

in bona fide to believe that no further claim was to be made against him, and therefore was not liable for arrears; August 1788, Earl of Haddington against Earl of Home; (not reported;) 25th February 1795, Sir John Scott against Heritors of Auerum, No. 87. p. 15700.

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Answered: The offices and duties of the Solicitor of Tithes, and collector of bishop's rents, are totally distinct from each other. It is the business of the former, by inhibition and process of spuilzie, to force heritors to renew their leases, and pay the usual composition of three years full value in Exchequer. The latter collects merely the elusory duty afterwards payable during the currency of the lease. It frequently happens, that the composition is in the same year received at the instance of the one, and the duty collected by the other; and as the latter had no power, so it will not be presumed that he intended to discharge the claim competent at the instance of the other, of the steps taken to enforce which he might be wholly ignorant.

The established effect of an inhibition in preventing tacit relocation, particularly when accompanied by a process of spuilzie, decree obtained, and charge of horning given on it, is completely subversive of the plea of *bona fides* urged for the defenders; Stair, B. 2. Tit. 8. § 23; Ersk. B. 2. Tit. 10. § 45.

The delay in conducting the cause is imputable to the defenders themselves; and if it had been otherwise, the Crown cannot be affected by the negligence of its officers; 1600, C. 14; Dict. *voce* KING.

Upon advising the petition, with answers, the Lords, on the grounds stated for the defenders, unanimously assoilzied them: 'In respect of the payment of the old teind tack duties made by Alexander, Earl of Caithness, and accepted by the collector of bishop's rents, as an officer of the Crown, after the execution of the inhibition and citation in the action of spuilzie;' and found, 'that the respondent must relieve the petitioners of the expense of extract, reserving the Crown's claim for any arrears of said tack duties which may have been due by the said Alexander, Earl of Caithness, at the period of his death in 1766.'

A reclaiming petition was (17th Jan. 1800) refused, without answers.

Lord Ordinary, *Monboddo*. Act. *Solicitor of Tithes Balfour*. Alt. *Ar. Campbell, jun.*
Clerk, *Pringle*.

D. D.

Fac. Coll. No. 146. p. 326.

1799. December 11.

THE DEANS of the CHAPEL ROYAL and their LESSEES, *against* ROBERT HAY and OTHERS, Heritors of the Parish of Ettrick.

THE chapel Royal at Stirling was founded by Pope Alexander VI. at the desire of James IV*. and consisted of a Dean, Subdean, Sacristan, Chanter,

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The tithes granted by the Crown.

* Forbes, in his Treatise on Tithes, C. 5. § 10. says, the Chapel-Royal was founded by James III; but this is a mistake, as appears from Keith's Catalogue of the Bishops, and the Appendix to Hope's Minor Practices, C. 19. § 26.

No. 6. for the support of the Chapel-Royal, are not liable for stipend till those heritably disposed are exhausted.

In the case of two distinct titularities, there must be a proportional allocation upon each.

Treasurer, Chancellor, Archdean, and sixteen Chaplains. The Dean was appointed the Queen's confessor, and had Episcopal jurisdiction. The institution was endowed by a Royal grant of various church lands and tithes. It appears from a charter from James IV. in favour of the Chapel, dated 20th November 1506, that the purposes of the institution were "ad celebrand. divina servitia in dicta ecclesia collegiata pro salute animarum quondam nobilissimorum patris et matris nostrorum, quorum anima propitietur Deus, ac aliorum antecessorum nostrorum, ac prosperitate nostra, et pro salute animæ nostræ et successorum."

On the Reformation, the institution was suppressed, as being inconsistent with the doctrines of the Reformed Church, and its whole revenues reverted to the Crown.

When the Bishops were afterwards restored, James VI. was desirous of reviving the Chapel-Royal in a shape that should not be inconsistent with the Protestant Religion. Accordingly, an unprinted statute was passed in 1606, which, after a preamble, giving a history of the institution, and its dormant state since the Reformation, sets forth, that the want of the institution "would breed derogation to the honour of the realme, qlk only among all christian kingdoms, will, be thir meane, want that civil and commendable procession of ordinair music for recreation and honour of their prince; for remeid whereof, and to the effect that be his Majesty's example, the subjects of the said kingdom may be funder encouraged to intertine their foundations of music-schools, quhair youth may be instructed in that liberal science, qlk quickens ingyne, givis pleasant and harmless recreation to all estaities of persons, and is an haly exercise, agreeable to the religion and commandment of God, for giving of thanks and praises to his Majesty:" Therefore, "our Sovereign Lord, with advyse and consent of all his Estaities of the present Parliament, ratifies and approves the said foundation and institution of the foresaid chapel-royal, in so far as concerns the service of his Majestie and his successors in music, and in all things not repugnant to the true religion presently profest and be law established."

This plan for the revival of the chapel-royal was not successful; for it appears from Spottiswood's Account of Ecclesiastical Establishments, preserved in the Appendix to Hope's Minor Practics, C. 19. § 26. that the deanery of the chapel-royal was soon after given, first to the Provostry of Kirkheugh, next to the Bishop of Galloway, and afterwards to the Bishop of Dumblane. Whether it was given to the Bishop *tanquam quilibet*, or annexed to the bishopric, is somewhat doubtful. Spottiswood is of the latter opinion; but an opposite conclusion may be drawn from the words of an unprinted statute in 1621, ratifying the grant which is there recited, as a grant personal to the bishop, and making no mention of his successors in office. On this last supposition, however, the grant must have been renewed in their favour; for the deanery of the chapel-royal remained with them till the Revolution. Upon that event,

Episcopacy being again abolished, and Presbyterian church-government established, the revenues of the chapel-royal reverted once more to the Crown.

King William accordingly made a gift of the whole emoluments of the chapel-royal to Mr. Carstairs, who, at the date of the grant, was an ordained minister, and Principal of the College of Edinburgh, but held no benefice in the Church.

For many years past, the revenues of the chapel have been gifted to three of his Majesty's chaplains in Scotland, who enjoy them over and above the fixed salary which they receive in common with the other chaplains, and are called the Deans of the chapel-royal. The gift is always declared to continue only during the King's pleasure; but it authorises the grantees to let leases of the tithes belonging to the chapel-royal for nineteen years, not under the former rent.

A branch of the revenue of the chapel-royal consists of the tithes of a part of the parish of Yarrow, which was annexed to the parish of Ettrick in 1650. Of these tithes the Deans of the Chapel have been long in the use of granting short leases to the Duke of Buccleugh, and other heritors of the lands.

Lord Napier, in right of the Abbey of Melrose, is titular and patron of the old parish of Ettrick; and, in this last character, has been in the practice of presenting the minister of the united parish. All the heritors of the old parish have acquired heritable right to their teinds.

In 1787, the Minister of the parish of Ettrick obtained an augmentation of his stipend, the whole of which was allocated on the tithes belonging to the chapel-royal; on the principle, that tithes held in lease, fell to be allocated prior to those which were held under heritable titles.

In 1793, the minister having obtained a new augmentation, a scheme of locality was made out, apportioning the augmented stipend according to the principle which had been adopted in the former augmentation.

The Deans of the chapel-royal contended, that the principle then adopted was erroneous; and

Pleaded: *1st*, When the original institution of the chapel-royal came to be repugnant to the doctrine of the Reformed religion, the tithes which had been granted for its support were attached to a bishopric. As bishops' tithes, therefore, they are allocable to the minister only *ultimo loco*; 13th July 1715, Minister of Arngask, mentioned in 7th March 1770, Officers of State, No. 22. p. 14796.

2dly, Even supposing that the tithes in question could not strictly be regarded as bishops' tithes, yet, as being destined to a pious use, in terms of the act 1693, C. 23. they are not saleable; and where tithes are not saleable, they can be localled to the minister only *ultimo loco*; 9th December 1795, Heritors of Portmoak, No. 36. p. 14823. Indeed, if the law stood otherwise, and made such tithes allocable, prior to those heritably disposed, it is obvious, that institutions for pious purposes would be totally deprived of their tithes, in conse-

No. 6. quence of the very exemption from sale which was bestowed upon them as a privilege by the Legislature.

3dly, et separatim, There are two titularities in this parish. The Crown is titular of the teinds which belong to the Deans of the chapel-royal, while Lord Napier is titular of the old parish. And, according to the established rule, where there are two distinct titularities in the same parish, the minister's stipend falls to be localled in proportion to the rental of the lands within each; 18th February 1719, Case of the united parishes of Tinwald and Trailflat, (not reported;) 13th July 1774, Fotheringham, No. 27. p. 14815; 5th December 1798, Earl of Hopetoun, No. 39. p. 14832; Heritors of Logie, APPENDIX, PART I. *voce* COLLEGE, No. 2; 23d Jan. 1799, Lord Dundas against Duke of Hamilton, No. 40. p. 14833. No larger portion of the stipend, therefore, should be allocated on the tithes of that part of the parish of Yarrow which is united to Ettrick, than what corresponds to the rental of these lands, in proportion to the rental of the whole lands in the old parish of Ettrick.

Answered: *1st,* The teinds in question have no pretensions to the character of bishops' teinds. For although they seem at one period to have been granted to one of the bishops of Dumblane, *tanquam quilibet*, there is no evidence that they were attached to that bishopric.

2dly, Neither can these teinds be regarded as destined to pious uses in terms of the act 1693. They reverted to the Crown on the abolition of Popery, and although, since the Revolution, the Crown has made grants of them during pleasure, to one or more of its chaplains, such grants may be recalled at any time, and a new grant of them made to a layman, or for any public purpose which the Crown may judge proper. These teinds, therefore, as not falling under the exception of the act 1693, are liable to sale in the same manner as other teinds.

3dly, The doctrine of two titularities has been introduced to rectify the hardship which occurred, where the tithes of the two titularities stood in different situations, as where the one were saleable, and the other not. In that case, it was thought hard, that the heritor whose teinds were saleable, should be burdened with the whole stipend. But it has been shewn, that the tithes of Yarrow have no extraordinary privilege, and therefore, as all the heritors in the parish might have put themselves on equal footing, by purchasing their tithes, there is no room for apportioning the stipend according to the respective rentals of the two titularities. Besides, the titularity of the old parish is virtually extinguished, by all the heritors having purchased their tithes.

The Court was of opinion, that the Deans of the chapel-royal were well founded in both their pleas, viz. That the tithes in question were applied to an existing pious use, which entitled them to all the privileges conferred on bishops' tithes; and, *2dly,* That the stipend fell to be allocated, on the footing of their being two distinct titularities in the parish.

Accordingly, the following judgment was ultimately pronounced :

‘ Find the teinds belonging to the Deans of the Chapel-royal were originally, and still continue to be, teinds destined to pious uses, and are therefore not subject to sale, or to be localled upon, while there are teinds belonging to lay titulars in the same parish unexhausted : But, in terms of the former interlocutor, find, That in this parish there are two distinct titularities ; and therefore find, that the augmentation of stipend to the minister, allocated in the former process of locality, *anno* 1787, and the augmentation granted in this present process, fall to be divided proportionally between the two titularities effeiring to their respective proven rentals, and that each titular may allocate their proportion within their own right : Find, That the heritors who have paid the stipend in terms of the locality 1787, shall have no claim against the other heritors, for repetition of any part thereof so paid, or for any other payment which may appear by the present locality to have been made by them, but that the new locality shall only regulate the payment of the former stipend, due and payable from and after the term of Martinmas last, and in time coming.’

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For the Deans of the Chapel Royal and their Lessees, *Ar. Campbell, junior.*
Alt. Cha. Hay, Wm. Robertson.

R. D.

*Fac. Coll. (APPENDIX,) No. 9. pt. 15.*1800. *January 15.*

The REV. JAMES BADENACH, *against* Colonel FOTHERINGHAM OGILVIE and Others.

IN the locality of Kingoldrum, several heritors, nearly in the same circumstances, claimed exemption from payment of the additional stipend obtained by the minister, as having right to their lands *cum decimis inclusis*, though they paid part of the former stipend by locality in 1635. In particular, Colonel Fotheringham Ogilvie claimed this for certain lands belonging to him, on a feu-charter from the commendator of Arbroath, with consent of the chapter in 1558, of half of the lands of Baldovie, ‘ *Una cum decimis garbalibus, dict. dimidietatis terrarum et villæ prædict. semper et hucusque per prædecessores, nostros tenen. prædictarum terrarum conjunctim, et pro indiviso ultra memoriam hominis assedatis et locatis,*’ &c. reddendo ‘ *summam duodecim librarum, et sex solidorum, usualis monetæ regni Scotiæ, ad duos anni terminos,*’ &c.

The Reverend James Badenach, minister of the parish, objected, and produced a copy of a lease of the lands and teinds by the Abbot and convent in 1550, taken from the copy of the Cartulary of Arbroath, in the Advocates’ Library : ‘ *Reddendo inde annuatim, pro firma dimidiæ partis villæ prædict.*

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To exempt lands from payment of stipend, as being held *cum decimis inclusis*, it is necessary that the lands and teinds should have been feued together for a *cumulo reddendo*, by a churchman having right to both, and that the oldest titles produced, which must be prior to the act