

No. 95.

Answered: The former mode of allocating the stipend, was adopted in consequence of the suggestion of the heritors, without any appearance on the part of the assistant, and with the acquiescence of the then incumbent; and whatever concessions may have been made by him, can only exist during his life-time, and cannot injure the benefice itself. The assistant not being a regularly ordained clergyman, could not insist in a process of augmentation, and therefore no addition of stipend could be awarded to him, but upon the application of the Minister, and by burdening the stipend with a sum payable to his assistant; for although the Court of Teinds may disjoin or annex parishes, it has not the power of appointing assistants, which in effect erects a new church within the former parish. Thus the Minister of Ardnamurchan was, in 1750, burdened with 500 merks payable to an assistant, which was raised to 1000 merks on a new augmentation. (29th June, 1796). The Minister of St Ninian's was likewise decerned to pay 600 merks to an assistant, (11th February 1778), which, on a new application for stipend, was raised to £.600 Scots, (19th May 1802). In the case Tirii, the arrangement was made by the heritors, as the price of acquiescing in the claim for augmentation, and not objected to by the Minister on that account.

This was considered as an important general question of law, and it was unanimously held by the Court, that the Minister being the only incumbent, was the only person entitled to sue for an augmentation, and must have the whole stipend modified and localled to him in the first instance, though his right should be burdened in favour of the assistant, who was subordinate to him, and over whom it was expedient he should have this controul, as being one for whose behaviour and character he was in some measure answerable. Nor would the Court listen to the plea, that the Minister should find security for this payment, as no irregularity was alleged to have taken place formerly, and there was an easy remedy if any should occur in future.

The Court accordingly "adhered."

Lord Ordinary, *Justice-Clerk.* For Macruer, *Connell.* Agent, *J. Campbell, Atus, W. S.*  
For Macnicol, *A. Campbell, junior.* Agent, *Crawford Tait, W. S.*

F.

*Fac. Coll. No. 101. p. 221.*

1803. July 8.

The KING'S COLLEGE of ABERDEEN *against* The EARL of KINTORE.

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Absolute warrandice being granted by the titular to an heritor in a tack of his teinds, the titular, in the case of an augmentation, is not

The King's College of Aberdeen is titular of the teinds of the parish of Marykirk, in which are situated the lands of Inglismaldie, belonging to the Earl of Kintore. A certain proportion of the teinds is payable to the Minister, the rest being paid to the College.

In 1785, a contract was entered into for nineteen years, by which the titular "disponed to the Earl the whole teinds payable out of these lands, consisting of 78 bolls 1 firloft 2 pecks of meal, and 35 bolls bear, with warrandice at all hands;" taking him bound, on the other hand, "to pay yearly to the Minister

10 bolls 3 firlots 3 $\frac{1}{2}$  pecks of meal, and 6 bolls and 1 firlot of bear, the victual-stipend then payable out of the lands;" and also the sum of £.605 13s. 3d. Scots to the titular, "as the agreed price and value of the residue of the foresaid victual-teind, consisting of 67 bolls 1 firlot 2 $\frac{1}{4}$  pecks of meal, and 28 bolls 3 firlots of bear, converted at the rate of £.6 6s. Scots the boll." Similar contracts were entered into with other heritors.

At this time it was understood, that those teinds whereof churchmen were the titulars were not subject to be modified for augmenting stipends; but, in 1788, the Minister of Marykirk having brought a claim against the College, was successful in 1794, and a proportional addition to the victual-stipend formerly paid was laid on the lands of Inglismaldie, operating back to the year 1788.

The College was compelled to pay this augmented stipend to the Minister; and, upon the principle, that so far as regarded the number of bolls evicted by the Minister, the bargain was at an end, brought an action against the Earl to be relieved from this payment, in so far as it was greater than the conversion, on account of being obliged to pay the Minister the selling price of the grain; and concluding, that the College should also be freed from this claim in future.

The Lord Ordinary (18th June, 1802,) "found, That, in the contracts founded on by the defenders, it is presumed to be the meaning of parties that the conversion of the victual-teind, at the rate of 10s. 6d. per boll, should apply only to such part thereof as was or should be payable to the College or titulars, but not to such part as was or should be payable to the Minister."

Against this judgment the Earl reclaimed; and

Pleaded: The contract is clear; and there is no need of resorting to presumption. A certain specified number of bolls are sold for a specific price, with absolute warrandice to secure the enjoyment of the subject for the whole period of the contract. If the Minister had demanded, and obtained, from the heritor, the selling price of the victual which he has thus evicted, the heritor would have a claim against the College, upon the warrandice, for whatever was paid above the conversion. The whole subject is warranted on paying a certain price, and he is entitled to be relieved from whatever is paid beyond that.

If the titular's right be always qualified by the inherent right of the Minister, the warrandice, in such a case, should be from fact and deed only; for absolute warrandice implies, that the subject of the contract is not liable to any diminution, or at least promises relief, if such should be the case; Stair, B. 2. Tit. 3. § 46. p. 234.

The contract is simple and individual. It cannot be at an end to the extent of what is paid in addition to the Minister in consequence of his augmentation, and subsist as to the free residue still to be drawn by the titular.

Answered: The subject sold is whatever belongs to the titular; for whatever belongs to the Minister the titular has no power to dispose of. It is nothing else than the residue, or that part of the teinds which remain to the titular after paying

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bound by the terms of the tack, so far as the teinds are evicted by the Minister, but is relieved from the consequences of such eviction.

No. 96. the Minister's stipend. The quantity of grain specified is only descriptive as to the quantity then payable to the College; and stipend being an inherent burden upon teinds, absolute warrandice, in a tack of teinds, never comprehends future augmentations; Ersk. B. 2. T. 3. § 12. (Small Edition); Lumisden, 6th January, 1682, *voce* WARRANDICE; Plenderleath against Lord Tweeddale, 14th January, 1800, (not reported; see APPENDIX). Burdens imposed by law, the purchaser is always presumed to be aware of; and if he does not obtain special warrandice in such a case, he can have no claim of relief.

The Court adhered.

Lord Ordinary, *Polkemmet.*

Act. *Walker.*

Agent, *Wm. Walker.*

Alt. *D. Douglas.*

Agent, *Geo. Cumine, W. S.*

F.

*Fac. Coll. No. 107. p. 236.*

1803. *November 16.* DALGLEISH *against* The HERITORS of PEEBLES.

No. 97.

Where an heritor, in the course of a process of locality, surrenders his whole valued teind, instead of paying the stipend as allocated upon him, his proportion of victual-stipend must be laid upon the other heritors.

In 1793, Dr. William Dalgleish, Minister of Peebles, brought a process of augmentation of stipend, in which he prevailed. Before the locality was settled, Mr. John Anstruther, advocate, one of the heritors, obtained a decree of valuation of his teinds, (3d July, 1799,) at £.20 14s. In October, 1800, a scheme of locality was made out, localing upon these lands eleven bolls of meal, the same quantity of bear, and £.2 5s. 5d. in money.

Upon this, Mr. Anstruther produced his decree of valuation, accompanied with a minute, making a judicial surrender of his valued teind; which, though objected to on the part of the common agent, because the valuation was not obtained till after the augmentation was decreed to the Minister, was however sustained, (12th May, 1801). Dr. Dalgleish objected to the locality, which now substituted Mr. Anstruther's valued teind for the victual and money localled upon him; and, accordingly, the Lord Ordinary found, 27th January, 1802, "That the Minister's right to the stipend, as localled to him by the interlocutor of Court, partly in victual and partly in money, cannot be impaired or altered by the circumstance that Mr. Anstruther, one of the heritors, took the option of giving up his whole valued teind; and therefore remits to the Clerk to make a rectified locality, applying the whole of Mr. Anstruther's valued teind, and localing the remainder of the modified stipend, both in victual and money, upon the other heritors."

The heritors reclaimed, and

Pleaded: The judgment in Lamington, No. 38. p. 14827. out of which this question has arisen, decides this point; for, while it is ascertained that victual stipend may be allocated on heritors whose teinds are valued in money, it declares, that at any time the heritor may be relieved, by surrendering his whole valued teind, and that this surrender is to be made to the Minister; making the valued teind exactly a surrogate for the stipend localled upon him, and without the necessity of a reduction of the locality, whenever any of the heritors avails himself of this