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Pleaded for the Respondents.—By the law of Scotland, all partners in a private trading society, are liable conjunctly and severally for furnishings made to the trade of that society. It is not essential to the constitution of such a society, that a contract in form should be executed between the partners, or a firm, or social name assumed by them; but the society may be established to the above effect, *rebus ipsis et factis* by the consent of the parties, proved by their accounts and transactions. A society may also be established *de certa re aut negotio* concerning a particular voyage, or adventure, as well as for a greater length of time, or more extensive trade. Society is defined, a contract for the communication of profit and loss. Persons may in some cases be called not improperly joint traders, without being *socii* or copartners. But where there is a communication of profit and loss, and of the property of the goods *pro indiviso*, a proper society is created. In the present case, there was clear evidence that it was a society, and not joint adventure, which connected the appellant with Ancrum in the two cargoes in question, and the latter having dealt with the respondent as *præpositus negotiis* of the concern, was liable for the furnishings ordered by him.

After hearing counsel, it was

Ordered and adjudged that the appeals be dismissed this House, and the interlocutors therein complained of be hereby affirmed; and that the appellant do pay to the respondents £80 costs on these two appeals.

For Appellant, *Fl. Newton, Al. Forrester.*
For Respondents, *Tho. Miller, C. Yorke.*

Note.—This case is not reported in Court of Session.

GEORGE WISHART, D.D., and all the other Ministers of the Gospel in Edinburgh, } *Appellants;*

THE MAGISTRATES of Edinburgh, - - *Respondents.*

House of Lords, 17*th February* 1766.

JURISDICTION OF COURT OF TEINDS—STIPEND.—Held the Court of Teinds has no jurisdiction to augment the stipend of ministers out of any other funds than the tithes of the parish, where the minister serves the cure, and, therefore, that they had no jurisdiction to augment the stipends of the ministers within the city of Edin-

burgh, although there were several funds set apart and devoted to the support of the Clergy under the control of the Magistrates.

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THIS was an action raised by the ministers of Edinburgh, before the Court of Session, as Commissioners of Teinds, for augmentation of stipend, in the following circumstances. Between the years 1648 and 1653, the stipends of the ministers of Edinburgh had been augmented to £172. 4s. 5d. but thereafter, the affairs of the corporation becoming embarrassed during the Usurpation, they consented to restrict this sum to £138. 17s. 9½d., under a proviso that their doing so should not prejudice their successors, or their own right to resume their claim to the higher sum. Matters continued in this situation, until, finding themselves no longer able to subsist on so small a stipend, from the great rise in the price of provisions, they raised the present action before the Court of Session, as a Court and Commission of Teinds, against the magistrates of Edinburgh, setting forth, that the expense of living had greatly increased, and that there was a sufficiency of funds devoted to the support of the clergy, from several sources, over which the corporation had control, more than adequate to afford an augmentation to all, and therefore concluding that the said Lords should modify and settle a suitable stipend to the ministers within the city of Edinburgh, and their successors in office, out of the funds allocated for payment thereof. In defence, the respondents did not appear to dispute the expediency and justice of the demand for augmentation; but stated this preliminary defence: That the Commission of Teinds, and Court of Session, as come in place of that court, has only jurisdiction in modifying and augmenting the stipends to ministers *out of the teinds of the parish where they serve the cure;* and actions of this nature, at the instance of ministers of royal burghs, that are stipendary, and where there is no landward parish, are unprecedented and inept. It was answered, that there was a sufficiency of funds for augmentation in the several funds set apart for these purposes; as, 1*st*, From tithes of landward parishes in the neighbourhood; 2*d*, From the ancient revenues of the church, such as lands pertaining to all chaplinaries, alterages, and other prebendaries; 3*d*, From the annuity of six per cent. on rent of houses within the town; 4*th*, From impost tax of eight pennies on French wine imported; 5*th*, From impost of one merk Scots on each ton of goods imported by strangers into Edinburgh;

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6*th*, Rents of seats in churches; 7*th*, Donations made for the purpose of providing stipend to ministers; 8*th*, Impost on ale and beer. From all these sources there was realized a yearly revenue of £4000, whereas the stipend paid to the whole ministers only amounted to £2222. 4s. 3d. per annum. The question on the merits was therefore beyond dispute: But in regard to the preliminary objection to the jurisdiction, the Court had right, as a Court of Teinds, to augment stipend in the circumstances of this case, because it was clear that they were the proper judges to try and award such stipend by the act 1707. To these judges, as a commission, or court of Teinds, the legislature had delegated its own power. That the words of the act were *general*, giving full power to grant *augmentations of ministers' stipends*, and though some of the temporary acts referred to, in the act 1707, did mention teinds or tithes, as the great national fund for the provision of the clergy, yet neither these temporary commissions, nor the act 1707, declare that the ministers were to be provided from teinds *only*. That, accordingly, the Commissioners, as a court of Teinds, had always granted provision to ministers out of other funds besides the tithes, particularly out of feu-duties; out of the ordinary revenues of burghs, as in the case of Town of Haddington in 1650; also in the case of Dysart in 1723; and in the case of the Town of Inverness in 1754. Out of collieries and salt-works, as in the case of Dysart in 1723. These proved, beyond all doubt, that the jurisdiction of this court was not confined to teinds only; but that the court had power to assign stipends to ministers from other funds.

Jan. 19, 1763. The Lords, of this date, "repelled the objections offered "to the competency of the court, and ordained parties to "be ready to debate on the merits." But memorials being thereafter given in on the whole cause, embracing also the objection to the court's jurisdiction, and containing a careful review of the several grants and acts of parliament establishing the funds for the provision of ministers, the Lords,

Dec. 12, 1764. of this date. "found, that they had no jurisdiction to grant "an augmentation to the ministers of Edinburgh out of the "funds now condescended on by them."

It was against this interlocutor that the present appeal was brought before the House of Lords.

Pleaded for the Appellants.—It is not disputed in the case, that the ministers, in consequence of the increased expense of living, are in justice entitled to an augmentation

of stipend. It is also not denied, that the Court has jurisdiction in so far as to entitle them to an augmentation of stipends from the tithes. The only question thus remaining is,—Has the Court, or Commission of Teinds, jurisdiction to grant such augmentation, in the circumstances of this case? The act 1617, which is the basis of all the subsequent acts, empowers the Commissioners to assign competent livings to the clergy, and mentions the *whole fruits belonging to the patrimony of the church* as a fund for their provision. The subsequent acts mention teinds, without specifying any other fund; but this does not prevent the Commissioners, who are a committee of parliament, invested with the most ample powers in these respects, to grant provisions or augmentations out of any other funds, especially out of those set apart for the support of the clergy within burgh. This view is supported by the practice of the Court of Session, in the instances of cases above quoted, for the last century past.

Pleaded for the Respondents.—The Lords of Session, by the act 1707, c. 9, were appointed judges of the augmentation of ministers' stipend, "conform to the rules laid down "and powers granted by the 19 Act Parliament 1633; 23 "and 30 Acts Parliament 1690; and 24 Act Parliament "1693," and as by those acts stipends can only be augmented out of the tithes of parishes where the stipends are sought to be augmented, the Court of Teinds has therefore no power of augmenting the appellants' stipends out of any other fund, nor out of those set forth by the appellants. The jurisdiction conferred is limited to tithes out of land; and in all such new jurisdictions, the power conferred must be so interpreted, as not to go beyond the jurisdiction conferred. It is therefore clear, that none of the grants above set forth, vesting the funds enumerated in the corporation, come under the power of the Court of Session, as a commission or court of Teinds,—they having no control over any fund except the tithes of the parish; but the funds under these several grants, seem to fall under the management of the magistrates, as a corporation, against whom, action may lie at common law, in the ordinary way, as to the proper appropriation of these funds. Nor do the words *fruits*, *rents*, and patrimony, used in the first commission 1617, nor the exception in the act 23d Parliament 1690, of *such feu-farms*, or quit rents, as were then part of the ministers' stipend, or whereof the ministers had been in possession for ten years, warrant the appellants' demand to modify, or augment the ministers' stipend, out of any other fund than the tithes of

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the *parish*; and therefore the present augmentation being sought to augment the stipend of ministers within burgh, the Court of Teinds had no jurisdiction over the funds of such a corporation.

After hearing counsel, it was

Ordered and adjudged that the interlocutor complained of be, and the same is hereby affirmed.

For Appellants, *C. Yorke, Al. Wedderburn.*
For Respondents, *Tho. Miller, Al. Forrester.*

Note.—This case is reported in Morison's Dictionary, p. 7476; and Fac. Coll. p. 244. It is there stated that the objection to the jurisdiction of the Court of Teinds was *repelled*, without observing that, on further discussion, this judgment was altered: and the objection to the jurisdiction *sustained* by the Court; and no notice is taken of the affirmance of this last judgment in the House of Lords. *Vide* Ersk. b. i. tit. 5. § 23, who founds correctly on the latter judgment, and lays down the law in conformity with it.

ALEXANDER BURNET, Charge des Affaires at the Court of Berlin, - - } *Appellant;*

SIR THOMAS BURNET, Bart. - - *Respondent.*

House of Lords, 30*th April* 1766.

SUCCESSION—ADJUDICATIONS—DESTINATION—HEIRS WHATSOEVER—CONFUSIO.—Adjudications were purchased up by the heir succeeding to an estate specially destined to "*heirs male.*" He took the conveyances of these adjudications to himself and his "heirs whatsoever." Held, that when the estate descended to an heir male, different from the heir of line, or heir whatsoever, that the heirs of line were not entitled to succeed as such, to the adjudications; and that these, as collateral and accessory rights, had accrued to the family estate, and were not now a separated estate, but extinguished *confusione* in the person of the heir male.

IN the year 1700 Sir Thomas Burnet settled his estate of Lees by a tailzie, upon Alexander, his eldest son, and the "heirs male of his body, whom failing, to his other heirs "male," reserving a power to himself to alter the tailzie, and to charge the estate at pleasure.

His eldest son being married to Miss Helen Burnet, only