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the other contracting party to give more, by a process of augmentation of a stipend which does not belong to him, when the minister does not insist. A second minister, who is established by private agreement, cannot insist for an augmentation; Marshall against Town of Kirkaldy, 7th July 1738, No. 18. p. 14795. nor an assistant, Macruer against Macnicol, 18th May 1803, No. 95. p. 15711.

The Court adhered.

Act. *Campbell*, Agent, *James Robertson*, W. S. Alt. *Gordon*. Agent, *A. Storie*, W. S.

F. *Fac. Coll. No. 234. p. 529.*

1808. *February* 3.

MINISTER of PRESTONKIRK, and the PROCURATOR for the CHURCH of SCOTLAND, *against* THE EARL of WEMYSS.

No. 6.
Stipends of Ministers may be augmented by the present Court of Teinds, tho' augmented by it before.

See now on this subject, Act. 48. Geo. III. Ch. 138.

IN the year 1796, the Minister of Prestonkirk raised a process of augmentation, and obtained an augmentation of his stipend accordingly. In the year 1806, he brought a second process, demanding another augmentation. The Earl of Wemyss, being one of the heritors of the parish, opposed this demand; and pleaded that the present Court of Teinds, having already granted an augmentation to this living, had no power to grant another.

The point was argued first in presence, and afterwards in memorials.

Argument for pursuers.—At the time of the Reformation, the teinds were the property of the church. They were possessed by ecclesiastics of different kinds; but the clergy having the actual cure of souls, had always a super-eminent right, to a sufficient maintenance at least, out of the teinds of the parishes in which they served. To this extent, the rule, *decimae debentur parocho*, was the law of Scotland.

As the Reformation was not an abolition of all national establishment of religion, and as the establishment of the parish clergy in particular was in no degree superseded or diminished by it, the claim of this part of the church to a sufficient provision out of the teinds only became stronger, when the other ecclesiastical institutions, to which they had been appropriated, were abolished.

The reformed clergy, indeed, claimed the full property of the teinds,—Spottiswoode's History, p. 150 and 199. and the justice of their claim was admitted by Parliament in act 1567, C. 10. which calls the teinds 'the proper patrimonie' of the church.

Notwithstanding this, the teinds, in various ways, came almost wholly into the hands of laymen; but all the grants by which they were conveyed were under burden of giving a sufficient maintenance to the clergy of the parishes from which they were drawn; and the existence of this burden on the property

No. 6. of teinds, independently of all express stipulation, and in whomsoever that property might be vested, has always been universally acknowledged by all our writers on the subject.—Stair, B. 2. Tit. 8. § 21.—Erskine, B. 2. Tit. 10. § 10.—It never was imagined that the clergy of Scotland were to be maintained from any other fund.

The lay possessors of teinds having, however, neglected to provide sufficiently for the clergy, after some ineffectual regulations, act 1617, C. 3. was passed, establishing a commission, with power to fix the precise stipend which the minister of each parish should receive from the possessors of the teinds. By this act, a maximum of stipend was fixed; and a legislative promise was given, that no augmentation of the stipends so fixed ever should be demanded. This commission 1617, was appointed to last only till Lammas 1618. Act 1621, C. 5. renewed the provision of act 1617, by appointing a similar commission for the same purposes, with the same powers, and for the term of one year.

But by the proceedings of Charles the First, in relation to teinds, the submissions that were made by the teind-holders, the decreets-arbitral on those submissions, and the acts of Parliament by which the decreets were ratified, the provisions in favour of the teind-holders were completely done away, and the general right of the clergy to a sufficient maintenance out of the teinds revived. A new commission was appointed by act 1633, C. 19. to continue, not for a limited period, but during the King's pleasure. It was empowered to fix sufficient stipends, without any maximum, and no provision was made against future augmentations. This act, too, mentions the right of ministers, though not titulars, to reduce collusive valuations of teinds, which could only rest upon the interest they had from the chance of future augmentations. It ordains the tythes to be sold for nine years purchase, which was far below their value if they had not been liable to the burden of future augmentations.—Erskine, B. 2. Tit. 10. § 52.

This commission 1633, without being recalled, was succeeded by another constituted and renewed by acts during the usurpation, (15th Nov. 1641, 24th July 1644, 24th March 1647.) These acts were rescinded, but the proceedings of the commission that acted under them were ratified by act 1661, C. 61.

This act appointed a new commission in terms similar to those of act 1633, to which it refers. It particularly empowers the commission 'to appoint 'constant and local stipends (i. e. in opposition to arbitrary allowances) and 'grant augmentations;' and it contains no limitation either as to the amount or number of these augmentations. This act, too, allows the titular to allocate the whole stipend upon the teinds of any one heritor, which shews that the teinds were never meant to be given to the heritors as an absolute property, liable only to a definite burden; for such a right in the heritors would never have been left subject to be destroyed at the titular's pleasure. This commission was appointed to continue till discharged by the King.

Without any prior discharge of it, a new commission, in similar terms, was appointed by act 1663, C. 28. and another commission in the same way by act 1672, C. 15. This act empowers the commission to modify stipends, "where ministers are not already sufficiently provided," without any other limitation. It empowers them also to give prorogations of tacks of teinds "for all augmentations granted since 1630;" from which it is evident, that the commission 1633, and all the subsequent ones, had the power of granting augmentations.

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Commissions in similar terms were constituted by acts 1685, C. 28. 1686, C. 22; and by act 1690, C. 30. which was renewed by act 1693, C. 23. and continued till the Union, and the act 1707, C. 9.

From the year 1633, then, down to the year 1707, there was a perpetual succession of commissions, all having the power of augmentation, and without any appearance of restriction, except where the minister was already sufficiently provided. They seem, in short, to have been a succession of courts for the purpose of enforcing, whenever it became necessary, the general right of the clergy to a sufficient maintenance out of the teinds.

The act 1707, C. 9. bestowed this jurisdiction on the Court of Session.

It is admitted, that by this act the Court of Session has all the powers contained in acts 1633, 1690, and 1693; in short, all the powers held by any of the former commissions; and on that ground alone they have power to grant augmentations wherever the minister is not already sufficiently provided.

But, secondly, this act gives them jurisdiction in all things that were referred to former commissions, "as fully and freely in all respects as in other civil "causes;" that is to say, it commits the perpetual right of the clergy to a sufficient maintenance out of the teinds, to the perpetual jurisdiction of the Court of Session, in the same way as all other rights are committed to that jurisdiction. From this it follows, of necessity, that the Court must enforce that right by judgments repeated from time to time, as the variation of circumstances requires; that is, it must give augmentations of stipend, whenever they are necessary, for a sufficient maintenance to the clergy.

Though it could be supposed, therefore, that each of the preceding commissions, or even all of them together, had power only to give single augmentation, that is, a single judgment upon this right of maintenance, yet that circumstance could not limit the jurisdiction of the Court of Session in regard to it, or prevent them from giving repeated augmentations.

Accordingly, it is admitted, that from the passing of this act 1707, the Court of Session has always granted augmentations of stipends which were not sufficient, though they had been augmented by former commissions. Yet there is no authority for doing this that does not equally apply to stipends formerly augmented by the Court itself, provided they are not sufficient for the proper maintenance of the minister.

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For a long time, however, there was no such change in the circumstances of the country, as made it necessary to re-augment stipends already augmented by this Court; and when this necessity at last came, a sort of rule of Court had been adopted against it. But this was founded either on some erroneous notion of *res judicata*, or on some idea of expediency, which had no foundation in law or in truth.

To this rule, however, the Court adhered in the case of Kirkden, No. 28. p. 14816; but the decision was reversed by the House of Lords, 8th July 1784. The very form of this reversal, which was quite simple and general, shews that it was upon the general point. This is proved by a letter of Mr. Spottiswoode, solicitor for the church, and by notes of the Lord Chancellor's speech, which were taken by Mr. John Russell, writer to the signet, and coincide in substance with notes of the same speech taken by one of the counsel for the heritors. (See Note I. p. 16. *infra.*) It sufficiently appears, indeed, from the second report of the case of Kirkden, given at the time of the appeal, No. 192. p. 7479. This judgment was followed (according to the report of the teind-clerk) by about twenty cases of second augmentation of stipends before augmented in this Court. The point was notwithstanding again disputed in the case of Tingwall, in which the argument was by joint agreement confined to the general point. The Court again adhered to their rule, and the House of Lords again reversed the decision. (No. 30. p. 14817.) There can be no doubt this reversal was on the general point. The special circumstance mentioned in the judgment of reversal, as well as the remit contained in that judgment, relate entirely to the merits of the claim for augmentation, not to the question of jurisdiction. They are of such a nature, that they could have no influence on the question of jurisdiction. (See Note IV. p. 22. *infra.*)

Accordingly, when the cause came back to this Court, the interlocutor applying this judgment was, 'That the said Lords Commissioners, in obedience 'to the above judgment, do hereby *reverse the interlocutors complained of in the 'said appeal*; and after hearing counsel as well for the minister and procurator 'for the church, as for the heritors of the said united parish, upon the import 'and effect of the said judgment and remit, they find, that in this case it *is com'petent to the minister to insist in his process of augmentation, modification, and locality, 'against the heritors of the said united parish, notwithstanding the decree augmenting 'the stipend in the year* 1772; reserving to both parties to be heard in *said pro'cess*, upon the several circumstances taken notice of in the above judgment, 'and without prejudice to any other plea or argument which either of them 'may adduce.' And though a petition was given in against this interlocutor, on the ground that the point of jurisdiction was left open by the House of Lords, yet the Court adhered to it on the 25th November 1789. On this occasion, the notes of the Lord President Miller, which appear on his session papers, are in these words: 'Question about augmentation. Whether decree since Union, '*a bar?* 25th November 1789, *Found no bar.*'

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If this interlocutor had given a wrong interpretation of the judgment of the House of Lords, it could easily have been rectified by another appeal, for the same Lord Chancellor continued sitting, but no such appeal was taken. Since that time there has been without interruption to the date of this case, a stream of second augmentations by this Court, affecting the stipends of a very large proportion of the clergy of Scotland. By this long course of practice, the point must now be regarded as shut, whatever had been the merits of the original question. Not to mention the infinite confusion it must occasion at present, the overturning of such a practice must render all law uncertain.

Argument of the defenders.

It is true that the Roman Catholic church, by superstitious pretences and arts, had got possession not only of the teinds, but of one fourth of the lands of Scotland. It is true, also, that when that church was abolished in this country, the reformed teachers made a claim to its whole possessions. But this claim was utterly rejected by the nation. It never was admitted as in itself legal to any extent, by any statute or decision whatever. It was recognized merely in the view of morality or expedience, and a legal sanction given to it, to a certain extent, by express act of Parliament. Beyond this it neither has, nor ever had, any existence in law. The way in which this right was given to the reformed clergy, was first by giving them a certain share in the greater benefices, which did not consist wholly of teinds, (see act 1567, C. 10,) and the entire possession of the smaller benefices, (see act 1572, C. 52,) and afterwards by appointing commissioners to modify stipends to them out of the teinds.

The first commission of this kind was that appointed by act 1617, and renewed by act 1621. This commission was evidently intended to fix these stipends once for all at a low rate; and a legislative promise was given to the teind-holders, that nothing more should ever be demanded of them. But this promise was disregarded by Charles I. and his Parliament, who, after a variety of proceedings, instituted a new commission by act 1633, of which the object, so far as related to the clergy, was to fix their stipends *at a higher rate.* A higher minimum accordingly is appointed by it; the maximum is taken away; and power is given to fix the stipends of all ministers at this higher rate. But these larger stipends were to be fixed by this commission just in the same way as the smaller were to be fixed by the commission 1617, that is, *once for all.* The attempt to bind the Legislature, to be sure, was not repeated, but that had nothing to do with the powers of the commission. The commission was *for a year, or during pleasure*, so that it evidently was not intended to last long. It was appointed, according to the words of the act, '*for the finishing and 'full perfection,*' of a '*glorious work,*' which '*could not take a full end,*' without the authority of Parliament, and its duty is to 'set down *a constant local stipend* 'for each minister.'

No. 6. By the same act, too, the heritor is empowered to purchase the teinds of his lands, " such as shall rest attour the minister's stipend, and other pious pur-" poses, which by the tenor of the commission are to be *first* provided." He was to buy them, too, at nine years purchase, which was a full price. Erskine says the contrary; but he did not advert to the situation of things at the time when this price was fixed, *i. e.* previous to the decree-arbitral in 1629. Interest was at 10 per cent *, and consequently the price of a perpetual annuity could not be above ten years purchase, and at a time when money was so scarce, it was probably lower. But the teinds were liable to the King's annuity of 6 per cent, so that nine years purchase was a full price for them. Indeed, by the very same act, the feu-duties of superiorities of teinds, which were liable to no tax or burden of any kind, and were enhanced by casualties, were ordained to be sold to the Crown at ten years purchase. The price, therefore, at which this act authorised the heritor to purchase his teinds, was certainly intended to be, and then was, a full and fair price; so that it never can be supposed, that the same act meant to subject those teinds to an unlimited burden, by which, after this purchase, he might be wholly deprived of them without any compensation †.

In all these circumstances, it is impossible not to believe that this commission was intended to fix the stipends once for all, and had no unlimited power of augmentation.

The terms of the rescinded act 15th November 1641, renewed 24th July 1644, and 24th March 1647, and of the rescinded act 16th March 1649, afford the same inference, for they allow the commissions they create to grant augmentations of stipends already augmented since 1633, by an express clause, on a special preamble, and in certain very special cases only; and as these acts passed at a time when the clergy were in the highest favour, it is impossible to suppose, that an unlimited power of re-augmentation in all cases previously existed.

These acts were rescinded by act 1661, C. 61. though it ratified the proceedings under them, with this exception, that the decrees of the commissions during the usurpation might be annulled by the commissioners it appointed, on account of " *injustice or exorbitancy;*" which shews that the decree of a commission was not in its own nature perpetually open.

This act is in all other respects a renewal of act 1633, to which it refers. It mentions in the preamble, that the royal purpose of Charles I. had not yet " *got a final accomplishment,*" and that Charles II. was desirous " *of prosecuting*

* Act 1633, C. 20. first reduced it to 8 per cent.

† To this it was replied, that, at least as soon as 1642, teinds were in fact sold before any modification of stipend to the minister; so that this burden could not well be regarded, even in 1633, as inconsistent with the sale at nine years purchase; and in the future acts no such view could possibly be entertained.

'so good a work." So that the intention of getting the stipends fixed once for all, is no less evident in it than in act 1633.

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The acts 1663, 1672, 1685, 1686, are all in similar terms. They all refer to "*the great work not yet finally accomplished,*" and renew the powers contained in acts 1633 and 1661.

The acts 1690 and 1693 commence with similar preambles, and are in similar terms, with this exception, that they empower the commissioners "to alter or annul, *for injustice or exorbitancy,*" the decrees of all former commissioners, instead of confining this power of review to decrees during the usurpation.

All these commissions then were granted for the prosecution of one great plan of fixing once for all the stipends of all the ministers in Scotland at a reasonable rate. The power of review was given only to afford a remedy in cases where this had not been fairly done.

The granting of *augmentations* is no doubt mentioned in these acts, but there is no reason to suppose this alludes to any thing more than augmentations of stipends fixed before 1633, which, no doubt, might be augmented by any of the subsequent commissions.

The right of ministers to reduce valuations arose from this, that originally the valuation was previous to the modification of stipend, by act 1633, and that afterward stipends might be affected by a collusive valuation, though they had been granted prior to it; indeed, they might all have been extinguished in this way, if the minister had possessed no power of interfering. It cannot, therefore, be inferred from this interference, that ministers had any right to augmentations unlimited in number.

No instance has been produced where a stipend, fairly fixed by decree of a commission since 1633, has ever been re-augmented *causa cognita*, down to the year 1707. Under the clause, allowing a power of review for injustice or exorbitancy, some latitude of proceeding may have been allowed, which must have been much facilitated by the destruction of the teind-records, which happened by shipwreck, immediately after the restoration, and by fire in 1702. But no possible interpretation of this clause could authorise a second augmentation by the same commission, while its former decree remained unimpeached.

The act 1707 transferred to the Court of Session the power of granting augmentations, conform to the rules laid down and powers granted by acts 1633, 1690, 1693. It is plain, therefore, that this Court could have no more power in this matter than these former commissions had. There is not a hint in the statute about giving any *new* right to the church at the expense of the teindholders, nor any appearance from history that such a thing was thought of. The clause, that the Court were to judge in this matter as in other cases, refers merely to the *mode* of exercising their powers. The argument, as to a perpetual court, giving judgment on a perpetual right, is *a petitio principii.* No such right is established by any of the acts of Parliament constituting com-

No. 6. missions; and the clergy have no legal right to the teinds but what is contained in these acts. Far less have they any such right as can come under the cognizance of a teind commission, which the present Court of Teinds is. Indeed, if they had any right beyond these acts of Parliament, it must have been a common law right, cognizable at all times, from the Reformation downwards, by the ordinary jurisdiction of the Court of Session, but no such thing was ever heard of.

The present Court of Teinds, however, probably on a liberal interpretation of the power of reviewing decrees of former commissions for injustice or exorbitancy, early adopted the practice of granting augmentations of stipends augmented before 1707. And in some few cases, it appears, that they reviewed their own decrees when they had been obtained by collusion.—See report of Kirkden. But from 1707, down to the date of the judgment of the House of Lords in that case, no instance has ever been produced of a stipend being re-augmented by them that had been formerly modified by themselves in a fair manner. On the contrary, it appears from the reports of the House of Commons, V. II. page 831, that Mr. Andrew Chalmers, being called as a witness to give evidence on this subject, before a committee to whom an inquiry upon a petition from the General Assembly for an alteration of the law relative to minister's stipends was entrusted, said, "He had examined all the records of all the decrees of the Court of Session since the Union to the year 1738, relating to the augmentation of ministers' stipends, and that he does not know any instance, or find any one upon record, wherein the Court of Session have augmented any living within that period which had before obtained a decree of valuation." The record at that time had been brought up no further than the year 1738. Since that time not only the same negative rule has been observed, but augmentations have been refused on the ground, *per expressum*, that there had been a prior augmentation since the year 1707. This happened in the case of the Minister of Strathden, 22d January and 5th July 1766, (not reported;) that of the Minister of Ceres, in the same year, (not reported;) and in that of the Minister of Arngask, 25th Nov. 1772, No. 24. p. 14808. In other cases this general rule was admitted; and a second augmentation obtained, *per expressum*, only on special circumstances affecting the validity of the first decree of augmentation; Minister of Kinettles, 1st July 1767, (not repotred;) Minister of Lochbroom, 13th Feb. 1769, (not reported;) and in a great variety of other cases. This practice not only afforded a demonstrative interpretation of the act 1707, but it was so clear, and of such long continuance from 1707 to 1799, that it was amply sufficient to fix the law on that subject.

Accordingly, the Court found so in the case of Kirkden. The reversal of that case was on specialties. That there were specialties in the case appears from numbers 3d and 4th of the reasons of appeal, which are founded on specialties; and the best proof that the judgment of the House of Lords rested

on them, is to be found in the unanimous decision of the Court of Session, in the case of Tingwall, which followed soon after.

This decision, too, was reversed; but, though the argument in it was on the general point, there were specialties in the case which were brought forward in the House of Lords; and are inserted expressly in the interlocutor of reversal, as considerations or grounds of judgment. That the judgment of reversal was founded on them, appears further from a letter by the solicitor for the respondents. (See Note II. p. 20. *infra.*)

The interlocutor, applying the judgment, is by no means explicit as to the general point. It bears to be pronounced only *in this case;* and is equally applicable to the judgment of the House of Lords, supposing that judgment to have rested on the specialties. At any rate, the particular defender had no interest to appeal it, since it appeared that, in all events, the minister was to have an augmentation, and the body of heritors were long before weary of supporting the litigation.

The subsequent augmentations were all given without opposition, because the teind-holders would combine no longer, and no single individual would, for a small interest, engage in a law-suit with the whole church, which was always ready to take up the question. But practice of this sort cannot constitute law.

The judgment of the Court was, (3d Feb. 1808,) 'Find, That this Court 'having been established by an act in the year 1707, as a permanent Court of 'Commission, in place of the former temporary Commissions, for the purpose, '*inter alia*, of modifying and augmenting the stipends of parochial ministers out 'of the teinds, it is the duty of the Court, and within its powers, as recognized 'by the House of Lords in two decided cases in the years 1784 and 1789, and 'by the uniform practice of the Court, acquiesced in by all parties, in a great 'variety of instances, ever since the last-mentioned period, to receive such ap'plications when made in the regular form, and to determine upon them accord'ing to the state of matters at the time, and the merits of each particular case, 'notwithstanding a former augmentation since the institution of the court; 'and therefore, that the present case must be allowed to proceed as usual.'

This judgment was given by a majority of 10 to 3. (See Note III. p. 21. *infra.*)

The Judges delivered their opinions on this case at very great length. A printed copy of their Lordships speeches, corrected by themselves, has been lodged in the Advocates' Library, and is bound up along with the papers in this case, but it was too extensive for publication here. It may only be observed, that those Judges who formed the minority appear to adopt the argument for the heritors throughout; and that the majority, with the exception of one Judge, who founded his opinion solely on the two cases decided by the House of Lords, adopted in general the argument of the minister, with very little exception. The considerations which seemed most deeply to weigh on this side were, that

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by the ancient and established law of Scotland, the proper provision of the parochial clergy was a *burden inherent on the teinds*: That there was nothing either in the acts of Parliament quoted, or the practice of the teind commissions, which was sufficient to extinguish this principle, and to convert the great mass of the ancient spirituality of the church into free property: That, on the contrary, the inherent liability of the teinds to the burden of maintaining the clergy, was every where either expressed or taken for granted in those statutes, as well as in the submissions and decreets arbitral, and in all our authorities on the subject: That in this situation, though each of the former commissions, being temporary, might have confined the exercise of its powers to granting *one* augmentation, yet that it was impossible for the Court of Session, being a perpetual court of teinds, to do this, because, by such a restriction, it must leave the clergy not sufficiently provided, and free the teinds from that burden that was inherent in them: That there was no authority of any kind for the adoption of such a rule: It had been adopted from erroneous views, and without very deep consideration, but it was done away by the decisions of the House of Lords, which established that the powers of this Court were liable to no such limitation. The Lord President, who had been counsel for the heritors in both the cases of Kirkden and Tingwall, and had argued those cases at the bar of the House of Lords, declared his full recollection that both these casess had been decided by that House on the general point. The Lord Justice-Clerk, who had argued the case of Tingwall in that House, expressed a similar recollection with regard to it.

Act. *Connell.* Alt. *Gillies* et *Cranstoun.* *Jo. Murray*, W. S. and *Jo. Anderson*, W. S. Agents.

M. *Fac. Coll. No.* 28. *p.* 92.

*** Note I. referred to p. 10. *supra.*

'Dear Sir, *London, 8th July*, 1784.

'I wrote you on Tuesday last. Yesterday the Advocate and Mr. Erskine 'were heard for the respondents, and this day Mr. Macdonald replied; after 'which the Chancellor, in a speech of considerable length, was pleased to *Re-'verse* the interlocutors of the Court of Session, which found the pursuer 'barred from insisting in this action by the decree of augmentation 1716; 'and he remitted the cause, *with directions to the Court to proceed* UPON THE 'MERITS. He said, *there was nothing in the acts or expedience, that ought to 'make such a rule so strict as to prevent them to look into any case*; yet that, in nine-'teen out of twenty cases, it would be found discretion to follow such a rule: 'That if repeated applications should be made to the Court for re-augmenta-'tions, and if, after looking into all special circumstances, the Court thought 'no augmentation should be granted, they had it in their power to punish

'such wanton applications, by inflicting full costs. That, in the present case, No. 6.
'he could not say whether or not an augmentation should be allowed; *but he*
'*saw no rule in law to prevent the Court from examining the merits of the cause.*
'I will send you the judgment to-morrow.' Mr. J. Russel, Writer to the Signet, attended the pleadings, and took notes of the Chancellor's speech, and can give you particular information when he returns. I am,' &c.

Follows a Copy of the Notes, taken by Mr. Russel,—in the House of Lords, 8th July 1784,—Miligan versus *Wedderburn.*

Lord Chancellor.—This case has been argued upon an extensive ground, more extensive indeed than was necessary, and upon a ground which had properly no relation to the question. It is not now before us what provision the clergy should have; but the case before us is to be determined on the law. The question is, Whether, by the law of Scotland, the decree should be affirmed? To understand the question, it is necessary to construe the decree. The *ratio* given, is, that it is incompetent to enter into the consideration of a summons of this kind, if, since 1707, a decree has been pronounced by the Court, giving an augmentation. We are, therefore, to consider, Whether, by the law, there is that sort of bar, by which the Court are prevented from entering upon the merits, not whether, upon the merits, the living would be augmented; whether it is enough to say, there has been such a decree, not whether there is much of sound discretion in the rule; not whether it may be proper, in nineteen out of twenty cases; but whether not one of the twenty cases shall be looked into? If this is the law of the land, it must be good; but if only a principle of discretion, the discretion erected into a rule is inept, unless the law has furnished that rule.

The history of the tithes has been entered into only for the purpose of giving a general idea of the situation of the clergy, and of the constitution of the Court. The tithes were originally part of the patrimony of the Church: Had they continued so without additions more corrupt, they might have been considered as the *jus divinum* of the clergy, and being made part of the law of the land, that right must have been recognised; but this right was shaken by going into abuse. The Reformation in Scotland was too severe. The rights of the Church were considered as a wen which it was necessary to cut off. All ecclesiastical preferments were cut down; and being considered as belonging to no person, they were given to the King. The greatest part of these were annexed to benefices. There never can be a solid establishment without attention to the parochial clergy. All preferments above them are for good discipline and order. In Scotland, all the livings of the parochial clergy had gone into the hands of their superiors.

On the revolution which took place in ecclesiastical establishments, the great men obtained the estates taken from the Church. The clergy in Scot-

No. 6. land were left perfectly destitute. The first provision made for them was 300 merks for each benefice; and it is to be observed, that the statute giving them that provision calls it a temporary provision, until the teinds can be restored. They never were restored; and the reformed Church of Scotland remained in a very sad state.

The first statute 1617, raises the provision from 300 to 500 merks, and fixes the *maximum*. In 1621, another commission was named, with an authority to augment the churches. Both these commissions were only temporary: It was wise, therefore, to confine them to augment churches not before provided. If the law had continued in the same form, I would have acceded to the whole argument of the respondents. In 1633, the Legislature encreased the rate at which they were to be augmented. The Court of Session, in interpreting this statute, have thought themselves at liberty to extend the *maximum*, because, in the words of Erskine, "the general intent," &c.

Tithes given to bishops, to hospitals, and other corporations, the one mensal, the other common tithes. A doubt entertained, whether the Court could exercise their authority on these; but these were also considered to be within the reason of the statute.

A variety of commissions were afterward granted. These vary in an important phrase, having power to augment all parishes where there is not a sufficient provision; a question, whether confined to those not augmented before; never was there such a torture of interpretation. The reference to former commissions is only as to the mode of proceeding; the statute 1690 seems to recognize rather than give the power of revision.

It is said by the respondents, that from 1633 to 1707, it was impossible to reform the acts of former commissions or their own. If this was so, and they could not revise, why should the perpetual commission in 1707 revise the decrees of former commissions? This being the state of the case, it is abundantly clear, that the acts confer the authority of revision, and that they have neither, in defining the powers of these commissions, or in any part of them, created this species of bar to any action.

In all these acts, a number of other authorities are given. Valuations and sales of teinds, as far back as 1633; it was the intention of the Legislature to give to heritors the occupation of their own teinds; it was then thought proper to fix the teinds at one-fifth of the rent. In the 1690, teinds, not in the purview of the old statute, were also fixed, and nine and ten years purchase were the rules then ascertained for the different species of teinds, apparently because an absolute estate in the tithes was not given; but they are always to be subject to a competent provision for ministers.

The law therefore is, that the Court are to review decrees upon the actual situation of the parish. In none of these books is there the smallest trace of this rule; and when Lord Advocate says, the Court are in the daily practice of it, he must mean that it is an idea always afloat in the minds of the Judges.

It has been argued by the respondents, that if this judgment is to be reversed, it ought to be upon the special circumstances of the case; but this cannot be done. At the same time, were the arguments used by the appellant on the general situation of the clergy to pass without notice, it might be productive of worse consequences than the respondents are afraid may arise from determining the general point.

I am perfectly clear, it is competent to appeal from time to time to the Court; (He means to apply to the Court of Session for an augmentation.) But it is impossible that frivolous and vexatious *appeals* can be made with impunity; the Court can award full costs. If appeals are made here, the House always provide the means to make costs effectual where appeals are frivolous; and the recognisance entered, is twice the yearly value of almost any livings in Scotland. I think the Court must, with discretion, go beyond the *maximum*, but that is not before us.

Much has been said of the policy of a proper provision for the clergy. A state has no business with religion, as religion, but merely as a political establishment. Were I speaking here as a legislator, I would say, that the well-being of Scotland was deeply concerned in making a more liberal provision for the clergy. I would have higher promotion,—higher hopes,—and greater preferment. It is that alone can keep the clergy in a situation to be of use to religion. For he must be a wretch, indeed, whose hopes are bounded by the scanty preferment of that country. But in a judicial line, it is impossible to extend the policy.

This case is far from reaching the *maximum*. It was the *minimum* in 1716. But the circumstances are not before the Court of Session, nor what changes may have happened to authorise an augmentation now. I think his having got one, then, may be a bar to his receiving one now; but I cannot affirm a judgement which says, I shall not enter into the consideration of the case. Another question has here been stated, whether it was augmented to the *minimum*. I don't know why the communion-elements should be laid upon the teinds. The communion-money is not affected by any of the statutes. Suppose that fifty merks sufficient in 1716, *non constat*, that, though enough then, it is so now. It is expensive in Scotland; I wish it was less so, that it might be more frequently administered. But who shall say at what the communion-elements were rated. All the instances prove there is no limitation, consequently they should have looked into it.

It appears to me, great inconvenience must arise in allocating where victual given by the Court, though none paid as tithe. The stipend said that it could noway exceed the tithe; in this way it may. If the tithe 800 merks, the stipend four chalders victual, and 100 merks, the value must clearly exceed the tithe.

The Court have no reason in expediency, or authority in law, to say they will not look into it. I therefore move your Lordships to reverse the two

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Notes of the Lord Chancellor's Speech in Kirkden Case,—by Counsel for Heritors.

Lord Chancellor.—It is not before us at present what provision the wisdom of the Legislature should make, but what the law is. The first thing necessary is to construe the decree. If sense of decree is, that the Court is barred by a rule laid down by the Court itself, such rule is inept if not founded in law. Scotland went to extreme at the Reformation. Parochial clergy, the first object of an ecclesiastical establishment,—parochial clergy in Scotland was left destitute. True patrimony of church never was restored. His Lordship then traced the commissioners commissions; went above the *minimum* upon general intent of Legislature to give the ministers a sufficient maintenance, extended to mensal churches; upon same principle, reference to rules in former acts cannot cut down the authority itself. Permanent commission in 1707 would not have authorised Court to rectify former decrees, if this argument were good. Valuation of tithes fixed at one-fifth of rent at that time, then sale confined to nine and six years purchase on account of burdens. No trace of this rule in law-books. It is an idea of discretion alone. The idea of reversing upon specialties alone, at first sight appeared wise, but upon consideration perhaps it would raise more doubts, and occasion more dispeace and uncertainty. If frivolous suit brought, costs are the remedy. No danger of vexation. Circumstances must be special to admit of demand for augmentation beyond legal rate. If question were before me as a legislator, would think well-being of Scotland deeply concerned in giving higher establishment and more elevated situations to clergy; but in judicial capacity, will not extend. Do not know whether this minister should be augmented or not. See no reason why he should be augmented. Rather suppose that he ought not; but still question is, Whether decree 1716 a legal bar? besides, *non constat*, that communion-elements may not have required more than 50 merks, or that they should not be increased. No reason either in law or expediency, why they should find themselves barred from looking into case; but when they have done so, will judge according to circumstances. *Reverse.*

Note II. " The further hearing of Mitchell's appeal came on this day, when " Mr. Dundas was heard, and Mr. Adam about to reply, when the Chancellor " stopped him; and then made a speech of some length on the specialties of " the case, thinking that the Court had not considered the decrees of 1722 and " locality in 1780 sufficiently; and that it was absolutely necessary to remit " the cause, that they might go into that consideration. He was inclined to " favour the doctrine, that the Court were not precluded, but seemed to think " the appeal not competent. He wished not to go further at present on the

" general question. Lord Kinnaird and Lord Hopetoun both said a few words " approving of the Chancellor's caution. When I get a copy of the judgment, " I shall send it to you." (See Note IV. *infra.*)

Note III. Against this interlocutor, the Earl of Wemyss appealed to the House of Lords; and that most Honourable House was pleased to pronounce the following judgment:

' *Die Veneris*, 20° *Maii* 1808.—After hearing counsel, as well on Friday the ' 6th, Monday the 9th, Wednesday the 11th, Friday the 13th, as on Saturday ' the 14th days of this instant May, upon the petition and appeal of the Right ' Honourable Francis Charteris Earl of Wemyss, complaining of an interlocutor ' of the Lords of Session in Scotland, Commissioners for the Plantation of Kirks ' and Valuation of Teinds, of the 3d February 1808, and praying that the same ' might be reversed, varied, or altered, or that the appellant might have such ' other relief in the premises as to this House, in their Lordships great wisdom, ' should seem meet; as also upon the answer of the Reverend Daniel Macqueen, ' minister of the gospel in the parish of Prestonkirk, and John Connell, Advo- ' cate, Procurator for the Church of Scotland, put in to the said appeal; and ' due consideration and debate had this day, of what was offered on either side ' in this cause; it is ordered and adjudged, by the Lords Spiritual and Tempo- ' ral in Parliament assembled, That the said interlocutor complained of in the ' said appeal be varied, as follows: After the words [find, That] the follow- ' ing words be inserted, [it is within the legal powers of,] and that after the ' words [this Court,] the following words be left out, [having been established ' by an act in the year 1707, as a permanent Court of Commission, in ' place of the former temporary Commissions, for the purpose, *inter* ' *alia*, of modifying and augmenting the stipends of parochial ministers ' out of the teinds, it is the duty of the Court, and within its powers, as ' recognized by the House of Lords in two decided cases in the year 1784 and ' 1789, and by the uniform practice of the Court, acquiesced in by all parties, ' in a great variety of instances, ever since the last mentioned period;] and ' that after the words [to receive,] the word [such] be left out, and that after ' the word [applications,] the following words be inserted, [for modifying and ' augmenting the stipends of parochial ministers out of teinds;] and that after ' the words [former augmentation,] the following words be left out [since the ' institution of the Court; and therefore, that the present case must be allowed ' to proceed as usual,] and that the words [made since the year 1707,] be in- ' serted: And it is hereby ordered and adjudged, That, with these variations, ' the said interlocutor be, and the same is hereby Affirmed: And it is further ' ordered, That the cause be remitted back to the said Lords of Session in ' Scotland, to proceed as is just.'

In consequence of this judgment, the Court, (1st June 1808,) on the petition of Mr. Macqueen for application of it, found, ' That it is within the legal

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'powers of this Court to receive applications for modifying and augmenting 'the stipends of parochial ministers out of teinds, when made in the regular 'form, and to determine upon them according to the state of matters at the 'time, and the merits of each particular case, notwithstanding a former aug-'mentation made since the year 1707.'

Note IV.—The judgment of the House of Lords in the case of Tingwald, was in these words :—" *22d May*, 1789. ORDERED, that the several interlocutors complained of be reversed, and that the cause be remitted back to the Court of Session in Scotland, as Commissioners for Plantation of Kirks and Valuation of Teinds, in order that parties may be further heard upon the effect of the above circumstances, and upon the state of the teinds in those united parishes, without prejudice to any other plea or argument which either of them may adduce, and that the said Lords Commissioners may then give their determination accordingly."