Case 24. Robert Lord Blantyre, and George Seaton of Barnes Esq; - - - - *Appellants*;
Mr. John Currie, Minister of Haddington, - *Respondent.*

1st *June* 1714.

Third Court, Minister's Stipend.—A Parish being disjoined the stipend formerly modified upon the whole, is allocated upon the original remaining parish, notwithstanding the use of payment had remained for 50 years, and the same after the disjunction as before.

It was not necessary to call the heritors of the new parish, as parties.

It was no sufficient defence, that the stipend still remaining was above the minimum settled by act of parliament.

A stipend is objected to as above the maximum of 1633, c. 19. but this stipend is allocated and decreed to be paid.

MR. Robert Ker, Minister of Haddington, the respondent's predecessor, in February 1650, obtained a decree of the then Lords Commissioners for plantation of Churches and valuation of Teinds, whereby a stipend of three chalders of wheat, and three chalders of barley Linlithgow measure, 400*l.* Scots, in money, and 100*l.* Scots for communion elements, was modified and settled on Mr. Ker, and his successors, ministers of the said parish. This stipend was not by any subsequent decree allocated or apportioned on the several heritors, or possessors of Teinds within the parish, but they by some voluntary allotment and proportions made and agreed to among themselves, paid the same to Mr. Ker and his successors for several years.

A considerable part of the parish of Haddington was afterwards, in 1692, by decree of the then Lords Commissioners for plantation of Churches and Valuation of Teinds taken away, and made a new parish, by the name of the parish of Gladsmuir. The stipend of the minister of Haddington, being thereby diminished about 20*l.* sterling, this last mentioned decree appointed the same to be made up out of the free Teinds of the parish of Haddington, which were more than sufficient for that purpose. But the then incumbent of the parish of Haddington, during his life, never demanded or received from the heritors more than the proportions of the stipend which had been in use to be paid before the disjunction of the new parish; and the proportions of the stipend paid formerly to the minister of Haddington, out of the lands dismembered from the said parish were paid to the minister of the new parish of Gladsmuir.

The respondent, was admitted minister of the parish of Haddington in 1704; and in 1707 he brought an action before the Lords of Session, as Commissioners for plantation of Churches and valuation of Teinds, against all the heritors and proprietors of lands and Teinds within the parish, for allocating and proportioning the stipend which had been modified in 1650. The heritors and proprietors having made appearance, insisted, that the Earl of Winton and others, within the new parish of Gladsmuir, who

who were defenders in the former action of modification, ought to have been made parties. The respondent made answers, and the Lords of Session, on the 16th of July 1707, "repelled the defence "and found that the whole heritors of the present parish being "called was sufficient."

It was afterwards contended, that no action ought to have been brought for augmenting a stipend, which the heritors for above 50 years had been accustomed to pay. After answers for the respondent, the Lords of Session, "found that the "use of payment by private paction, could not preclude a "locality." No date.

It was further contended, that there still remained a very competent stipend, far exceeding the minimum settled by act of parliament, being 846*l.* 14*s.* 2*d.* Scots, with a manse and glebe, and 80*l*, Scots prebend's fee, and grass of the church-yard, sufficient for a horse and two cows; and that if the stipend was diminished by the separation, the minister's trouble was also lessened. After answers for the respondent, the Lords of Session on the 26th of November 1707, "repelled the defence." And by an interlocutor on the 7th of Janaury 1707-8, "sustained the said de-"creet of modification in 1650, and found that the stipend "modified thereby ought to have been allocated."

They afterwards remitted it to the Lord Ordinary, to hear parties upon their several rights and to prepare a locality, which having been prepared after sundry hearings before the ordinary, and reported, the Lords of Session on the 1st of February 1709, "approved of the locality made by the Lord of Fountainhall in "so far as the same continued the former use of payment as a "rule *pro tanto*, and for making up what the stipend was dimin-"ished by the erection of Gladsmuir, ordained the teinds to which "the heritors or proprietors of the lands had no right to be allo-"cated in the first place, and the teinds of other men's lands in "tack in the next place." And of same date "ordained the "said stipend modified in 1650, to be yearly paid to the respon-"dent, and his successors, ministers of the parish of Haddington," conform to the locality contained in the decree.

By this locality, the whole additional stipend was laid upon the teinds of the appellant, to which Walter Lord Blantyre had right as titular of the parish.

The appeal was brought from "several interlocutory sentences "of the Lords of Council and Session, as Commissioners for "planting of Kirks on the behalf of" the respondent. Entered, 24 April 1713.

Walter Lord Blantyre dying before the cause was heard, the House on the petition of the appellant Robert Lord Blantyre, his brother, and heir, revived the appeal, and ordered him to be made party thereto.

Heads of the Appellants' Argument.

The respondent, even after the dismembering of the parish had still remaining a very competent stipend, far exceeding what is de-

determined to be the *minimum* of ſtipends by act of parliament. For the ſtipend as it then was, after the diſunion, was about
1617. c. 3. 1200 merks, whereas by act of parliament, 1617, c. 3. the loweſt ſtipend was enacted to be 500 merks, or five chalders of victual, and the higheſt 1000 merks or 10 chalders of victual. It is true, that by another act of parliament 1633. c. 19. the loweſt ſtipend to
1633. c. 19. be allowed is eight chalders of victual, or 800 merks, yet the commiſſioners appointed by that act, have a power granted them even to reſtrict theſe 800 merks, where they ſhall ſee juſt. But neither by that nor any other act, have the Commiſſioners any power or authority to augment any ſtipend above the ſaid 1000 merks or ten chalders of victual, that being the utmoſt extent they were empowered to go: and if the proprietors of the ſaid pariſh out of their tender conſideration and regard to the greatneſs and extent thereof, and conſequently of the incumbent's trouble, had condeſcended to pay him a ſtipend exceeding the higheſt allowed by act of parliament, there could be no manner of reaſon to oblige them to continue that, much more to augment their proportions; eſpecially ſince after the diſunion of the pariſh, the miniſter's care and trouble were diminiſhed, and he had ſtill a ſufficient ſtipend and ought to be therewith ſatisfied.

The ſeveral heritors had been in uſe of payment of a certain quantity of ſtipend, for upwards of 50 years, the proportions therefore ought not now to be heightened; and conſequently no augmentation granted to the reſpondent.

If any augumentation were neceſſary, or if the quota appointed by the decreet in 1650 ſhould ſtill continue the rule, then the whole proprietors, both the preſent and thoſe who were diſmembered, ſhould bear a proportion; for it was againſt reaſon to allocate upon any part the ſtipend modified againſt the whole. Since theſe heritors had procured the ſaid new erection for their own conveniency and advantage, it is unreaſonable that thereby the other proprietors ſhould be ſubjected to the payment of a greater proportion than formerly, and that thoſe who procured the ſaid new erection, ſhould continue ſtill to pay only their former proportion.

Walter Lord Blantyre purchaſed the ſaid teinds after the diſunion of the ſaid pariſh, and finding that the miniſter had at that time a ſufficient ſtipend, he paid an adequate price and valuable conſideration for them.

Heads of the Reſpondent's Argument.

If the reſpondent had had a decree of allocation, as he had not, and though a part of ſuch allocated ſtipend had by the decreet of erection been annexed to Gladſmuir, he could not have been deprived of his modified ſtipend. For though the Lords Commiſſioners had a power of augmenting, they had no power of diminiſhing miniſter's ſtipends; and ſo ſenſible were they of this, that by a clauſe in their decreet of 1692, it was provided, that it ſhould not *prejudice the former ſtipend of Haddington.*

That

That ſtipend was about 846*l.* 14*s.* 2d. Scots, with a manſe and glebe, what was ſuggeſted reſpecting the prebend's fee being *untrue.*

The ſtipend being modified, and no allocation or apportioning thereof legally eſtabliſhed, ſuch uſe of payment could not preclude the reſpondent of his right.

The heritors and proprietors of the pariſh of Haddington, as it ſtood at the commencement of this action, being only liable to the payment of the ſaid ſtipend, there was no reaſon that any others ſhould be made defenders.

After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the ſeveral interlocutory ſentences, or decrees therein complained of be affirmed.* Judgment, 1 June 1714.

For Appellants, *Rob. Raymond. John Pratt.*
For Reſpondent, *P. King.*

Hugh Wallace of Ingliſton, - - *Appellant;* Caſe 25.
Sir Alexander Hope of Kerſe, Bart. - *Reſpondent.*

3d, *June* 1713.

Jus Exigendi.—A Lady's jointure being ſecured on certain heritable debts but no inveſtment taken, the huſband's eſtate is forfeited during *the Uſurpation*, but being afterwards reſtored to his heir, reſerving the claims of the widow and others, and ordering thoſe to refund, who had received grants out of the eſtate: the aſſignee of the widow's executrix had no *jus exigendi* of the ſums received by theſe grants.

Forfeiture under Cromwell's Uſurpation.—The Earl of Forth, and Bramford being forfeited, and his eſtate ſeized, a bona fide creditor of the then government, is paid his debt by a grant out of the Earl's eſtate: on the reſtoration, the Court of Seſſion found that the heir of ſuch creditor was obliged to refund, but their judgment was reverſed in the parliament of Scotland.

This laſt head is only mentioned incidentally but not decided in this caſe.

SIR Patrick Ruthven, Knight, afterwards Earl of Forth and Bramford, by deed bearing date the 29th of March 1637, in conſideration of the great love and affection he bore to Dame Clara Barnard his then wife, and for her better proviſion and maintenance in the kingdom of Scotland, where ſhe was a ſtranger, ſettled an annuity of 2000 merks Scots, *per annum*, on his ſaid lady for her life payable out of his real and perſonal eſtate, at the terms of whitſunday and martinmas by equal portions; the firſt payment thereof to commence at ſuch of the ſaid terms as ſhould happen next after his deceaſe; and for the better ſecuring the payment thereof, he did by the ſame deed aſſign to his ſaid lady, ſo much of the intereſt of the ſum of 110,000 merks due to him by the Earl of Erroll, and of the ſum of 50,000 merks due by the Earl of Southeſk, for which he had heritable ſecurity, over their reſpective eſtates, as would ſatisfy the ſaid annuity. This aſſignment to Lady Ruthven never was completed by infeftment in her favour.

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