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MITCHELL v. OFFICERS OF STATE.

[Mor. 7928.]

REV. MR. MITCHELL, Minister of the United Parishes of Tingwall, Whitness, &c. } *Appellants;*

OFFICERS OF STATE, . . *Respondents.*

House of Lords, 22d May 1789.

AUGMENTATION OF STIPEND—JURISDICTION.—Held, that the Court of Session, granting once an augmentation to a minister of the parish, is not precluded, as Commissioners of Teinds, from afterwards granting a second augmentation,—this being within the jurisdiction and powers of modification conferred on the Court.

The appellant, minister of the populous and extensive parish of Tingwall, &c. in the northern extremity of Scotland, enjoyed only a stipend of 1000 merks, (£55. 11s. 1½d. sterling), together with £5 for communion elements, applied for an augmentation of stipend, in the usual way, to the Court of Teinds in Scotland; and the question of law raised in his application was, Whether a decret pronounced by the present Court of Commission for Plantation of Kirks and Valuation of Teinds, by which the stipend was modified, on a former occasion, to a minister of the established church, precludes that Court from taking cognizance, at any future period, of the situation of the parish, and of again modifying a stipend, suited to the alteration of circumstances which may have taken place since the former decree of modification was pronounced? Or whether, notwithstanding such former decret of modification, the Court may again resume the consideration of the situation of the parish?

It was objected, that the Court of Session had no jurisdiction to modify a second stipend, because, having once exercised the powers of augmentation, conferred and modified a stipend to the minister of the parish, the powers of the Court were completely exhausted, so as to preclude them from again considering the circumstances of the parish,
Feb. 21, 1787. and modifying a new stipend. The Court, of these dates,
July 4, 1787. dismissed the process.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The decret arbitral of King Charles the First, had in view, not only to relieve the landowners from the oppression of the titulars; but likewise to

secure to the clergy such stipends as might enable them to live in a manner becoming the situation in which they were placed. Accordingly, ample powers of augmentation were conferred on the Commissioners for Plantation of Kirks and Valuation of Teinds, and they were not fettered by any limitations with respect to the maximum of stipends, in the same manner as all former commissions had been, and the limitation for which the respondents contend is altogether inconsistent with the spirit and intention of the decrees arbitral pronounced by Charles the First, and the Commission 1633, c. 19. It is, besides, inconsistent with the words of the various Commissions issued from time to time, and the practice of the Court.

Pleaded for the Respondents.—The Commission of 1707 gives no power, after the Court has once modified a competent stipend, to augment and reaugment at pleasure and discretion. Their powers, once exercised, cannot be again resumed; and, to hold the contrary doctrine, would just be to lay a precedent that would lead to inextricable confusion. There must be a limit somewhere, or none at all; and where a decree is adduced fixing a stipend above the minimum, that ought to bar any further application. This, upon the most sound view and construction of the acts and practice of the Court, appears to be the rule applicable to the present case.

After hearing counsel, "and due consideration had of "what was offered on either side, in this cause, and "having considered the terms of the decree of modi-"fication and augmentation, which, as the libel alleges, "was obtained by the minister of the said united "parishes in the year 1722, and that the minister "was, in consequence thereof, allowed to possess the "*ipsa corpora* of the teinds till lately, when the heri-"tors proceeded to obtain a decree of locality; it is "ordered that the several interlocutors complained of "be *reversed*; and that the cause be remitted back "to the Court of Session in Scotland, as Commission-"ers 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 these united parishes, without preju-"dice to any other plea or argument which either of "them may adduce, and that the said Lords Commis-

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"sioners may then give their determination accord-
"ingly."

For Appellant, *William Adam, Wm. Robertson.*
For Respondents, *Ilay Campbell, Geo. Buchan Hepburn.*

NOTE.—Lord President Hope stated, in the case of Preston Kirk, in reference to the above case, "I know something of this case of Tingwall; and the circumstances attending it made some impression on my mind, as it was the first cause I pleaded in the House of Lords. The House of Lords felt no difficulty on the general point. They did not determine the case of Tingwall upon the specialities. These were no doubt noticed by the Lord Chancellor, when he delivered the opinion of the judges; but they were noticed for a very different purpose, and to a different effect. The doubt which the Lord Chancellor mentioned of the *ipsa corpora* of the teinds was, whether the possession of the *ipsa corpora* of the teinds, for more than 40 years, founded on the title of incumbency, was not sufficient to carry a prescriptive right to the whole teinds in all time coming. In deciding the Tingwall case, his Lordship stated most distinctly that it would be productive of the most pernicious consequences not to adhere to the decision in the case of Kirkden; and in consequence he did adhere, and did mean to adhere to the same principles, by reversing the decree."—Vide case of Preston Kirk.

[Mor. 2315.]

MISS FRANCES HAY, a Minor, and Her Curators. . . . } *Appellants;*
ROBERT HAY, Esq., of Drumelzier, *Respondent.*

House of Lords, 25th May 1789.

ENTAIL—SUCCESSION—HEIRS MALE.—Circumstances in which the words "*heirs male*" in an entail, received a strict technical interpretation, though they had been used with the same meaning, so far as appeared from the deed, as that of "*heirs male of the bodies*" of the substitutes, which had been used in other parts of the deed.

By settlement made in the form of an entail by Sir Robert Hay, he disponed his estate to himself and his sister, Mrs. Margaret Hay, in liferent, and "to the *second* lawful son to