

claimed; Note upon Erskine, B. 2. T. 10. § 52. Edition 1785; 13th July, 1715, Minister of Arngask, (not reported; see APPENDIX); 7th March, 1770, Campbell of Lochnell, No. 22. p. 14796.

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The Lord Ordinary repelled "the objection to the scheme of locality produced for the Officers of State."

On advising a reclaiming petition for Messrs. Skene and Elmslie, with answers, the Court, considering the law as completely fixed by the decision in the case of Campbell of Lochnell, unanimously "adhered to the interlocutor complained of, as to the general question, that Bishops' teinds are only liable to be localled upon *ultimo loco*; and, before further answer, ordained both parties to give in memorials upon the question, Whether the teinds of the lands in question belonged to the Bishop of Aberdeen, or to the Minister of Daviot, as parson of the parish."

Lord Ordinary, *Swinton*.For the Officers of State, &c. *Solicitor of Tithes Balfour*.Alt. *Rolland, Ja. Gordon*.*Fol. Dic. v. 4. p. 300. Fac. Coll. No. 172. p. 406.*

1795. December 9.

The HERITORS OF PORTMOAK *against* MRS. ANNE JEAN DOUGLAS.

The teinds of the lands of Kirkness, the property of Mrs. Anne Jean Douglas, in the parish of Portmoak, originally belonged to the Priory of St. Serf's Inch in Lochleven, and afterwards to the Priory of St. Andrew's. At the Reformation, they were vested in the Crown, and were bestowed by James VI. in 1586, on St. Leonard's College in St. Andrew's, which is described in the gift as founded by him for promoting the study of theology. This gift was ratified by act of Parliament in 1612.

Mrs. Douglas has a lease of her teinds from the College.

The family of Kinross are superiors of most of the lands in the parish, of which they are also patrons; and, in that capacity, they had right, under the acts 1690 and 1693, to the teinds not heritably disposed; but they have since granted heritable rights of them to most of their vassals.

The Minister of the parish having got an augmentation to his stipend, a scheme of locality was made up, in which a great part of the burden was laid on the lands of Kirkness, out of which no part of the old stipend had been paid, while those heritors who had heritable rights to their teinds were totally exempted. Mrs. Douglas objected, That the teinds of a college can only be burdened *ultimo loco*.

The heritors

Pleaded: The provision of a competent stipend to the Minister of the parish is a burden inherent on all possessors of teinds, who do not themselves officiate in

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Teinds belonging to a college are not liable for stipend till those heritably disposed to the proprietors of the lands are exhausted.

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the cure. Even Bishops, the most favoured order of the clergy, had no exemption as to the teinds possessed by them. The Priors of St. Serf must either have officiated themselves, or paid stipend; and so must the College of St. Andrew's. Indeed, it is a settled point, that teinds held by a college may be so burdened; 12th December, 1716, Minister of Old Machar against the College of Aberdeen; 1753, Minister of Marytown against the College of St. Andrew's; 16th May, 1792, Minister of Marykirk against the College of Aberdeen, &c.; (cases not reported; see APPENDIX); and this being the case, the present question must be determined according to the established rules of allocation, by which teinds held in lease by an heritor must be exhausted before those heritably disposed to him; Ersk. B. 2. T. 10. § 51, 52.

But if it should be thought hard to apply the ordinary rules of law to this case, where the teinds of the parish are derived from different titulars, who have exercised their rights differently, the burden may be divided between them, according to the valued rent of the lands over which their right as titulars extends, on the principle of the decision, 13th July, 1774, Fotheringham against Bower, No. 27. p. 14815. where two parishes had been united.

Answered: So long as the Crown retained possession of other teinds in the parish, it could not be meant that any part of the stipend should be paid out of teinds so solemnly bestowed on a college, originally considered as an ecclesiastical institution, and still less that they should be subjected to a new burden, in consequence of a posterior grant to a layman.

The ordinary rules of allocation, mentioned by Mr. Erskine, relate only to the cases where the competition arises between the Crown and a lay-titular, or between a lay-titular and those deriving right from him; and not (as it is indeed virtually admitted by the heritors, from their reference to the case of Fotheringham) to the case where there are two titulars in the parish, both of whom were meant to be equally favoured by the Crown; and still less to the case where the competition arises between those deriving right from a lay-titular and the lessee of a college.

Further, the ordinary rules of allocation have been introduced, not from an enactment of the Legislature, but from the discretionary powers of the High Commission; and therefore they cannot have place, where their application would create injustice to the parties, and be contrary to the enactment of the Legislature. Now, by the act 1693, C. 23. it is declared, that the powers of the Commission of Teinds "shall not be extended to the buying and selling of teinds, which formerly pertained to Bishops, and now belong to their Majesties, by the abolition of Episcopacy, so long as the said teinds shall remain in their Majesties' hands undisposed of, nor to teinds belonging to colleges and hospitals, or mortified or destined to pious uses."

The object of this enactment, it is evident, was to preserve entire the revenues of those privileged possessors of teinds; but, according to the doctrine of the heritors, its effect would be directly the reverse; for as teinds belonging to these

bodies cannot be heritably disposed, the possessors of them would be in a worse situation than ordinary titulars, who, upon a sale of their teinds, get a price, low indeed, but which is not subject to any after burden; whereas, in every parish where the teinds were of the description excepted in the act, the other heritors would find it their interest to purchase their teinds, by which means the whole burden of stipend would fall upon the former, and seminaries of learning, and hospitals for the sick, be deprived of their revenues, without any return. But the decisions of the Court, following out the spirit of the statute, have established, that Bishops' teinds are not liable for stipend, till those heritably disposed by a lay-titular are exhausted; 13th July, 1715, Minister of Arngask against the Heritors, (not reported); 7th March, 1770, Officers of State against Campbell of Lochnell, No. 22. p. 14796.; 3d June, 1795, Skene against the Officers of State, No. 35. p. 14822.; and that even Bishops' teinds are liable before those belonging to a college; 23d June, 1756, Straiton, No. 101. p. 10824. *voce* PRESCRIPTION. (The point in this case alluded to is not reported. See APPENDIX.)

The Lord Ordinary found, " *1mo*, That the respondent Mrs. Douglas could not, in right of the College of St. Andrew's, plead an exemption from the locality, if there were not other teinds in the parish upon which the stipend could localled; but found, *2do*, As there are in this case lay-titulars of teinds, upon whom the stipend can be localled, the teinds belonging to the College of St. Andrew's, in whose right the respondent pleads, are, by the law, entitled to an exemption; and accordingly, by a late decision, in the case of one of the Colleges of St. Andrew's against Straiton of Lawriston, the teinds belonging to the College were found entitled to an exemption, in competition even with a tack of Bishops' teinds from the Crown;" and therefore adhered to a former interlocutor sustaining the objection.

Upon a reclaiming petition, with answers, it was

Observed on the Bench: It is implied in the nature of a grant of teinds for a pious use, that they cannot be attached till those derived from a lay-titular are exhausted.

The Lords unanimously " adhered."

A reclaiming petition was presented for the heritors, in which they quoted the cases, 6th July, 1709, Minister of Denino against the Heritors, and 9th July, 1718, Minister of Craig against the Parishioners, (two cases not reported), as establishing the opposite doctrine, and craved time to search the records, and lodge an additional petition; but it was unanimously refused, without answers.

Lord Ordinary, *Monboddò*.

For the Heritors, *W. Robertson, Williamson*.

*Akt. Maconochie, D. Douglas*.

*D. D.*

*Fol. Dic. v. 4. p. 301. Fac. Coll. No. 190. p. 459.*