The Lords remitted to the Lord Ordinary, to remit to the Sheriff, with instructions to assoilzie the minister, and recal the interdict, and farther found him entitled to expenses. No. 1.

A reclaiming petition was (31st May) refused, without answers.

Lord Ordinary, *Eskgrove*. Alt. *Cathcart*.

For the Heritors, *Williamson, Rae*. Clerk, *Pringle*.

*D. D.*

*Fac. Coll. No.* 124. *p.* 282.

*** The Court were much divided in opinion on the cause of Mercer against Minister of Lethendy above alluded to. It was simply remitted to the Lord Justice-Clerk Macqueen, Ordinary, and on that account has not been reported in the Faculty Collection. His Lordship, 26th November 1795, pronounced the following interlocutor, which was acquiesced in: "Finds, that "the whole marl ought to be dug out, and the surface of the glebe then "restored to the proper shape: Finds, That the whole expense of digging, "and of afterward putting the surface of the glebe in proper shape, and "also the expense of this process, ought to be deducted from the produce "of the marl, and the free residue only secured for behoof of the incum"bent: Finds, That the digging, putting the surface of the glebe in pro"per shape, ascertaining and securing the free residue, must be done at the "sight of the heritors of the parish and the presbytery, the charger finding "caution to the extent of £50. Sterling for due implement of the above "particulars, and lodging a bond of caution; therefore removes the inter"dict; suspends the letters *simpliciter*."

*D. D.*

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1799. *June* 11.

The MINISTER of KINGSBARNS, *against* DAVID BALFOUR HAY, and Others.

No. 2.

Lands are liable to be designed for glebe, as church lands, although the superiority of them only had belonged to the church for a long period before the Reformation; and when at the time of de-

PART of the Parish of Crail was, in 1631, erected into the new parish of Kingsbarns, in virtue of a decree of disjunction, by the High Commission, which declared, "That the heritors of the kirk-land within the new-establish"ed parish of Kingsbarns, and their successors, shall be subject to contribute "*pro rata* with the heritors of the kirk-lands within the parish of Crail, sick"like, and in the same manner, as if this division had not been made."

In 1720, the minister of Kingsbarns applied to have a glebe and foggage designed to him; and the presbytery having met for that purpose, the heritors in 1721, by a written agreement, obliged themselves and their successors to pay to the minister and his successors 260 Scots yearly, in lieu of glebe and foggage, according to their valued rents. Fallside belonging to St. Leonard's

College, in the University of St. Andrew's, was the only property not included in this agreement. And it is believed that a similar payment had been made to the minister, though without any written obligation, from the erection of the parish.

This annual payment was continued till 1790, when the presbytery, on an application from the minister, designed a glebe out of temporal lands immediately adjoining to the manse.

The heritors of temporal lands having complained of this by suspension, the Court, (see Minister of Kingsbarns against Erskine, 10th June 1794 N. o. 22. p. 5140), found that temporal lands could not be designed, as there were church-lands in the parish.

The presbytery now proceeded to design a glebe out of church-lands. Those understood to be such were Pitmillie, belonging to Colonel Monypenny, nearest to the manse; Fallside, belonging to St. Leonard's College in St. Andrew's, at a greater distance; and Newton of Randerston, belonging to Mr. Balfour Hay, still farther removed from it.

Pitmillie had, at least as early as the 13th century, been held of the priory of St. Andrew's by laymen, for the yearly feu-duty of 13s. 4d. Scots, and there was some reason to believe that it had originally belonged to the bishopric of St. Andrew's. The revenue of the priory was annexed to the Crown at the Reformation, and it was soon after erected into a temporal lordship in favour of the Duke of Lennox. It was purchased from him in 1635, by Charles I., who immediately presented it to the archbishopric of St. Andrew's, and, since the abolition of Episcopacy, Pitmillie has been held of the Crown in right of the Archbishop.

Fallside was disponed to St. Leonard's College by a Prior of St. Andrew's in 1512. James IV. confirmed the gift with an immunity from all future burdens. It was ratified by an unprinted act of Parliament in 1612, and no public burdens of any sort have since been paid for these lands.

Newton of Randerston was disponed by the Bishop of St. Andrew's to the Prioress and Convent of Haddington in 1359, and there is extant an instrument of seisin on a feu-right to the lands, granted to a layman by the Prioress and Convent in 1461. The superiority remained with the priory till the reformation. Since that time, the lands have been held of the Crown; and in some of the later titles, all mention of their having formerly held of the church has been omitted.

The presbytery designed four acres as an arable glebe out of Newton, and seven acres for grass out of other lands belonging to Mr. Balfour Hay, which afterward turned out to be temporal lands.

Mr. Hay having raised a suspension, the judgment of the presbytery was at first supported only by the minister of the parish and Colonel Monypenny; and the Lords (17th May 1798) on advising informations, "repelled the reasons of suspension, and found the letters orderly proceeded, so far as con-

**No. 2.** signing a glebe, there are lands in a parish held of the Crown in right of a priory, others held of the Crown in right of a bishop, and others by an university in right of the priory, the first are primarily liable, the bishop's lands in the second place, and the others only *ultimo loco*, whatever may have been the description of the lands at the Reformation, or date of the act 1593, C. 165. But this arrangement may be prevented by special circumstances.

No. 2.

"cerns the four acres of glebe designed out of the suspender's lands of New-
"ton; suspended the letters *simpliciter* so far as concerns the grass designed
"out of the muir of Randerston; and remitted to the presbytery to design
"the grass for the minister out of the sea-greens, or any other pasture-ground
"in the farm of Newton."

Mr. Hay presented a petition against this interlocutor, which the Court directed to be answered by the heritors of temporal lands, and by St. Leonard's College, as well as by the other heritors.

Mr. Hay, besides contending, that from the terms of the decree of disjunction, and subsequent conduct of parties, the burden of affording a glebe should be borne indiscriminately by the whole heritors of the parish according to their valued rents,

Pleaded: *1mo*, There are no church-lands in the parish liable to the designation of a glebe. The act 1563, C. 72. which was the first on the subject, gave the reformed clergy a right to a manse and glebe only where the popish parson or vicar had formerly possessed one. The act 1572, C. 48. fixed the amount of the glebe at four acres most adjacent to the manse. By 1592, C. 118. the privilege was extended to abbey and cathedral churches, although there had been no manse or glebe before, the glebe to be taken out of the lands belonging to the abbey or cathedral. At last the act 1593, C. 165, gave the clergy in general right to a glebe out of any church-lands in the parish; and enacted, "that the designation be made of the parson, vicar, "abbot, or prioresse landes; and failzeing thereof, out of the bishoppis landes, "friers landes, or ony uther kirklandis lyand within the bounds of the said "paroche, ay and quhill four aikers of land be compleit." From these enactments, it is evident, that the Legislature meant that the reformed clergy should be provided with manses and glebes from the patrimony of their popish predecessors. They cannot, therefore, affect the *dominium utile* of lands, which like Newton have been *bonâ fide* feued out to a layman above a century before the Reformation, and which, retaining no other connection with the church than the payment of a quit rent, it would have been hard to pitch on as exclusively liable for the burden.

It is true, that some of the statutes mention, that a glebe should be designed from lands which have been previously feued, and that provision is made for relief of the feuar whose lands are attached. But this only establishes, that certain feus were ineffectual against the claim of the minister; for example, where his predecessor had feued out his glebe, which was declared illegal by 1563, C. 72.; or where the feu had been granted in view of the Reformation, after 8th March 1558, and therefore by 1564, C. 88. ineffectual, unless confirmed by the Crown.

2*do*, Supposing Newton liable to be designed, in terms of the act 1593, C. 165. still Pitmillie from being nearer to the manse would be primarily liable.

No. 2. These lands were held of a priory from a very early period till the year 1635, and their only connection with a bishopric was the payment of 13*s.* 4*d.* Scots annually, to the Archbishop of St. Andrew's, from that period to the Revolution, while the right of the vassal remained the same as it had been for centuries before. If the designation had taken place before 1635, they must have been considered as Prior's lands; and the subsequent change cannot affect the question.

In fixing the order in which different church-lands should be subject to the burden of glebe, the Legislature, by the act 1593, must have had in view the situation of the lands at the Reformation, as the patrimony of the church was then, with a few exceptions, annexed to the Crown, and declared for ever unalienable from it. From that period, therefore, there ceased to be, strictly speaking, any distinction among church-lands, and it could not be in the view of the Legislature that any future distinctions should arise.

*3tio*, Supposing Pitmillie to be considered as bishops lands, the glebe should be designed from Fallside. These are Priors lands; and except the rescinded act 1644, C. 31. there is no authority for exempting lands mortified to a college from the ordinary rules.

The heritors of temporal lands

Answered: Although churchmen frequently gave feus of their glebes and other landed property, such grants were, at all times, strictly illegal; Spottiswoode, p. 297. and therefore there was no hardship in enacting that they should not prevent the reformed clergy from possession of a glebe. Accordingly, the act 1563, C. 72, not only prohibited feus in future, but declared that the parson should have right to a glebe out of that formerly belonging to his popish predecessor, "quhidder the saidis gleibes be set in few or tack of "befoir or not;" and as this act was passed so recently after the Reformation, if it had been meant that feus prior to that period should be exempted, it would have been so expressed. The same appears from the act 1572, C. 48., which declares, that the parson should have right to the manse, 'together with four acres of land of the glebe at least, lyand contigue or maist 'ewest to the said manse,' 'whither the saidis manses and glebes be set in 'few or takkes of befoir or not:' 'and quhair ony persones, upon pretence 'of fewe or takkes obteined of manses or glebes, hes maid sumptuous biggings 'thereon, fra the quhilks they think heavie to be dispossessed or removed,' the act allows the fewer or takkesman to continue in possession of them, 'be 'delivering to the samin minister or reader of ane uther manse, quhilk sall be 'als gude and ewest as the uther, be just estimation, the time that it was set in 'few or takkes, to be bigged betwixt this and the first daye of October nixt 'to cum, togidder alswa with certaine acres of land adjacent thereto;' and provides, 'that sa meikle of the few-maill be deduced to the person or persones, 'to quhom the saidis manses or glebes is set in few, *secundum ratam*, and sik-'like, that the fewer have sufficient action against the settar of the said manse

No. 2.

'and glebe for sa meikle entres silver as he payed to the settar the time of the 'setting thereof, *secundum ratam*, as said is.' Nor can this enactment be restricted to feus granted after 8th March 1558, and not confirmed by the Crown; for as such feus were declared, by 1564, C. 88., wholly ineffectual, no relief could be meant to be given to the persons possessing them; and feus after that period, confirmed by the King, were equally valid with those of an older date. Again, the act 1592, C. 118, gives the minister in abbeys and cathedral churches a right to a glebe out of lands, "quhilk perteinis, "*or in ony 'time of before perteined* to the said abbay, or ony member thereof." The same was meant by the act 1593, C. 165, as is evident from 1594, C. 202., which enacts, "That the fewars, possessors, and tackesmen, out of quhais landes 'the manses or gleibes are designed, sall have their reliefe of the remanent pa-'rochioners quha are fewars, possessours, and tackesmen of kirklandes, lyand 'within the said parochin *pro rata*."

The act 1606, C. 7., too, in those parishes where there are no arable kirklands conveniently situated, gives a *surrogatum* in grass out of the best pasturage "of ony kirk-lands" lying nearest to the church. And, in like manner, the act 1644, C. 31., which, though rescinded in 1661, is considered as in force by 1660, C. 21., allows a glebe to be designed out of temporal lands, only where there are "no kirk-lands or houses formerly belonging to" churchmen within the parish. Accordingly, it has been found, that lands feued of an old date remain subject to the burden of glebe; 24th July 1629, Nairne against Boswall, No. 15. p. 5187; and none of our writers support the distinction made by the suspender. See Stair, B. 2. T. 3. § 40.; Bankton, B. 2. T. 8. § 119. 204.; Ersk. B. 2. T. 10. § 59.

The minister of the parish, and Colonel Monypenny,

Answered: The act 1593, C. 165, made the lands which had belonged to the popish parsons and vicars primarily liable, because the reformed parochial clergy came in their place, and had got right to a glebe out of their lands by prior statutes. The lands of abbots and priors were made liable in the next place, because most of them had been gratuitously disponed by the Crown in favour of laymen; and those of bishops only *subsidiariè*, because no grants of their property had been made by the King, as he intended to restore them. It is a mistake, therefore, to suppose, that all church-lands were in the same situation at the date of the statute, or that the Legislature might not have in view the future changes which might take place in them. Indeed, the act of annexation itself contained many exceptions, such as of those which had been already erected into temporal lordships. And lands belonging to "common kirks," which under the act 1593 were liable to be designed only *ultimo loco*, under the description of "ony uther kirk-landes lyand within the bounds of "the said paroche," were, by 1594, C. 199, put on the same footing with parsonages and vicarages, and consequently as such became *primo loco* liable to designation.

No. 2. The order of designation was introduced in favour of bishops, and the Legislature must have meant that all lands should have the benefit of it, which at any time were held of them. At the Revolution, all their superiorities, without distinction, were vested in the Crown; and there is this singularity in the tenure, that a superior cannot be interposed between the Crown and the vassal, even with consent of the latter, 1690, C. 29. It would be singular, if Pitmillie were to be considered as bishops lands in this and every other respect, except under the act 1593. It would follow from the suspender's doctrine, too, that if lands, temporal at the date of the statute, were afterward acquired by a bishop, they would not as to this question be considered as church-lands, and be liable to designation at all, prior to the act 1644, C. 31., even while the bishop was drawing the full revenues. If this will not be maintained, it must be granted, that Prior's lands at the date of the statute may have their place changed in the order of designation introduced by it, in consequence of their being afterward acquired by a bishop. Upon a similar principle, in designing grass to a minister, it has been found, that lands arable at the period of designation are not liable to that burden, although they were adapted for pasture only at the date of the act 1663, C. 21.; 26th June 1778, Grierson against Ewart, No. 42. p. 5162.

For St. Leonard's College, it was

Answered: Lands belonging to a college, are liable to be designed for a glebe only *ultimo loco*, (1644, C. 31., revived by 1663, C. 21.; Stair, B. 2. T. 3. § 40. Bank. Vol. 2. p. 47.; Ersk. B. 2. T. 10. § 59.), upon the same principle that their teinds are liable only in this order for stipend; 9th December 1795, Heritors of Portmoak against Douglas, No. 36. p. 14823.

Two of the Judges were much moved by the two first branches of the suspender's argument; but the general opinion was against him, on the grounds stated for the respondents.

The Lords (27th November 1798) "found, that in a question between the "heritors of church-lands, the glebe falls, in the first place, to be designed "out of the lands belonging to the petitioner, being Prior's lands; in the second "place, out of the bishops lands belonging to Colonel Monypeny; and, *ulti-*"*mo loco*, out of the lands belonging to the College of St Andrew's; and there-"fore adhered to their interlocutor reclaimed against, reserving to the peti-"tioner still to be heard upon any claim he may have against the other heritors "of the parish."

When this last interlocutor was pronounced, great doubts were entertained of the propriety of the judgment 10th June 1794, from the terms of the decree of disjunction, and other particular circumstances attending this case. Upon this, Mr. Balfour Hay presented a petition, in which he contended, that that judgment was not binding on him, as he was then a minor, and had made no appearance in the original suspension, except producing his titles, after a diligence had been granted to force production of them, and stated reasons for

an alteration of the judgment; and upon advising the petition, with answers, the Lords altered the interlocutors complained of; and found, "that in the "circumstances of this case, the minister has right to have his glebe designed "out of lands lying near to his manse, whether they be kirk-lands or temporal "lands; but found, that the heritor whose lands shall be so designed, is entitled "to a proportional relief from the other heritors in the parish, liable in pay-"ment of the £60. Scots hitherto received by the minister in lieu of a glebe." No. 2.

Lord Ordinary, *Monboddo*. For the suspender, *Solicitor-General Blair, Rolland, D. Douglas*. For the Heritors of Temporal Lands, *H. Erskine, D. Cathcart*. For the Minister and Colonel Monypenny, *M. Ross, W. Robertson, Monypenny*. For the College, *Ed. and Jo. M'Cormicks*. Clerk, *Home*.

*D. D.* *Fac. Coll. No.* 127. *p.* 288.

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1800. *December* 2. WILLIAM LAIDLAW *against* ANN ELIOT.

No. 3.
A minister having got a grass-glebe designed from lands which were of old part of the vicar's glebe, the proprietor's relief found not to be confined to the other feuars of the vicar's glebe, but to extend to all the heritors of church lands in the parish.

PART of the old vicar's glebe of Peebles having been designated to the minister of that parish for a grass-glebe, William Laidlaw, the proprietor, brought an action for proportional relief agaist the other heritors of kirk lands.

In this action appearance was made for Ann Eliot, a proprietress of church lands, who contended, that Laidlaw's right to relief ought not to extend to the whole heritors of church lands, but should reach only to the other feuars of the vicar's glebe.

Answered: After the reformation, the protestant minister or reader, by the statutes 1563, C. 72. and 1572, C. 48. was declared to be entitled to a certain portion of the glebe of the former parson or vicar. By the act 1593, C. 165. where there was no old glebe, all the other kirk lands in the parish were made liable to designation. And by 1594, C. 202. it is declared in general terms, that "the feurs, possessors, and tacksmen, out of whose lands the manses or glebes "are designed, shall have relief of the remanent parochiners, wha are feuars, "possessors, and tacksmen of kirk lands, lying within the said parochin *pro* "*rata*." Although the old glebe, therefore, is still primarily liable to designation, yet, in terms of this clause, the proprietor is entitled to a general relief from all the heritors of kirk lands; and the rule is a just one, as all of them have been equally benefited by the ancient inheritance of the church. It was accordingly so decided 12th February 1635, Cock, No. 32. p. 5150. See also Stair B. 2. T. 3. § 40. 3d January 1745, Fergusson against Glasgow, No. 38. p. 5157; 12th December 1755, Dury and Black against the Minister of Dunfermling, No. 40. p. 5161.

Replied: The act 1593, C. 165. allows the designation out of the church