

are either paid by contribution, or out of their common good, the burgh affording no tithes; and so has Carpzovius decided, cap. 8. *de decimis*, that annats are *debita fructuum* only; and it is known, that the ministers of Edinburgh, and many other burghs royal, have no annats, neither did menial kirks pay any; and by the same rules St Andrews must be free.—*Answered*, The act is general, and does not except burghs more than others; and *ubi lex non distinguit nec nos*. And though Edinburgh and other towns have not paid any such acknowledgment to their ministers, yet they redeem it by giving some equivalent for it, and prudently waved its being brought to a trial. And it is known, that royal burghs having a laudward parish annexed to them, have ever been in use to pay the annat; and though there grows no corns within burghs to be teindable, yet there is in most of them mortifications of teinds to help their stipends.—THE LORDS, by a plurality, found all stipendiary ministers included in the act, whether paid by money or victual, and therefore found annat due here.

Fok Dio. v. 1. p. 36. Fount. v. 2. p. 489.

* * The same case is thus stated by Forbes:

IN the action at the instance of John Shiels against the magistrates of St Andrews, THE LORDS found, That annat was due to the pursuer as nearest of kin to Mr Alexander Shiels, the defenders' late minister, albeit the defunct's stipend was not payable out of the tithes, but by contribution of the burgh, conform to an act of the town council; in respect the act of Parliament 1672, subjects all persons to the payment of annat, who are liable to pay stipend, without distinction of burghs royal; and the reason of the law, viz. Because ministers generally die poor, holds equally in stipendiary as in beneficed ministers.

Forbes, p. 321.

1747. June 9.

KATHARINE HUTCHISON, Relict of the deceased Mr Mathew Wood, one of the Ministers of Edinburgh, and Others, his nearest in kin, *against* The MAGISTRATES and TOWN COUNCIL of Edinburgh.

MR MATHEW WOOD, one of the ministers of Edinburgh, having died between the terms of Michaelmas and Martinmas 1741, Katharine Hutchison his relict, and others his nearest in kin, pursued the Magistrates and Town Council of Edinburgh, for the half year's stipend due at Whitfunday 1742, as the annat.

Alleged for the defenders, *imo*, That where stipends are not payable out of tithes, but as in the case of ministers within burgh, are made up by contribution, or out of the funds of the burgh, as the annuity and seat rents within the city of Edinburgh, no annat is at all due. *2do*, That by the several acts of the Town Council, settling the ministers stipends at the rates therein-mentioned, the

NO IT:
Annat takes place, although the stipend be not paid out of tithes. How computed.

No 11. same are declared to be in full of the annat. *3tio*, Supposing the annat due, it is already paid, in so far as the executors have already got payment of the half year's stipend due at Martinmas 1741, which is half a year more than the defunct was entitled to by his incumbency, having died before Martinmas 1741, which is the term at which the half year's stipend is payable by the acts of council.

Answered for the pursuers, to the *first*, That they had no access to know what particular grants may have been made to the city for the support of their ministers, though they have been informed that the original fund for the stipends of the ministers of Edinburgh, was a grant of the spirituality belonging to the church of St Giles, and that they are also possessed, for the like purpose, of grants of other tithes, which formerly belonged to the Archdeanry of East Lothian. But be that as it will, what they relied on was, that the law makes no distinction as to the annat between ministers in city or country, or out of what funds they are endowed. The act 1672, which is the latest statute that defines what the annat shall be, at the same time defines the persons to whose executors it is due, namely all clergymen having the cure of souls, stipendary ministers as well as bishops and dignified clergymen; and the very question that is again moved by this objection, was in point decided in the case, Sheils against the city of St Andrews, 8th February 1709, when the Lords found, that the annat was due to the pursuer, as nearest of kin to Mr Alexander Shiels, though his stipend was not payable out of teinds, but by contribution of the burgh; in respect the act 1672, subjects all persons to the payment of the annat, who are liable to pay stipend. (See No 10.)

To the *second*, That not to mention that the act of the town council 1714, which is the last act settling the rate of the ministers stipends to be 2500 merks, speaks nothing of the annat. It was not in the power of the town, by any quality, in any of their acts, to exempt the town from the annat, with which they are burdened by statute; and, *de facto*, the town have always been in use to pay it.

To the *third*, That this point is also settled by the aforesaid act of Parliament 1672. The annat was in use with us before the Reformation, as appears from the 5th act of the Parliament 1546; but the extent and boundaries of it were never clearly settled, till done by the foresaid statute in the year 1672: Before that time, the rule was, as Lord Stair observes, Tit. TEINDS, § 34. *annus captus habetur pro completo*; and if the incumbent lived till the 1st of January, the annat was that whole year's rent of the benefice. But by the act 1672, as the persons to whose executors it is due are defined, so the extent of it is settled to be half a year's rent of the benefice; and it is declared, that if the incumbent survive Michaelmas, he shall have right to the whole year's stipend for his incumbency, and for his annat, shall have the half year's rent of the following year. And they are those terms which the statute has fixed that are observed, notwithstanding the stile of decrees of locality still continue to decern the money to be paid at Whit Sunday and Martinmas, and the victual between Yule and Candlemas.

On this debate the LORD ORDINARY found, ' That Mr Wood having survived Michaelmas 1741, though he died before Martinmas, the term appointed by the acts of council for payment of the ministers' stipends, the pursuers were entitled to the half year's stipend payable at Whitsunday 1742, for the annat.'

The defenders having reclaimed on the same grounds, the LORDS had no regard to the *first*, in respect of the act 1672; nor to the *second*, in respect of the answer. But as to the *third*, some having thought it doubtful whether, although where stipends are payable out of teinds, Michaelmas be the last term, the fruits out of which they are payable being supposed then to be separated from the ground, the same should obtain where the stipends are not payable out of teinds. The petition was appointed to be seen and answered; but, upon advising petition and answers, the LORDS ' adhered.'

For although it may be true, that the reason of fixing Michaelmas may have been, that by that time the corns are generally brought in, and the teinds out of which stipends are due, are, or may be then drawn, yet as the statute makes no distinction, it would be taking too much liberty with a statute, to restrain that general rule, to such cases only as may be supposed to have fallen within the reason of fixing on Martinmas for the last legal term.

Fol. Dic. v. 3. p. 37. Kilkerran, (ANNAT.) No 1. p. 26.

. The same case is thus reported by D. Falconer:

MR MATHEW WOOD, one of the ministers of Edinburgh, having died betwixt Michaelmas and Martinmas 1741, Katharine Hutchison his relict, with his nearest of kin, pursued the city for half a year's stipend more than was due for his incumbency, in name of annat.

Pleaded for the defenders: No annat is due when the stipend is not payable out of tithes, or the proper fund of a benefice, but is made up by collection. *2do*, By several acts of town council, the determined stipend is appointed to be paid in full of annat. *3tio*, The term of payment of ministers' stipends in the city being Martinmas, and Mr Wood having predeceased it, that term's stipend has been paid, whereby the annat is satisfied.

For the pursuers: Annat is due out of all benefices by act of Parliament, and so was found 8th February 1709, Executors of Shiels against the Town of St Andrews; and the city of Edinburgh has gifts of teinds for the support, *inter alia*, of their ministers. The term of all stipends falling due is Michaelmas, though the payment may be delayed; and the city has always been in use to pay the annat.

Replied: St Andrews has, besides the burgh, also a landward parish.

THE LORD ORDINARY, 2d January, and 28th February last, ' Having considered the acts of town council, and decision of this Court referred to, between the Executors of Mr Alexander Shiels and the Magistrates of St Andrews, and that the defenders admitted that the town had always hitherto paid the annat to the executors of all their deceased ministers, sustained process, and found the pursuers were entitled to the annat libelled; and found, That Mr Wood ha-

No 11. ving survived Michaelmas 1741, though he died before Martinmas, the term appointed by these acts of council for payment of the ministers' stipends, he was entitled to that whole year's stipend for his incumbency, and that the pursuers were entitled to the half year's stipend that was payable at Whitsunday 1742, for the annat.' On bill and answers the LORDS 'adhered.'

D. Falconer, v. 1. p. 245.

1628. February 28. BAIRNS of the B. Galloway *against* COUPER.

No 12.

Whether the annat can be affected by the minister's debts or obligations.

IN an action of tutor counts betwixt the Bairns of the Bishop of Galloway and Andrew Couper their tutor, an article of defalcation of the charge being given in by the tutor, whereby he craved allowance of a pension given to him by the Bishop, during his lifetime, to be allowed to him particularly of that year after the Bishop's decease, the annat whereof pertained to his relict and bairns, conform to the ordinance of the kirk, which provides the fruits of the benefice for the year, after the late incumbent's decease, to pertain to his wife and bairns, and therefore the tutor craved the pension of that year to be allowed to him;— and the minors *alleging*, That the pension lasting only for the giver's lifetime, could not extend to that year:—THE LORDS allowed of the article of defalcation, and found, That the tutor ought to have that year's pension allowed to him, in his intromission with the minors' goods.

Clerk, *Hay.*

Fol. Dic. v. 1. p. 36. Durie, p. 351.

1686. March 18. ALEXANDER *against* CUNNINGHAM.

No 13.
Annat found to belong, *proprio jure*, to nearest in kin, not to an assignee.

THE case of Gilbert Alexander *contra* Cunningham, was reported by Harcarfe. A minister having no children, assigns his annat to his brother's son; his sister competes as nearest of kin, and *alleges* it was not the defunct's, but being given in the time of Popery, when churchmen were neither allowed wives nor children, it belonged to the nearest of kin.—THE LORDS found it belonged to the minister's nearest of kin, and not to his assignee.

Fol. Dic. v. 1. p. 36. Fount. v. 1. p. 408.

* * Harcarfe thus states the same case :

IN a competition for a minister's annat, who left neither wife nor child, betwixt his nearest of kin and a remote relation to whom he had legated the same :

Alleged for the nearest of kin : That the annat was not *in bonis defuncti*, but designed by way of charity to the relict and nearest of kin ; in prejudice of whom it could not be disposed of by the defunct, or affected for his debt.