

S E C T. XI.

Minister's grass.

1745. January 3. FERGUSSON *against* GLASGOW of Nethermains.

MR ALEXANDER FERGUSSON, Minister of Kilwinning, having applied for a designation of grass, or L. 20 Scots in place thereof, the presbytery, 'in regard there was no pasture ground near the manse, appointed the sum of L. 20 to be paid him; and found the lands belonging to George Glasgow of Nethermains were ewest to the manse and glebe, and therefore burdened him with the payment thereof, but prejudice to his obtaining relief off the other heritors of the parish, effeiring to their church-lands.'

Nethermains brought a suspension of this decret, in which the LORD ORDINARY, 18th January 1744, 'found the letters orderly proceeded,' and, February 15th, 'adhered.'

A reclaiming bill was presented, which was ordered to be answered, particularly as to the point, Whether the L. 20 being payable in money to the Minister, ought or ought not to be divided amongst the whole heritors.

Pleaded for the Minister, By act 202d Parl. 1594, it is statute, 'That the feuars, out of whose lands manses and glebes are designed, shall have their relief off the remanent feuars of kirk-lands within the parish *pro rata*;' and the preamble is, 'That ministers may be better answered in their manses and glebes in time coming, and enter thereto without trouble and contention, conform to the former act of Parliament anent manses and glebes.' This was the act 165th Parl. 1593, by which the several sorts of kirk-lands were in their order made subject to designations; so that in glebes the heritors are not to be equally burdened primarily, but the person burdened to the minister has relief.

By act 21st Parl. 1663, there was an addition made to the glebe, that the minister should have grass out of kirk-lands, with relief according to the former acts of Parliament. The act goes on in these terms: 'If there be no kirk-lands lying near the minister's manse, or otherwise, if the said kirk-lands be arable lands, in either of these cases ordains the heritors to pay to the minister and his successors yearly, the sum of L. 20 Scots for the said grass, for one horse and two kine, the heritors always being relieved according to the laws standing; off other heritors of kirk-lands within the parish.'

Where the grass itself is given, there is no doubt but it is to be allocated on the most ewest, who has relief off the rest; and indeed this act is in this respect to be considered as only explanatory of the original act 1593, by which glebes are appointed to be set off with pasturage, &c. and the L. 20 is a legal

No 38.

It was found in a case where the minister received money in lieu of grass, that the sum must be allocated upon the whole heritors; but, in this parish it happens that whole lands were kirk-lands. See No 40. p. 5161.

No 38. burden laid upon those lands, which, if they had not been arable, would have been allocated; so that the suspender has no cause to complain, who, for payment L. 20, saves the giving grass for a horse and two cows, which would be more.

Pleaded for Nethermain, After the reformation the Minister got the parson's or vicar's manse, with four acres of his glebe, act 72d, Parl. 1563, act 48th, Parl. 1572. Afterwards it is enacted (when the parish belonged to any religious community) that he should have a sufficient manse within the precincts of the abbey where he served, with four acres of land belonging, or which at any time belonged to the said abbey, lying contiguous and maist ewest to the manse, act 118th, Parl. 1592; and by act 165th, Parl. 1593, it is statuted in general, 'That where there has been formerly no gleib, the same should be designed out of kirk-lands, in a certain order;' and by act 7th, Parl. 1606, 'Where there are no arable lands, the minister is to have in place thereof sixteen souns grass.'

These acts concern only the designation of glebes out of kirk-lands; but by act 31st, Parl. 1644, they may be designed out of temporal lands, where there are no kirk-lands, with this specialty in favour of the heritor, That he may offer any other lands in the parish, within half a mile of the kirk: This act, it is true, is rescinded, but it appears to be still kept in force by the later clause of the 21st act, Parl. 1663, which plainly refers to it, and is unintelligible without having it in view. The clause is in these terms: 'And because several kirks as yet have no gleibs assigned to them, it is hereby provided, That in all designations of gleibs, incorporate acres in village or town where the heritor hath houses or gardens, shall not be designed, he always giving other lands nearest to the kirk.' Here it is understood that every kirk is to have a glebe, which could only be in consequence of the former statute; the act supposes that temporal lands might be designed, and makes an exception which is taken from another rescinded statute, viz. 45th act 1649.

There was no act giving grass to ministers, except that their glebes were to be with freedom of foggage, pasturage, &c. act 165th Parl. 1593, till the above mentioned act 1649, which gave them for a horse and two cows, and determined the manner of the relief, but gave no provision of money in lieu of grass, because no lands being then exempt, grass could not be wanting.

This branch of that statute concerning grass was renewed by the act 1663, with this difference, that it was only to be designed out of kirk-lands; and where these are arable or lie at a distance, L. 20 is given in lieu thereof; so that it remains a doubt if the money can be claimed when there are no kirk-lands in the parish. It may be thought the statute does not exclude money in lieu of temporal lands, though it mentions kirk-lands, out of which the grass is primarily to be designed; and this is supported by its being laid down in the same statute, that every kirk must have a glebe, and, by analogy, it ought to have grass or an equivalent in money. The statute says, That every

minister, except such ministers of Royal burghs who have not right to glebes, should have grass; in which it is implied, *1st*, That every minister who is entitled to a glebe is also entitled to grass; and, *2dly*, That every minister whatever is entitled to grass, except ministers of Royal burghs.

The clause giving relief runs thus, ' That every minister, except such ministers of Royal boroughs, who have no right to glebes, have grass for one horse and two kine, to be designed out of kirk-lands, and with relief, according to former acts of Parliament; and if there be no,' &c. (as cited above). This clause is very indistinct; as well as another already noticed; it does not with sufficient clearness determine who are the heritors liable in the L. 20, and it provides a relief according to the laws then standing; whereas there were no laws that regulated this case; and what encreases the difficulty, the same relief is given when there are no kirk-lands near the manse, as when the lands near the manse are arable; the power of exempting arable lands might be reckoned a privilege to the heritor, for which he ought to be primarily liable in the L. 20, getting relief; but when, on account of the distance, the money is given for the minister's conveniency, what reason can there be for loading one heritor more than another?

Amidst these difficulties, what occurs to the suspender is, That the general plan of the statute is to make the burden fall as light as possible on each particular heritor; when lands are allocated, relief is necessary; but money may be equally laid upon the whole; and if the statute also in this case mentions relief, it is because this method may be sometimes proper, though not absolutely necessary; as suppose the titular to draw the whole teinds, and to pay the minister, or the minister to receive from some heritors the bulk of his stipend in victual, and money only from a few, it were hard to put him to collect his L. 20 from a number of heritors; but if he receive money from all his heritors, there can be no inconveniency in adding each man's proportion of the grass-money to what he already pays. In the present case the Minister collects more or less of his stipend from every heritor; and it would be oppression for oppression's sake, to oblige the suspender to collect this L. 20 for him, when he can do it himself without any additional trouble.

In this case the great difficulty was, What sense could be put on the clause giving relief, in case the burden were laid on all alike? The Lords observed the heritors were obliged to pay, with relief off the heritors of kirk-lands; so that if the whole paid their proportions to the Minister, and sought their relief off those that had kirk-lands, the clause would have a meaning.

' THEY FOUND the L. 20 must be laid upon the whole heritors of the parish; and therefore turned the decret into a libel, and remitted to the presbytery to proceed accordingly.'

The procurator for the church was heard.

No 38.

* * * Lord Kames reports the same case :

By act 21st Parl. 1663, it is enacted, ' That every minister, except such ministers of Royal burghs who have no right to glebes, have grass for one horse and two kine, to be designed out of kirk-lands, and with relief, according to former acts of Parliament. And if there be no kirk-lands lying near the minister's manse, or if the kirk-lands be arable ; in either of these cases, ordains the heritors to pay to the minister yearly, the sum of L. 20 Scots, for the said grass ; the heritors always being relieved, according to the law standing, off other heritors of kirk-lands in the parish.' The parish of Kilwinning belonged in property to the Abbots of Kilwinning, and was by them totally feu'd out ; whereby there came to be about 200 heritors in the parish, all feuars of kirk-lands. The Minister wanting grass for a horse and two cows, applied to the presbytery. George Glasgow had a single-acre lying next the glebe, and because that acre was in tillage, the burden of the L. 20 Scots was laid upon him ; leaving him to seek relief in terms of the statute.

The matter was by suspension brought before the Court of Session, who gave the following sense to the statute, That the whole heritors of the parish are to be liable at the first instance for the L. 20 ; and that they are entitled to relief from the heritors of kirk-lands. And upon this footing,

' They turned the decree into a libel, and FOUND, that the L. 20 must be laid upon the hail heritors in the parish, proportionally to their valuation.'

This interpretation of the statute cannot well be supported ; for the context plainly shows, that the heritors, who are to be liable at the first instance for the grass money, are the same whose lands must be allocated, if not arable. Beside that it is preposterous to load the whole heritors at the first instance, and then to give them relief off the heritors of kirk-lands ; when it would be easier and more simple to lay the burden directly upon the heritors of kirk-lands. But the truth is, that it was a blunder in the statute to provide relief where money was to be paid, in place of laying the grass money directly upon the whole heritors of kirk-lands ; who, at any rate, are made liable ultimately. And it is probable the Court will follow this plan, by which the blunder will be corrected. And, with respect to the present judgment, though it was the opinion of most of the Judges, that the whole heritors must be liable at the first instance with relief, &c. yet the interlocutor, in effect, goes no further than to burden the whole heritors of kirk-lands ; the whole lands of this parish being kirk-lands.

Rem. Dec. v. 2. No 63. p. 100.