of be *reversed*, so far as it finds that the entail libelled on is effectually revoked by the deed executed by Sir Laurence Dundas upon the 14th Feb. 1779, and that the case be remitted back to the Court of Session in Scotland to carry this judgment into execution.

For Appellants, *Jo. M'Laren, Robert Blair, Alex. Abercromby.*

For Respondent, *Henry Dundas, Ilay Campbell, Alex. Wight.*

The Rev. Mr. William Milligan, Minister of Kirkden, - - - } *Appellant;*

Sir John Wedderburn and Others, Heritors of the Parish of Kirkden, - } *Respondents.*

House of Lords, 8*th July* 1784.

Stipend—Augmentation—*Res Judicata*—Appellate Jurisdiction of the House of Lords.—Held, though a stipend had been augmented since the Union, that there was no law which barred the minister from insisting for a further augmentation. Also, that the House of Lords had an appellate jurisdiction in reviewing the judgments of the Lords of Session, as Commissioners of Teinds in such questions.

The appellant, as the settled minister of Kirkden, brought an action of augmentation, modification and locality of stipend, before the Lords of Session, as Commissioners of Teinds, against the heritors of the parish. The last modification and locality was obtained by a decree of Court on 18th July 1716, by which the stipend was fixed at £47. 4s. $5\frac{4}{12}$d., including communion elements. The summons then proceeded to cite the several acts passed for the provision of competent stipends to the ministers, stating that the above sum was by no means adequate to the weight of the charge, nor could it be considered so, from the great increase in the price of all necessaries of life for the last sixty years. The respondents confined themselves to a preliminary defence, to the effect that the stipend of this parish having been augmented by a decree in the year 1716, they were entitled to found on that decree as a *res judicata* in bar of this action, because of the rule of the Court, confirmed by uniform practice, of not granting any new augmentation, where the stipend had been augmented since the Union.

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The Court of Session, by interlocutors, of these dates, sustained the defence, and held the appellant barred from raising the present action.

Against these interlocutors the present appeal was brought, and on its coming on for hearing, and in consequence of the new exception taken to the competency of the appeal to the House of Lords by the respondents, on the ground, that as the Court of Session, as Commissioners of Teinds, acted by special authority from the Legislature, and as a committee of Parliament, their decision was final, and, therefore, that there was no appeal to the House of Lords, in questions regarding the augmentation of stipend. The case was delayed to be further specially heard on this point.

Pleaded for the Appellant.—In regard to competency of
Mar. 19, 1783. seeking a further augmentation. That the decree in 1716 could not form a *res judicata*, because no person can possess an absolute right of property in tithes, which are, by law, subject to a perpetual burden in favour of the ministers of the parish, who are at all times entitled to have stipends modified to them, suited to the state of the parish, and the weight and importance of the charge, such as the increased expense of living, the value of the tithes, or of the population of the parish, and the Commissioners of Teinds have a power, from time to time, to make such additions to ministers' stipends as they may think necessary. The appellant's present stipend is under the minimum, and there is no rule of Court or uniform practice which bars augmentation in such circumstances, where the last augmentation has taken place since the Union. Because, by the spirit and letter of the above statutes, there is a power in the Court to augment the ministers' stipends, whose stipend is below the minimum established by law. 2d, In regard to the jurisdiction of the House of Lords, in appeals from the Court of Teinds in Scotland, it is only necessary to refer to the jurisdiction hitherto exercised by your Lordships in a great many cases, and also to the Acts of Parliament constituting the Court of Teinds, to refute the objection taken to the competency of the House of Lords to judge in this appeal.

Pleaded for the Respondents.—The appeal is incompetent, because the Court of Session act as Commissioners of the Legislature, in awarding augmentations of stipend, with discretionary powers, which exclude any appeal to a higher Court, where such right of appeal has not been reserved.

In this respect, the Commissioners of Teinds are not a court of law, but a court of discretion, possessing and exercising parliamentary powers, just precisely in the same way as before the Union in 1707, when the Court itself was a Commission of Parliament. And being authorized as a standing Committee of Parliament, to act in the matter of quantum of ministers' stipends, they alone are entitled to exercise the discretion of allowing or refusing an augmentation according to circumstances; and from their judgment in these respects, there is no appeal to the House of Lords. 2d, But even if though the appeal was competent, the decree 1716 must be considered as a *res judicata*, whereby the appellant is barred from any further augmentation, the last augmentation having taken place since the Union, which is a rule long established and recognized in this Court.

After hearing counsel,

Lord Chancellor Thurlow,

"My Lords,—"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 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;

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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 is 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 Scotland 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 increased 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 afterwards granted; these vary in the important phrase, having power to augment all parishes where there is not a sufficient provision; a question, whether confined to those 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 decree 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 the heritors the occupation of their own teinds;

it was then thought proper to fix the teinds at one-fifth of the rent. In 1690 teinds, not in *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 the books is there the smallest trace of this rule; and when the 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; 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 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 authorize an augmentation now. I think his having got one then may be a bar to his receiving one now; but I cannot affirm a judgment 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

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enough then, it is so now. It is expensive in Scotland; I wish it were less so, that it might be more frequently administered. But who shall say at what the communion elements were rated? All the circumstances prove there is no limitation, and consequently they should have looked into it.

"It appears to me great inconvenience must arise in allocating a stipend, where victual is given by the Court, though none paid as tithe. The statute said that it could no way 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 interlocutors complained of, and to remit to the Court to proceed on the merits."

It was ordered and adjudged that the interlocutors complained of be reversed, and that the cause be remitted back to the Court of Session in Scotland to give the necessary directions for carrying this judgment into execution.

For Appellant, *Henry Dundas, William Adam, William Robertson.*

For Respondents, *Ilay Campbell, T. Erskine.*

JOHN COLQUHOUN, - - - *Appellant;*
JOHN CORBET, Esq. - - - *Respondent.*

House of Lords, 27*th July* 1784.

LEASE—ARBITRATION—CONSTRUCTIVE CORRUPTION—OVERSMAN—PAROLE.—Disputes having arisen between a landlord and tenant, regarding a breach, and not implement of the stipulations of the lease on the part of the landlord. Actions were raised to have the tenant's rights ascertained, which were submitted to two arbiters, mutually chosen by deed of submission. There was a clause in the submission, providing, that in case of a difference of opinion, the oversman named was to be called in. A decree arbitral was pronounced, setting forth, that in consequence of a difference of opinion, the oversman was called in, whereupon the arbiters, along with that oversman, pronounced judgment.—A reduction being brought of the decree on the ground of corruption,