

No. 167. found on them; Erskine, B. 2. Tit. 10. § 34.; 28th February 1753, Earl of Morton against Marquis of Tweeddale, No. 7. p. 10672; 1st February 1764, Sir James Maxwell against the University of Glasgow, No. 13. p. 10692; 1762, Duke of Athol and Earl of Dunmore against Drummond; 3d February 1773, Lord Elibank against Officers of State; 14th December 1785, Heritors of Keith and Humbie against the Earl of Hopeton and Others. (These not reported; see APPENDIX.)

Answered: Although the Court have properly considered an excess of payment to a lay-titular as a dereliction of a sub-valuation, upon the ground stated for the defenders, the same inference ought not to be drawn from an excess of payment to the Minister, which may have proceeded solely from a wish on the part of the heritors, that he should be comfortably provided; 23d July 1760, Adam against Colville. (Not reported; see APPENDIX.)

Both parties likewise argued on the agreement between the Minister and heritors, and the decree following on it in 1650, as favourable to their plea.

The Court, upon advising memorials and additional memorials, which were ordered with a view to settle the general question, and without regard to specialties, came to be of opinion, that there was no difference between the effect of an excess of payment to the Minister, and one to a lay titular.

The Lords refused to approve of the report of the sub-commissioners, "in respect the same had been derelinqished by an over use of payment of stipend to the Minister."

A petition and additional petition were refused, (May 1797) without answers.

Act. Geo. Ferguson.

Alt. Solicitor of Tithes, Balfour, Wm. Robertson, Hagart.

D. D.

Fac. Coll. No. 16. p. 38.

* * * The Court, at the same time, pronounced a similar judgment in a question between Lord Dundas and the Minister of Balingry.

1798. *March 7.*

SIR WILLIAM ERSKINE and Others, *against* The Reverend DAVID BALFOUR.

No. 168.

A report of the sub-commissioners approved of, which proceeded on a proof of the value of the lands, although it did not bear that the Minister was present or cited.

Sir William Erskine, and other heritors of the parishes of Torryburn and Crombie, brought an approbation of the report of the sub-commissioners, with regard to their teinds, in 1629.

It appeared from the report, that the valuation took place at the instance of the procurator-fiscal, who was present. In several passages of it, it was mentioned, that the titular was present, and that the heritors were either present, or cited. But this did not appear with regard to the Minister.

The report, however, proceeded upon a regular proof of the value of the lands, except as to a few acres, which were valued of consent.

The Minister of the parish objected, That as the valuation proceeded in absence

of his predecessor, the report, upon the principle of the decision, 4th February 1795, Fergusson against Gillespie, affirmed on appeal 14th February 1797, No. 168. No. 164. p. 15768. could not be supported.

The pursuers answered: Reports of sub-commissioners do not narrate the whole proceedings, but merely their result; and, therefore, from its not being expressly stated, that the Minister was present or cited, it does not follow that he was not; on the contrary, as the report in general proceeds on a proof, the presumption is, that all parties interested were present, or cited. Indeed, the presence of the procurator-fiscal, for the presbytery, made that of the Minister unnecessary.

Many similar reports have been examined, and no instance has been discovered, in which the report bears, that the Minister was cited. This case differs materially from that of Fergusson. These two estates were valued within a few months of each other. The report as to one of them bore, that the patron, heritor, and Minister, were present. The report as to the other, mentioned the presence of the two former, and that they had agreed upon the valuation; but said nothing of the presence of the Minister; and, therefore, from the difference of expression used in the two reports, it was presumable, that the Minister had not been present, or a party, at the second. Consequently, as the value, in that case, was fixed of consent, and without a proof, it could not be binding on the Minister or his successors.

The Lords, on the grounds stated for the pursuers, repelled the objection.

Act. Ar. Campbell.

Alt. J. W. Murray.

Fac. Coll. No. 68. p. 158.

1799. May 22.

LORD GRAY and JOHN ANDERSON *against* ARCHIBALD DUNBAR, and Others.

Lord Gray and John Anderson brought an approbation of a report made by the Sub-commissioners of the Presbytery of Perth, in 1635, with regard to certain lands belonging to the pursuers, in the parish of Kinnoull.

By the report, the lands were valued in grain. Mr. Archibald Dunbar, the Minister of the parish, stated various objections to the original validity of the report; and further insisted, that it had been derelinquished by excess of payments to the Minister of the parish, as fixed, first by a locality in 1650, and still more by another in 1775, in neither of which had the valuation been founded on, or attended to.

It appeared, that if the stipend payable by the pursuers, in terms of the locality 1650, were converted into victual, at £.100 Scots the chalder, which, by act 1649, C. 45. the High Commission were authorised to do, there was no excess of payment by the first locality.

The pursuers, however, admitted, that, converting some wheat payable by them by the locality 1775 at £.9 Scots the boll, and the meal at £.100 Scots

No. 169.
Dereliction
of a sub-valuation
inferred
from over-
payment to
the Minister,
though it had
not been con-
tinued for
forty years.