

1800. *February 12.*

THOMAS CRANSTOUN, Common Agent in the Locality of Peebles, *against*
MISS ELLIOT and Others.

No. 3.

Lands which originally formed the vicar's glebe, are not liable to stipend.

IN the locality of Peebles, Miss Elliot, and other heritors of lands which formerly constituted the vicar's glebe, but had been feued to a layman prior to 1569, as appeared from a charter by the feuar of that date, objected to a scheme of locality, in which part of an augmentation was laid on them, though they had before paid nothing either to titular or minister,

Pleading: Glebes paid no teinds in times of popery. The exemption was continued after the Reformation, by statute 1678, C. 62., and has been understood to apply, though the lands now belong to laymen, unless they have paid teinds for forty years. This has arisen from the clergy being of old encouraged to feu their lands, provided they did not diminish the rental; and, if lands not previously liable to teinds, had become so on being feued, a feu-duty corresponding to the stock only could have been got for them; Mackenzie's Obs. on 1578, C. 62.; 16th July 1678, Earl of Queensberry against Douglas; No. 104: p. 15718; Forbes on Tithes, P. 378.

Answer: Glebes were not liable in teinds before the Reformation, only, because both stock and teinds belonged to the clergy; but when they were deprived of the right of titularity, their lands were understood to become universally liable to teinds; and the acts 1578, C. 62., and 1621, C. 10., were considered to be necessary to give a personal exemption to the reformed clergy for the glebes allotted to them; but this does not reach old glebes now possessed by laymen; especially if they have not been feued prior to the acts 1563, C. 72., and 1572, C. 48., which declared such alienations illegal.

The Lord Ordinary sustained the objection.

The Lords, upon advising a petition, with answers, (19th June 1799) adhered.

A second petition being followed with answers, the same judgment was repeated.

Lord Ordinary, *Dunsinnan.* For the Common Agent, *Williamson.* Alt. *W. Robertson.*

D. D.

Fac. Coll. No. 166. p. 370.

1800. *May 14.*

The Reverend WILLIAM STEWART, *against* The Earl of FIFE.

No. 4.

The minister of a parsonage is not

THE parish of Turreff is one of the few parsonages now remaining in Scotland; and the immemorial practice has been, for the minister, before his ad-

mission, to grant a lease of the teinds, during his incumbency, to the patron, for a certain tack-duty, which, in this way, comes in reality to be the stipend of the parish.

Mr. Stewart, the present incumbent, according to the usual practice, granted such lease about twenty-five years ago, containing a clause of warrandice from fact and deed. Notwithstanding this, however, Mr. Stewart, conceiving the tack-duty payable by the lease to be an inadequate stipend, brought an action of augmentation; in defence against which, the Earl of Fife, as patron of the parish, and Mr. Aberdeen, one of the heritors,

Pleaded: A process of augmentation is competent only, where the minister is a stipendiary. Being in this case the parson of the parish, and as such, the proprietor, during his incumbency, of the whole tithes, he may injure, but he can never benefit the living, by having recourse to this process. Besides, although the action were found to be competent, it would be nugatory; as whatever augmentation he might obtain, he would be bound to communicate it to the Earl of Fife, in consequence of the warrandice in the lease.

Answered: The act 1612, Cap. 1., while it sanctions transactions similar to the present between the patron and the incumbent, does so under the express qualification, that the tack-duty shall be such as to afford the incumbent 'a sufficient maintenance;' and although the tack-duty, reserved by the lease in question, may at its date have been an adequate stipend, it is not so at present. As leases similar to the present are, therefore, granted under an implied condition, that the incumbent shall have a sufficient maintenance, public utility requires that the Court should enforce this condition; and it is vain for the defenders to contend, that the pursuer, by seeking an augmentation, is hurting the benefice; for if any future incumbent were, at his admission, to refuse to grant the usual lease to the patron, the latter would infallibly reduce him to the situation of a stipendiary, by bringing a modification of his stipend, in virtue of the act 1693, C. 25.

Besides, on the supposition that the reserved tack-duty is an inadequate maintenance for the minister, the lease must be regarded as a *pactum illicitum*, and as such can be no bar to an augmentation; 22d January 1794, Boyd against the Earl of Galloway, No. 109. p. 9583.

The Court, on the grounds stated for the pursuer, repelled the preliminary defence.

Act. *W. Robertson.*

Alt. *C. Hope.*

R. D.

Fac. Coll. No. 174. p. 395.

No. 4.
barred from bringing an augmentation of his stipend, by his having previously granted a tack of the teinds of the parish in favour of the patron.