimed against this judgment, in so far as it allocates upon the teinds of their lands, the several sums mentioned in the scheme for communion-elements, over and above their proportion of stipend with the heritors. *1st*, They argued the general point, that Lady Frances is not entitled to allocate the communion-elements upon the teinds of the defenders lands.—It does not appear that there is any law making the communion-elements a burden upon the tithes. The only act with regard to the communion-elements, is 1572, Cap. 54. entitled, Anent the reparation of the parish-kirks; and which concludes, with this clause: And sicklike, our sovereign Lord, with the advice of his said dearest regent, the three estates, and hail body of this present Parliament, ordains the Parsones of all parochie-kirkes, within this realme, to furnish bread and wine to the communion, how oft the samin shall be ministrat within the samin kirkes.”

Sir George Mackenzie’s observations upon this clause of the act are in these words: “By this act also, the parsons of the parish should furnish bread and wine to the communion, how oft the same shall be administrated; and it seems, that, by the word parson, should be meant either *rector ecclesie*, for he is called the parson, or all the persons who are the parishioners; and which seems reasonable, because they partake of the sacraments, and yet heritors are only liable.”

In all the commissions granted for judging of rights of tithes, from that in 1633, down to 1707, though they contain an ample enumeration of the powers of the Court, both with regard to the rights of tithes, and the burdens affecting them, there is no mention of communion-elements, nor any authority given for decreeing them out of the tithes.

No. 80.

Communion-elements a burden on the teinds.— Power of a titular, burdened by a decree of the Court, with the payment of the sum modified for communion-elements, whose right of titularity is but partial, to allocate that sum upon those lands over which his titularity extends.

No. 80.

Indeed, there does not appear any reason why communion elements should be a burden upon the tithes, more than cups, tables, and table-cloths, or what else is necessary for the ministration of that ordinance, and of lavers and basons for the other sacrament of baptism. Sir George Mackenzie, though his observations were written long after the above act of Parliament, and after the law of tithes was established on the footing on which it now stands, was clearly of this opinion. He says, that they ought to be paid by the whole parishioners, though, in fact, they were paid by the heritors. He does not say that they were or ought to be paid from the tithes, nor by the titular, nor those heritors only who had no right to their tithes, but seems to consider it as a parochial burden paid by the heritors in general, without any regard to the tithes.

The ground on which Lady Frances Erskine was subjected to the payment of the communion-elements in this case, was, that she had been in use of paying them. This is, in effect, confessed by the note on the scheme of locality presented by herself; and, indeed, there could be no other ground. Lady Frances is titular only of the tithes of the lands of Corntoun, a small part of the parish. It could not therefore be as titular that she was subjected; for then they must have been allocated on her, and the other teinds of the parish, whereto she has no right, proportionally. It could only be in respect of the use of payment. Now, however that might be a reason for decreeing Lady Frances to pay the communion-elements, it is submitted, whether it ought to infer a perpetual burden on the defenders. If the same person had been titular of the whole teinds of the parish, then the communion-elements would have been allocated only on the defenders' lands, in proportion with the rest of the parish; and it does not occur why they should be in a worse situation, merely because Lady Frances has only right to a part of the tithes.

2dly, As the defender Robertson has a valuation and sale already in Court, in which a proof was allowed several weeks before this locality was given in, and now lies before the Court for advising, independent of any other plea, he is entitled to insist that his teinds shall not be affected with any burden, but in proportion with the whole other teinds within the parish, in terms of the act 1693. It was contended, however, upon the general grounds now pleaded, that none of the defenders can be subjected to pay this additional burden, beyond the rest of the teinds of the parish; or, if it should be thought, that the communion-elements, are a burden upon the tithes, and that Lady Frances is entitled to allocate those of the defenders' lands for that purpose, they ought, at least, to have a proportional relief out of the locality of the stipend, so as they may be on a level with the other heritors.

Answered: Lady Frances is proprietor of no lands within the parish of Logie; but, in the right of the family of Marr, she is titular of the teinds of the lands of Corntoun, part of which belong to these defenders. These lands of Corntoun were formerly part of the parish of Stirling, having been disjoined from that parish, and annexed to the parish of Logie; and, since the date of that annex-

ation, the pursuer's predecessors have been in use, out of these teinds, to furnish the communion-elements.

The pursuers have no occasion to impugn the opinion delivered by Sir George M'Kenzie, in his observations upon the statute 1572, C. 54. which the defenders have referred to, as the only act which regards communion-elements. His opinion is, that the communion-elements are a burden upon the heritors; and, when the pursuers are not proprietors of a fur of land within this parish, so, if the foresaid opinion be well founded, no part of the communion-elements can be a burden upon them. At the same time, Sir George M'Kenzie cannot be here understood to mean, that communion-elements were a burden upon the stock. It may be said, not with impropriety, that the heritors are liable; because they, as possessing the teinds of their lands, do naturally fall to pay the communion-elements, as well as the stipend; and the same may be said to be a burden upon them, when that part of the tithes which is allocated for the communion-elements, might otherwise have been purchased by the heritors from the titular, at the low price of nine years purchase. The statute itself does, indeed, clearly establish, that communion-elements are a burden upon the tithes, and not upon the stock. It ordains the parsons of all parish-kirks to furnish bread and wine to the communion. A parson had no right to the stock; but he was titular of the tithes of the parish; and, therefore, when the statute lays the foresaid burden upon him, it very clearly points out communion-elements to be a burden upon the tithes. This doctrine is accordingly very clearly laid down by Bankton, Vol. 2. p. 69. § 190.

2do, The jurisdiction that has been exercised by this Court, in consequence of the commission 1707, is a clear and demonstrative proof, that communion-elements are a burden upon the tithes. The Lords, in consequence of the foresaid commission, have no jurisdiction as to the stock. The Court is not authorised to lay any burden upon the stock of any heritor's lands within the kingdom; and yet, in every decree of modification, the Court have uniformly been in use to modify to the Ministers, not only a stipend, but also a certain sum for communion-elements. Every such decree is, in effect, a judgment upon the point, finding communion-elements a burden upon the tithes; and, wherever there was sufficiency of free tithes, the titular has been in use to local the communion-elements, as well as the stipend thereupon, keeping his own lands free of any part of the burden.

Indeed, the question is not now entire. The Court have decerned the £.60 for communion-elements, to be paid yearly to the Minister, by Lady Frances Erskine, and her successors, in the right of titularity of the teinds of the said parish; and this judgment has been acquiesced in, and become final. As long as the teinds remain with Lady Frances, or her representatives, the defenders could have no interest to oppose the payment of the communion-elements, according to the proportions established by the foresaid locality; because, as the same is far within the amount of their free tithes, it is of no moment whether they

No. 80. pay the same to Lady Frances the titular, or to the Minister; and, upon the supposition that the defenders should purchase their tithes from the titular, they would in so far become successors to Lady Frances in the right of titularity, and, consequently, behoved to be liable for their proportion of the communion-elements, by the express terms of the judgment of the Court.

The pursuers, indeed, have no interest to make any objection to that part of the defender's plea, viz. that, if the Court should be of opinion that the communion-elements are a burden upon the tithes, and that Lady Frances is entitled to allocate those of the defender's lands for that purpose, they ought to have a proportional relief out of the locality of the stipend, so as that they may be upon a level with the other heritors. It is certainly her interest, that the burden should be taken off the defenders' and the other heritors of Corntoun, and laid upon the other heritors of the parish.

The Court refused the desire of the petition, and adhered to the former interlocutor."

For Titular, *R. M. Queen.*

Akt. Rolland

Fac. Coll. No. 15. p. 37.

1777. July 9.

CAMPBELL *against* EARL of MORAY.

No. 81.

The heritors of Balquhidder, in an augmentation, contended that the same should be laid on the Earl of Moray's teinds of Inverlocharig, as he had produced nothing but a personal right to them, no mention whatever being made of the teinds in his disposition to the lands from the family of Athole. Answered, As the estate of Glengarroch, of which Inverlocharig made a part, was feued out in the year 1719, by the family of Athole, in five different parcels, and a right to the teinds had been granted expressly to all the other parcels; it must be presumed that it was a mere omission not to give the same right to that in question, particularly as there is no reservation of teinds in the conveyance; and there has been no demand made for those teinds by the family of Athole from the date of the feu.

The Lords found that the Earl of Moray had instructed a sufficient right to the teinds. See APPENDIX.

Fol. Dic. v. 4. p. 353.

1782. July 17.

HERITORS of the Parish of COLLESSIE *against* MISS HENRIETTA SCOTT.

No. 82.

Whether
separate *red-*
dendos for
stock and

Miss Scott was proprietress of certain lands which had anciently belonged to the abbacy of Lindores. In all the different charters of these lands, the teinds were comprehended, and uniformly denominated, *decimæ garbales inclusa*. Differ-