1749. *June* 14. FAIRNIE *against* The HERITORS of DUNFERMLINE.

No. 21.
In what case competent for a second Minister to pursue for an augmentation.

Though the stipend of the second Minister of Dunfermline appeared to have been originally 1,000 merks, raised by contribution by the Earl of Dunfermline, the Town, and other parishioners; yet, as by a decree in 1650, the commission had so far interposed, as to convert so much of the money into victual, and to determine by whom the same should be paid as the constant stipend in all time coming. "The commission now found Mr. Fairnie, the second Minister of Dunfermline, entitled to an augmentation on the teinds."

Fol. Dic. v. 4. *p.* 300. *Kilkerran, No.* 3. *p.* 521.

1770. *March* 7.
The OFFICERS OF STATE and The EARL of BREADALBANE, *against* DUNCAN CAMPBELL of Lochnell.

No. 22.
Whether teinds, called the Bishop's quarter-tithes in the Bishopric of Argyle, are to be considered as free teinds, and subject to allocation, in augmentation of stipend, before teinds to which the proprietors had heritable rights?

In the year 1602, King James VI. granted to Alexander Campbell, Prior of Ardchattan, the said priory, the kirks of Balliveodan, Bendrallach, and five other kirks, with the patronages, teinds, &c. parts of the priory. The charter bears, "Ereximus et tenore præsentis chartæ nostræ erigimus rectoriam seu parsonagiam, in qualibet ecclesia respective supra script. quæquidem rectoriæ a præfatis ecclesiis, titulam et nomen in futurum suscipiant; pro ut nos, pro nobis, &c. decernimus, &c. quod omni tempore futuro ad quamlibet ecclesiam parochialem ante dict. erit rector provisus et admissus, in sufficiente literatura et qualificatione; qui, &c. et qui incumbit functioni ministerii ejusdem, omnibus aliis necessariis ad easdem pertinen. vel reliqui rectores, aliiqui ministri infra regnum nostrum facient, et in futurum facere astringentur; et dictæ decimæ garbales, aliæque decimæ, fructus reditus, emolumenta, divoria, et totum patrimonium dictarum ecclesiarum, cum rectoriis, vicariis, et beneficiis supra script. una cum privilegiis, libertatibus, et servitiis ante dictis usitatis et consuetis, et pro reparatione dicta maneriei astrictis proprie pertinebunt."

The parishes in this grant, in particular the parish of Balliveodan, now called Ardchattan, are within the Bishopric of Argyle. That Bishopric was created out of the see of Dunkeld in the year 1200; and from the rental thereof, reports of the sub-commissioners of the valuation of the shire of Argyle in 1629, and the ancient and modern tacks of the Bishop's tithes, it appears that there was appropriated for that diocess in a great many of the parishes, one-fourth, called the Bishop's quarter tithes, with which neither patron, nor titular parson, nor vicar, had any concern. In particular, in the valuation of the sub-commissioners, the priory of Ardchattan is marked as patron of the parish of Balliveodan or Ardchattan, and titular of three-fourths of the tithes, and the Bishop of one-fourth.

No. 22.

The Minister of the united parishes of Ardchattan and Muckairn having obtained an augmentation, a locality was given in, charging no part of the stipend upon the tithes of lands belonging to Campbell of Lochnell and others, who produced heritable rights to their tithes from Campbell of Ardchattan, the successor of Alexander Campbell, the granter, in 1602; but charging almost the whole upon the tithes of the Earl of Breadalbane's lands, to which, as they were subject to the Bishop's quarter tithes, he neither had nor could have an heritable right. The Earl of Breadalbane objected to the locality, in so far as any part of the stipend was laid upon the tithes of these lands; while, *e converso*, Lochnell maintained that the Bishop's quarter tithes should be localled upon as free tithes, and therefore primarily liable.

The Lord Ordinary having approved of the locality, a petition upon the part of the Officers of State and the Earl was presented; which being followed with other papers and a hearing, memorials upon the question were ordered.

Pleaded for the Officers of State and the Earl of Breadalbane:

As Bishops were only a superior order of ministers, having their tithes allotted to them for their maintenance, it necessarily followed, that the proportion of the tithes of a parish, appropriated for the support of the Bishop, could not be taken from him and applied to the maintenance of another Minister. If this question had occurred prior to the abolition of Episcopacy, no doubt could have been entertained as to the result; and as every plea of right competent to Bishops, in questions of this nature, was competent to the Crown, the question must now, upon the same principles, meet with the same decision.

The greatest care had been taken to prevent the estates of Bishops from being encroached upon. By act 2. Parl. 1606, Bishops were restored to their possessions as before the act of annexation 1587. By act 1. Parl. 1662, they were restored against all encroachments. By act 28. Parl. 1663, an exception was made in their favour as to any decrees of the commission during the usurpation. By act 30, Parl. 1698, tithes in possession of ministers might be valued, but not sold. And by act 23, Parl. 1693, it was declared that the commission "shall not be extended to the buying or selling of teinds which formerly pertained to Bishops, and now belonging to their Majesties by the abolition of Prelacy, &c." When the Legislature had been so careful as not only to restore the Bishops against the encroachments that had been made upon their estates, but to except them out of the general rule as to alienation by purchase, it was absurd to suppose that the Legislature could intend that they might be alienated in effect by being allocated as stipend to Ministers.

The present case was different from that of a mensal church. There the whole tithes of the parish belonged to the Bishop, who, from the nature of his right, was bound to maintain the Minister who served the cure, so that the modification of stipends out of the tithes was both natural and necessary; but here the Bishop had not right to the whole tithes, but to a part only, which was appropriated for his own maintenance.

No. 22. The system of law with regard to tithes and Ministers' stipends, adopted in the time of Charles I. and pursued by subsequent acts of Parliament, so far from laying any additional burden upon the estates, or restriction upon the powers of Bishops, was extremely careful to preserve both entire. In the submission by the Bishops there was a very ample proviso, "That we and every one of us enjoy the fruits and rent of our several benefices as they are possessed by us at this present time; and that the same be not hurt nor diminished, neither in quantity nor quality, whether the same be paid to us in rent-bolls, or by gathering of the said teind sheaves;" but that they and their successors should freely enjoy the same without any alienation, &c. The condition was expressed in the decreet-arbitral, ratified and confirmed by act 19. Parl. 1633; and in the subsequent commissions 1672, 1685, and 1696, the same proviso was repeated.

The argument maintained, that as after the abolition of Episcopacy Bishops' tithes might be brought to sale, so that they were in every respect governed by the same rules of law as other tithes, till by the act 1693, they were declared only not saleable, was not conclusive. Though by the omission in the act 1690, in not declaring them unsaleable, Bishops' tithes were to be understood as having been saleable from 1690 to 1693, yet it did not from thence follow, that they might be allocated upon for payment of stipend, while there were other tithes in the parish. The act 1693 having followed the act 1690, plainly showed that it was an omission in the latter in not declaring Bishops' tithes unsaleable; and that it was the design of the Legislature that they should remain in the hands of the Crown in the same situation they were in when they belonged to Bishops, with this single variation, that in place of the Bishop providing for a Vicar or Minister serving the cure, such provision should be made by this Court.

The question now agitated was decided in the case of the Minister of Arngask in 1715; where the Court found, "That the teinds belonging to heritors, by virtue of heritable rights, were allocable to the Minister, before the teinds formerly belonging to the Bishops and their tacksman, and now belonging to his Majesty." See APPENDIX.

There was a strong plea of favour in support of this argument. Heritors who purchased the tithes of their lands got them at a small price on account of their being liable to be localled upon for future augmentations. The proprietors of lands subjected to quarter tithes could acquire no heritable right to these tithes; and hence, if they were considered as free and first liable, such owners would in most cases be subjected to the payment of a fifth of their rents, and thereby also be deprived of getting tacks from the Crown upon easy compositions.

Some separate argument was maintained upon the terms of the grant in 1602. As it appeared from that deed, that at the date thereof the parishes granted were not provided with Ministers or stipends; and as the consideration or onerous cause of the grant was, that these should be supplied, it was equitable that the grantee, and those in his right, should be bound to perform what was the inductive cause of the grant.

Pleaded for Campbell of Lochnell: No. 22.

1*mo*, It was a principle universally established by all lawyers, that teinds, into whose hands soever they passed, conveyed with them as a burden, competent stipends to the Ministers; Stair, B. 2. T. 8. § 21. No exception was made of teinds possessed by Bishops, whose right, if existing, could not have escaped observation; and when the statutes relative to this matter were duly considered, it would appear that the distinction and exemption assumed by the Officers of State had no foundation.

The Pope's jurisdiction being abolished by act 2. Parl. 1567, and a new confession of faith established by the Parl. 1567, "The hail thirds of the hail benefices of this realm" were appointed to be paid to the Ministers of the reformed church. Under this general appropriation, it was obvious that, alongst with others, the third of the Bishops' benefices were destined to the provision for Ministers serving the cure of the different kirks. But as this third was found insufficient by statute 1581, C. 110. it was provided, that every parish should have a pastor with a sufficient stipend; "and that all kirks annexed to Prelacies be provided of sufficient Ministers with competent livings." From this it appeared, that in all prelacies without distinction, the provision to the Minister was declared to be an inherent burden upon the teinds of the parish, and the prelates' right to the same; providing also, that before the title of any prelacy be conferred, the Ministers' stipends be reserved, and that any provision of Prelacy, without that reservation, should be null and void.

To this succeeded the general act 1587, C. 29. suppressing religious houses, and annexing to the Crown the temporalities of all benefices without distinction. Upon this footing matters continued till, by act 2. Parl. 1606, Bishops were restored to their former rights, amongst others, to their thirds of benefices, they always entertaining the Ministers serving at the cure; but all dispositions, &c. of Abbacies, Priories, or other benefices, were excepted and confirmed. The provision to Ministers serving the cure was finally settled by statute 1617, C. 3. anent the plantation of kirks; by which the Commissioners were authorised to call before them all persons, without exception, having or claiming right to any teinds within the kingdom, and out of the teinds of every parish to assign perpetual local stipends to ministers serving the cure. And as it was undeniable that under this general rule Bishops were comprehended, it followed that the teinds of which they were possessed were liable to make good the provision.

The next step was the general revocation of Charles I. with the submission and decreet-arbitral following: The submission of the Lords of erection and other laics was unlimited; but as to the Bishops and Clergy, a distinction was made between those teinds which the Bishops were in the actual possession of, either by rental bolls or by drawing teind-sheaves, and the other teinds pertaining to them. The first class was to continue to be possessed as formerly, and to undergo no valuation; but the other class was subjected to the same rule of valuation as the other teinds belonging to laics, and agreeable thereto the King's decreet-arbitral followed. The statute 1633, C. 17. anent the rate and price of teinds, was qualified with a de-

No. 22. claration that the rules established "shall be no further obligatory against whatever Archbishops, Bishops, &c. being Ministers, nor their successors, but according to the provisions and conditions expressed in the submission made by the Bishops." And as this exception was repeated in all the after statutes and commissions down to the Revolution, it appears by the intendment to have been personal to the Bishops themselves and their successors in office, a position that was confirmed by Charles the First's letter of 9th May, 1634, bearing, that the said favour should not be extended to the tacksmen of Bishops and other churchmen, they being laics.

Such being the sense of the Legislature with regard to teinds belonging to Prelates during episcopacy, it was not, when episcopacy was abolished, in any respect altered. By statute 1641, C. 30. power was given to a commission to apply teinds of whatsoever nature, belonging to the Bishopric, for the maintenance and provision of Ministers; and though this act was rescinded by Stat. 1662. C. 9. 15. yet these acts ratified the decrees of the commissions which had been pronounced during that period; thereby showing that Bishops' teinds were deemed to be the proper subject of provision to the Ministers serving the cure.

Upon this footing matters remained till the Revolution; when, by statute 1689, C. 3. the order of Bishops was totally suppressed; and by statute 1690. C. 30. the commissioners were authorised not only to modify stipends to each Minister, but "to take order that every heritor and liferenter shall have the leading and buying of their own teinds, if they be willing; extending the same to all teinds, except such as belong to and are possessed by Ministers for their stipends and provisions, which are only to be valued, but not to be sold or bought." As the single exception in this statute was of such teinds as were possessed by Ministers for their stipends, which were only to be valued but not sold, it was manifest that the Bishops' teinds, as then belonging to the Crown, fell not under the exception but the rule. Nor was the rule radically altered by the statute 1693; for though it was thereby declared that the commission appointed shall not extend "to the buying or selling of teinds which formerly pertained to Bishops, and now belong to their Majesties by the abolition of Prelacy; yet even this exception was not perpetual but temporary, viz. so long only as these teinds should remain with the Crown.

2do, Whatever privilege the Bishops might be supposed to have had *quoad* the teinds belonging to them, was a mere personal privilege which was extinguished by the suppression of the order, and of course was not transmitted to the Crown. As the confessed object of King Charles the First's revocation, of the submissions and decreets following, and of subsequent acts and commissions of Parliament, was, *1st*, to provide certain stipends to the Ministers; and, *2do*, to confer on the lieges in general the right of valuing and buying their own tithes; and as the only exception to the general rule established for these purposes was confined to those teinds which the Bishops were at the time in the actual possession of—there was nothing of course to distinguish one set of teinds from another, but the uses to which they were destined, or the personal relation they bore at the time to the

Bishops by whom they were appropriated. By the words and intendment therefore, both of the decreet-arbitral and the statute which followed, this privilege being personal to the Bishops, it followed as a necessary consequence, that, by the extinction of the order, the privilege ceased, and did not transmit to the Crown. No. 22.

This idea was confirmed by attending to the mode in which the Bishop's right in the tithes vested in the Crown. The Crown was not, in construction of law, the successor of the Bishop; the Crown's right accrued *jure coronæ* as *res nullius*, or by virtue of the Sovereign's universal right of titularity. Sir George Mackenzie, in his observation upon the act 1587, gave this as his opinion; and hence, upon the suppression of the order in 1689, their estates devolved *simpliciter* to the Sovereign, but their privileges or exceptions being personal, became extinct. That such was the acknowleged sense of the Legislature, was apparent from the act and commission in the year 1690; for though in the former acts the exception in the submission in favour of the Prelates was anxiously repeated, no sooner were the Bishops suppressed, than it was industriously kept out; and according to the construction of the statute 1693, the inference was plain, that Bishops' tithes, as they then stood by the suppression of the order, were both valuable and saleable, though, as a proper measure of Government, excepted from being saleable, so long only however as they remained with the Crown.

This was no new point: Many of the religious orders were indulged with particular privileges and exemptions; but as these were merely personal, they, upon the suppression of these houses, ceased, and did not transmit to the Lords of Erection. Sir George Mackenzie, in his observation on act 9. Parl. 1. Ses. 2. Charles II. says, that the privileges insured to the Bishops by the submission were merely personal in favour of churchmen; and as to the case of Arngask in 1716, it was a single decision of an ancient date, and had been departed from in the two subsequent cases of 9th January, 1724, Ker against Don of Newton, (not reported) and 25th February, 1756, Straiton of Lawriston against New College of St. Andrews, No. 101. p. 10824. *voce* PRESCRIPTION.

3tio, The charter 1602 contained an express grant of the five kirks and parishes mentioned, "cum omnibus decimis garbalibus, aliisque decimis magnis et minutis," with the right of patronage, &c. and contained also a *novodamus* in favour of Alexander Campbell, "cum pleno jure et potestate dicto Alexandro suisque hæredibus, &c. intromittendi et colligendi annuatim, omnes et singulas prædictas decimas garbales, &c." Hence, as the charter was anxiously conceived to express the plenitude of the right intended to be conveyed, it might justly be supposed that the whole teinds of these parishes were disponed, and that the grant did not of course impose any obligation upon the grantee to provide the Ministers with stipends out of the three-fourths more than out of the Bishop's quarter.

The following judgment was pronounced: "Find, That no part of the stipend can be allocated upon the fourth of the teinds which formerly belonged to the Bishop, till the other teinds within the parish, as well those heritably disponed as

No. 22. 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.

No. 23.
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,