No. 25. and that, as their teinds, as ascertained by the decree 1637, are fully exhausted, no further augmentation can be given out of their lands."

The petition was "Refused, without answers."

For the defenders, *Macqueen.*

Fol. Dic. v. 4. *p.* 300. *Fac. Coll. No.* 73. *p.* 176.

1773. *June* 29.

MR. WILLIAM WALLACE, Minister of the Parish of Drummelzier, *against* The EARL of MARCH and RUGLEN.

No. 26.
The exception in the Act 1690. Cap. 23. along with possession by the Minister, of an annual duty and services out of lands formerly holden of the vicar of that parish, with that *reddendo*, found to give the Minister a preferable right both to the feu-duty and personal services, in a question with the patron, now become proprietor of the lands.

Mr. William Wallace, minister of Drummelzier, brought an action against the Earl of March, present proprietor of the lands of Happrew, in order to assert his right to a small duty of £.4 Scots, and likewise certain services, which the pursuer claimed as due to him out of these lands of Happrew; concluding, as to the services, for an annual sum of £.6 Scots, as their value, from the period of the Earl's purchase of said lands in 1756, since which they had been withheld, and for performance in time coming; and he referred to the original feu-charter of these lands granted by Ninian Douglas, Vicar of Stobo, to Nicol Brown, dated 15th January, 1536, the reddendo whereof was expressed thus: "Reddendo inde annuatim dict. Nicholas Brown, et hæredes sui præscrip. mihi, et meis successoribus, Vicariis de Stobo, summam quatuor librarum monetæ regni Scotiæ, ad duos anni terminos, &c. et sex dies servitii secular. in angariis, sive parangariis, sive in utrisque, ad voluntatem meam, et successorum meorum, semel in anno, quando mihi et meis successoribus videbitur magis expediens, tantum, pro omni alio onere," &c.

The pursuer, in support of his action, set forth, that the parish of Drummelzier was anciently a vicarage, depending upon the parsonage of Stobo; and the Vicar's living partly arose from certain duties payable out of the lands lying in the parish of Stobo; in particular, the lands of Happrew were always held feu of the vicars of Drummelzier, for payment of a yearly duty of £.4 Scots, with six days service of men and horse, which, by the practice, has been explained to be the service of one man and one horse for six days: That, after the Reformation, and when Drummelzier came to be a separate parish, the Minister serving the cure there continued to exercise this right of superiority over the lands of Happrew, and has immemorially enjoyed all the emoluments thereof, which never were annexed, or taken away from the church of Drummelzier by any of the statutes after the Reformation: That, when Mr. Wallace, the present incumbent, was admitted Minister of this parish, he found this superiority a part of the benefice, and he enjoyed the emoluments thereof, as his predecessors had done, from the earliest times; and Mr. Brown, the late proprietor, took a charter from him, as his lawful superior, and was regular in the payment of the feu duty and performance of the above mentioned services, which had been wrongfully discontinued, only since the defender became purchaser from

him. And it was contended, that the right to this feu-duty remained entire to the minister, notwithstanding the statute 1690, being secured by the second branch of the exception in the act;—" or where the minister is, and has been, in the possession thereof, by the space of ten years;" under which, this case was clearly comprehended. No. 26.

On the other hand, the defender stated, that, as to the superiority of the lands, he has taken a charter to hold of the Crown, as, by law, he is entitled to do; and being himself patron of the parish of Drummelzier, by the act 1690, the feu duty and services in question belong to him as patron.

As to the exception in the act, argued, in the *first* place, The pursuer does not show, in terms of the act of Parliament, that he has been ten years in possession. 2*dly*, Although he seems to consider the exception as in favour of Ministers, no such thing is said. The act of Parliament was partly in favour of the Crown, and partly in favour of Patrons. The superiorities were declared to belong to the Crown, with the whole casualties and emoluments thereof, with a reservation to the patrons of the feu-farms and feu-mails of these superiorities, ay and until they should receive a certain value for them from his Majesty; or, in other words, these feu-farms and feu-mails are declared redeemable by the Crown from the patron, at a certain rate; but from which power of redemption, there is an exception, where the the feu-farms are a part of the minister's modified stipend, or where he has been ten years in possession, or where he has the full benefice;" "in which cases they are to be irredeemable." From these last words, that they are to be irredeemable, it is plain that the exception is from the power of redemption mentioned in the preceding part of the clause; and therefore is an exception in favour of patrons, diminishing so far the Crown's right. The feu-duty, in short, was, in all events, meant to be given to the patron; or, which is the same thing, the patron was to have the benefit of it, redeemable by the Crown; but this power of redemption was not to take place in any of the cases there excepted.

It was very proper that the Crown should not have the power of redeeming, in any of these cases; because, though the patron had the right, yet the subject was in the possession of the Minister, as a part of his living. If it was allocated to the Minister, as a part of his modified stipend, it continued with him for ever; and the patron had so much less to pay out of the teinds. If, on the other hand, there was no decree of modification and allocation, the Minister's right to the feu-duty was defeasible; but still he had a good title to continue the possession of it, till a modified stipend should be settled upon him; and, during that time, it was proper that the Crown should not redeem it from the patron.

The language of the statute, in so far as regards the patron's right, is clearly general. There is no exception whatever, no distinction between one feu-duty and another; but, afterwards, when the act gives a power of redemption to the Crown, an exception is justly thrown in, in order that the Crown may not redeem those feu-duties which are in the possession of the Minister, as an established part of his living.—But these are not declared irredeemable in the person of the

No. 26. Minister. The act says no such thing; and it is clear, that, in two of the cases therein mentioned, viz. where he was in possession, either of the full benefice, or of a part of it, without any modified stipend, these feu-duties could not be irredeemable in the person of the Minister; for it was in the power of the patron, at any time, to apply for having a settled stipend modified to the Minister out of the teinds; in which case, there was an end to the Ministers' right as beneficiary; and it would have been unreasonable, and inconsistent with the general idea of the law, to have declared those feu-duties, or any other part of the ancient benefice, irredeemable from the Minister, after a modified stipend was settled upon him. They were irredeemable from the patron, as long as possessed by the Minister as part of his benefice; but they, of course, fell to the patron, when the Minister got a settled stipend, in terms of the act 1690, not including such feu-duty; and they might then be redeemed from the patron by the Crown, at the rates therein mentioned.

The pursuer misconstrues the act of Parliament, so far as he makes the words, "Where the Minister has been in possession thereof by the space of ten years," to mean, whether he has a modified stipend or not. The act could not suppose, that the Minister both had a modified stipend, independent of the feu-duties belonging to the ancient benefice, and was likewise in possession of these feu-duties. At the time of passing the act, many Ministers were, no doubt, in possession, without any modified stipend; but, as soon as a modification was obtained, either it was settled, that the feu-duty should be held as a part of the stipend, in which case so much less was given out of the teinds; or, if a full stipend was modified, the feu-duty came, of course, to belong to the patron, redeemable by the Crown.

The Minister of this parish obtained a modified stipend, in the year 1731, without any mention of the feu-duty or services now claimed; and it is adverse to the genius of the law, as it presently stands, that a stipendiary minister should be entitled to exact them, under pretence of being in right of the ancient benefice; more especially when, in reality, he has no right to the benefice, and when, in his decree of augmentation, no mention whatever is made of his having such a claim, which appears to have been improperly concealed from the Court.

In the next place, as to the services, it was *separatim* contended: By the acts 1633 and 1690, it is clear that every sort of casuality and duty was annexed to the Crown, except the feu-mails and feu-duties, which were reserved, by the one act, to the titular, and, by the other, to the patron; and though, by the act 1690, there is an exception of the feu-farms from the right of redemption allowed to the Crown, yet, in no case are the personal services either excepted or reserved; and it never could be meant that these should belong to the Minister, after the right of superiority itself was taken from him.

Accordingly, this very point was decided, in the case of Watson against Ellis, reported by Stair, No. 46. p. 7975. *voce* KIRK PATRIMONY, where the Lords, in a process at the instance of the Lord of Erection, assoilzied the vassal from arriage and carriage, as taken away by these acts of Parliament; but decerned for the feu-duties.

No. 26.

Indeed, the general bent of the law, as it presently stands, and as it has stood in this country for some time past, is against personal services, whether in the case of kirk-lands or others. By an act, 1st Geo. I. C. 24. personal services of all vassals, even in temporal lands, were discharged to be performed in kind; and, by the act Geo. II. tenants were relieved from the general clause of services, used and wont.

Observed on the bench: The act 1690 cannot be understood so favourably for the patron, as the defender argues. It is a beneficial statute to the patron, but with an exception that goes to the right that is granted; and, therefore, how can the patron get what is specially excepted from the right, especially where the benefice has been so long in possession? And the exception is broad enough to comprehend the whole, both feu-duty and services.

"The Lords repel the defences, and find the defender liable to the pursuer for the feu-duty of £.4 Scots yearly, from the year 1756; likewise for the sum of £.6 Scots yearly, as the value of the personal services libelled from the said year 1756; and find him liable for the said feu-duty of £.4 Scots yearly, and in the performance of the said personal services themselves yearly, in time coming; and find expenses due to the pursuer."

Act. *Ogilvie.* Alt. *Ilay Campbell.* Reporter, *Coalston.* Clerk, *Kirkpatrick.*

Fol. Dic. v. 4. *p.* 299. *Fac. Coll. No.* 78. *p.* 190.

1774. *July* 13.

THOMAS FOTHERINGHAM-OGILVIE of Powrie, *against* ALEXANDER BOWER, and Others, Heritors of the Parish of Methie.

No. 27.

After two parishes have been long united, Whether they are to be considered as one in localling an augmented stipend?

The parishes of Methie and Inverarity, in the county of Forfar, were united, *quoad omnia*, by proper authority, above a century ago, and have ever since had only one church and one Minister.

The patronage of Inverarity belongs to Mr. Fotheringham of Powrie, who has also a separate right to the teinds of his whole lands, which compose the old parish of Inverarity, by charters from the Crown.

The kirk and teinds of Methie anciently belonged to the Abbacy of Cupar, and came to the Lord Cupar, as Lord of Erection of that Abbacy. Mr. Bower and others are heritors of the parish of Methie, and possess their teinds in virtue of tacks flowing from the Abbacy of Cupar, which, since the Reformation, were confirmed by Lord Cupar, the Lord of Erection, and prorogated by the commissioners, having powers for that purpose.

Powrie is also proprietor of some lands in the parish of Methie, to the teinds of the parish of which he has no right.

A process of augmentation, modification, and locality, was lately brought by the present Minister of these united parishes. After some procedure, a decree of aug-