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EARL OF WEMYSS v. MACQUEEN &c.

[Mor. App. I. Stipend, No. 6.]

THE EARL OF WEMYSS, . . . *Appellant;*

REV. DANIEL MACQUEEN, Minister of the Parish of Prestonkirk, and JOHN CONNELL, Esq., Advocate, Procurator for the Church of Scotland, . . . *Respondents.*

House of Lords, 20th May 1808.

AUGMENTATION OF STIPEND—JURISDICTION AND POWERS OF THE COURT OF TEINDS.—The minister of Prestonkirk had, in 1793, obtained an augmentation of stipend. In 1806 he applied for a second augmentation, which was opposed by the appellant, on the ground that, his stipend having been once augmented, the Court of Teinds had no further power to grant a second augmentation to the minister. Held him entitled to the augmentation, and that the Court had power to grant him such. Affirmed in the House of Lords, with a variation, which see.

The question in this case was, Whether the judges of the Court of Session, as Commissioners for the Plantation of Kirks and Valuation of Teinds, have by law the power of augmenting the livings of the Established clergy, from time to time, at their pleasure, till the whole tithes of Scotland are exhausted or appropriated? It was stated, that a power to augment, at their discretion, was vested in the judges, as a *Committee of Parliament*, while it was, on the other hand, admitted that they may be controlled in the exercise of that discretion by the House of Lords in a *judicial capacity*, which the appellant maintained was a contradiction in terms; because, if they had a *discretion as* a Committee of Parliament, then their decision on augmentations would be final, and not subject to judicial control or review. The appellant farther maintained, that if the doctrine of the respondent were correct, that the Court had this unlimited discretionary power of augmentation, then there would be no end to augmentation.

The circumstances out of which the present case arose were:—That, in 1793, the respondent brought an action of augmentation, and had modified to him, inclusive of old stipend, 21 bolls of wheat, 45 bolls of barley, 65 bolls of oats, and £46 sterling in money, with £5 for communion elements. These were equal to £218 per annum, exclusive

of manse and valuable glebe. But, not satisfied with this, he brought, in 1806, another process of augmentation within the twenty years. And it was then objected to by the appellant, on the ground of *want of power in the Court*. In answer, the respondent contended, that the judgments of the House of Lords, in the cases of Kirkden and Tingwall, and the subsequent practice of the Court, were conclusive against the appellant's plea.

The Lords' Commissioners pronounced this interlocutor: Feb. 3, 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 sti-"pends 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 the 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 instan-"ces, ever since the last mentioned period, to receive such "applications, when made in the regular form, and to de-"termine upon them according to the state of matters at "the time, and the merits of each particular case, not-"withstanding a former augmentation, since the institution "of the Court; and, therefore, that the present case must "be allowed to proceed as usual."

Against this interlocutor the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—That it was impossible for any person reading attentively the statutes on this subject of augmentation, and the Court's powers therein, from the Reformation to the Union, and particularly those which passed in the early part of the reign of Charles the First, and the transactions of that period, without being convinced that the intention was to fix the stipends of the parochial clergy at once and for ever, at least so far as they were to be payable out of the teinds. The question, therefore, Whether the present commissioners have the power of augmenting the stipend of a parish repeatedly at their discretion, so long as there are free teinds, has never been decided in the affirmative by the House of Lords. Nay, it was solemnly decided in the negative by the Court of Session in the case of Tingwall in 1787, and there is not a single decision or dictum since to support the practice, except the seeming application of the judgment of your Lord-

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ships' House in the Tingwall case, upon a supposition, which, if it was entertained, proceeded upon error, as no such power is given by the statute 1707.

*Pleaded for the Respondents.*—The plea set up by the appellant in the present cause, of the want of jurisdiction in the Court of Teinds, has been twice repelled by solemn decisions of the House of Lords; and these decisions have been followed by an exercise of their jurisdiction in upwards of 800 cases, which cannot now be stirred or questioned in any court of law. Yet, were the question new, still the Court of Teinds has full power, and is fully authorized, by the different statutes upon which their powers are founded, to grant augmentations of ministers' stipends out of the tithes of Scotland, from time to time, as the circumstances of each particular case require.

After hearing counsel,

The EARL OF LAUDERDALE read a speech, concluding with a motion that this judgment should be reversed.

The LORD CHANCELLOR ELDON said,

" My Lords,

" Attending to the infinite importance of this cause, not only as affecting the parties immediately concerned in it, but as it must necessarily affect the interests of both clergy and laity in Scotland, I feel concern that I have been able only to abstract, from other professional duties, a portion of time insufficient for methodically arranging my opinion as to those grounds on which I must dissent from the motion of the noble Baron who has just sat down.

" I feel the more concern on this account, because it is impossible not to admit that his Lordship has done justice to the opinion which he entertains, and has delivered his sentiments in a judicial manner.

" The question for your Lordships to decide is, If you shall affirm or reverse, or alter the interlocutor appealed from? The proposition made by the noble Lord goes in substance to reverse the judgment; and he prefaced his proposition by stating certain principles on which he wished you to adopt his motion.

" There are various propositions stated in the interlocutor, to which it will be necessary to attend; it appears to me that it requires alteration. But the alterations which I shall propose do not go to reverse the judgment in substance, but only in so far as it predicates certain facts and grounds of judgment. (Here his Lordship read the interlocutor appealed from).

" I conceive you would not much approve of the terms of an interlocutor, stating itself to be founded on certain former judgments of this House, as to the point of law now in question, if such state-

ments be not warranted by the words of those judgments. So far as the interlocutor also is founded on the uniform practice of the Court since that period, and the acquiescence therein, we can scarcely form an opinion as to such acquiescence; it is of itself no slight matter, but it does not enter into the record.

" As to the cases alluded to in the interlocutor, I cannot think that the cases of Kirkden and Tingwall, in their terms, settled the general point. In the Kirkden case, a noble and learned Lord certainly conveyed a strong opinion on the subject; but this opinion cannot be represented to have been embodied in the judgment of this House.

" If the law, as contained in the acts of Parliament, be quite clear, I know nothing more dangerous than it would be to set up precedent against it. But I know I am speaking in England, where a long and inveterate usage has prevailed, even against an act of Parliament, in the case of common recoveries. Though I never could have consented to this originally, as contrary to law, yet the consequences of overturning what has been done by these common recoveries, is such, that no lawyer would now think of altering this. You could by no means discover the amount of the damage you would do by such alteration.

" On similar grounds, your Lordships will give a very weighty consideration to a train of decisions in another part of the island. If a law might originally have admitted of two constructions, and if one of these constructions has been given to it, and this been followed by long usage, I am sure it is not the practice of those who administer justicè in the *dernier resort* in this country to alter such usage.

" If this case had come here in 1707, soon after the act of Parliament then passed, there were many cogent reasons to be urged why the Lords of Session could not augment a stipend that had been modified under a former commission, much less a stipend that had been once augmented by themselves.

" I shall at present leave out of view a great deal of the argument that was urged at the bar, (though perhaps it was there properly urged), as to the consequences of a decision in one way or other. Every person must see, on the one hand, that if the Lords of Session have power to augment stipends from time to time, the heritors, if they do not suffer an injury, must suffer in the matter of expense, of vexation, and constant litigation, from which the Legislature might have relieved them. But the argument *ab inconvenienti* cannot be listened to at present. Here we do not sit as legislators.

" On the other hand, if the act of 1707 put it out of the power of the Lords of Session either to augment stipends, modified under former commissions, or to re-augment these stipends, it follows that the clergy of the Church of Scotland must remain unprovided with the

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means of holding that rank in society which is useful and necessary for them, but which is much more useful to the laity.

" If the argument *ab inconvenienti* does not satisfy your Lordships, it must not be resorted to on either side.

" In this country, they went another way to work with regard to the London clergy. They had their stipends (as I may term it) settled at certain rates in Charles the Second's time. When an act of Parliament was applied for to augment these in the reign of Geo. II., though it was strongly represented that parties had acquired their properties under an understanding that their tithes having been commuted for a stipend, they were only liable in certain burdens, yet the Parliament interfered to augment the livings of the London clergy.

" This sort of general principle was also acknowleged by the Legislature in Scotland. It is impossible to look at the proceedings in 1617 and 1621, and not to perceive that the Legislature meant then to settle the terms of a legal contract, in which a certain stipend was to be settled for the minister, and the rest of the tithes secured to the possessors of them ever after.

" But afterwards, when a new commission was granted in 1633, the commissioners had power to augment those stipends which amounted only to the minimum of the former acts, and the maximum was taken away.

" I state this, to illustrate what I wish to throw out of view in this case, the degree of inconvenience on either side. In whatever way your Lordships may decide this cause, there must remain a mass of inconvenience, which it may be the interest of all parties to have put on a better footing by the Legislature.

" I shall now state briefly the grounds upon which I conceive it would be contradictory to the usual rules for administering justice, and highly dangerous to reverse this judgment. I will not enter into the consideration of the fifty-three cases set out at the bar, as second augmentations, prior to the Kirkden case. I shall suppose, what I believe is contrary to the fact, that there were no cases, even of first augmentation, where a stipend had been previously modified prior to 1751, still the question is, What has been done since that period?

" In cases where former commissions had fixed the stipends of clergymen, it appears to me that the Lords of Session had no more power to augment these once, than they had to augment them a second time. But I am free to say, that I can never assent to this, though it may have been laid down by great names in the Court of Session, that what they were in the daily habit of doing was a stretch of power.

" There is no doubt that the present Court augmented once, where augmentations had been granted prior to 1707. If this be so, I do not want a case of second augmentation. Augmenting once demonstrated that the Court had the right to augment twice, or oftener.

As a lawyer, I am entitled to say, that every decision which proceeded on the same principle, was to be considered as one of a series of decisions.

"It is quite impossible to read the record in the Kirkden case, without seeing that the granting of one augmentation was the reason founded on why a second augmentation was refused. But the Court did not specify that, the stipend having been once modified, there was no power to augment it again. In Lord Thurlow's judgment upon this case, (I speak of this, not as embodied in the record, but as stated in the opinion said to be given by him), his Lordship directed the Court to inquire into the grounds upon which their refusal to augment was founded, whether as founded in law or discretion merely.

"Then the case of Tingwall came before the Court; and I see, from what is given us of the notes of the Judges' speeches in that case, that not one of the Judges denied that the Court had a power of augmenting. Some of them say nothing of it; but Lord Braxfield, (for whose memory I, with all others, entertain the highest respect), and Lord Eskgrove (then also a high character on the bench), both admit that a difficulty had arisen in their minds, from the Court having reviewed modifications granted by former commissions.

"I never heard, in the course of my professional life, of a series of judgments, on which so much is to be founded with regard to the law of the question at issue. In the Kirkden case, we see, that as strong an opinion as could be delivered in favour of the competency of a second augmentation, was given by the great lawyer who then presided in this House. Yet the lieges in Scotland agreed to try the question again; and all the Judges still agreed in opinion that they had no power to grant a second augmentation. This judgment was reversed; and it appears afterwards that not less than 800 cases of second and farther augmentations have occurred.

"These cases were not upon a point like the meaning of *heirs male*, or *heirs of the body*, which no person hears of, or knows distinctly, but the parties immediately interested. These decisions regarded the whole tithe law of Scotland. From the struggle which had occurred on this point, is it possible to believe that all these passed on amicable acquiescence? Must there not have been a persuasion that, if any one of these cases had been brought here on general grounds, it must have been decided, as I think this case must be decided?

"The noble Baron has said that no great inconvenience would ensue from reversing the judgment now under discussion; that such reversal would only operate upon other judgments pronounced within the last five years, and that the Legislature would interpose to quiet these matters. But, as a judge, I cannot speculate to-day upon what the Legislature may think proper to do on the morrow.

"If I were to stop here, without proceeding to controversy upon the meaning of the acts of Parliament, I conceive I might put down my foot, and say, that if the act 1707 will bear the

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construction put upon it by the clergy, it ought to bear that construction. Lord Stanhope had put this construction upon it. Considering what has been done since that time, and how the law has been considered since 1757, can you reconcile it to yourselves to say, that all these proceedings have been founded in acquiescence merely? To say so much would be inconsistent with the safety of property and the interests of the country.

"But I beg leave to say, that if I had been called on to decide the question immediately after the act 1707 was passed, I am far from being clear that it would have been decided otherwise than it has recently been.

"The act of Parliament 1567, while it gave to the clergy a right to the *thirds* of all the benefices in the kingdom, declared the tithes to be their proper patrimony.

"No grant was made to a titular without the obligation of a maintenance to the minister. And when bishops were again established, the same obligation was imposed upon them. Thus a provision to the parochial clergy was inherent in the right to tithes.

"While the maintenance of the minister was thus an indefinite burden imposed upon the granter of tithes in Scotland, it must have been anomalous indeed, and unlike to any thing known of a similar nature in this country, if there was no court in Scotland that would have enforced this obligation, though this was argued at the bar.

"Then came the act of Parliament of 1617, by which certain commissioners were empowered to assign a perpetual local stipend to the minister. This stipend was no doubt meant to be incapable of increase; and, for this construction, there is both the express and the implied authority of the act. There is something in the act which appears to show the meaning of the word perpetual; for when it speaks of a stipend to be fixed by the commissioners, it calls it a perpetual local stipend; but when it speaks of the minimum of 500 merks, or five chalders of grain, it calls this a local stipend, dropping the word 'perpetual.'

"In the act of 1621, the enactments are the same as in that of 1617; and I think it must be agreed, that, at this period, nothing could have given farther relief to the clergy but an act of the Legislature.

"Next came the act of Parliament 1633, which is to be construed along with the decrees arbitral of Charles I., which had been pronounced before this time. The general view of these was, that these should be a stipend for the ministers, that the heritor was to be empowered to buy his tithes at nine years' purchase; and that, after this, the heritor was to be entitled to the tithes in full property, and the minister confined to his stipend. It was a good deal discussed at the bar, if nine years' purchase was a fair and adequate price or not. I do not enter into this at present; the law writers, however, state this as a low price.

"This bargain was carried into effect by an act of Parliament. If it was the understanding of those who were parties to the decrees árbitral, that a stipend could never be augmented upon after the tithes were purchased, how is the act of Parliament in 1633 to be accounted for? Though the former acts of 1617 and 1621 stated that perpetual local stipends were to be fixed for the ministers, free from all claim of farther augmentation, it is to be observed that the act 1633 does not direct the commissioners to fix a *perpetual*, but a *constant* and local stipend. I do not think there is much in this; but learned men have argued upon it.

"This act of Parliament also gives the minimum; and it contains no clause, that purchasers of tithes should in all future times be free. If such had been meant, the prudence of the Scottish landholders would no doubt have obtained the creation of a similar clause to this effect, as was contained in the acts of 1617 and 1621.

"After this there was a great number of commissions; and I have mistaken the effect of them very much, if power was not granted by them to augment stipends which had been modified under former commissions. This was a Parliamentary declaration, that the titheholder was to be subject to farther augmentations.

"From what passed as to parochial tithes in 1690, it seems to be impossible to contend that, of these, there should be no augmentations and re-augmentations. The act concerning them was a sort of parliamentary commission, that might have granted augmentations at the time, and in future, as circumstances might require.

"Then, at the Union, came the act of 1707. Instead of a temporary commission, as the former ones had been, this constituted the Court of Session as a perpetual Commission of Teinds, with power to grant augmentations of ministers' stipends, &c.

"Lord Thurlow was undoubtedly of opinion that a power of re-augmentation was within the power of the Court. If the question had occurred before his Lordship in this House, soon after the act 1707 was passed, I think, if I had been counsel for the landlords, I might have raised doubts in his Lordship's mind. But now, in 1808, as I view the proceedings that have since taken place, I conceive that, on judicial principles, it is impossible to agree with the motion of the noble Baron. But I find it also impossible to agree with the terms of the interlocutor as it now stands.

"In the Kirkden case, it was stated by the appellants that there was a sort of Rule of Court, upon which the second augmentation had been refused. The opinion given thereon was as I have stated it to be, but the opinion was not embodied in the judgment. The judgment was upon that principle that I think you would act on now, if matters had been as they were then.

"That judgment appears to direct the Court to look to and see what was contained in the act 1707, that the Rule of Court was nothing; but that it was necessary to consider and declare the law, as

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it was contained in the act of Parliament. I do not think, therefore, that the judgment in the Kirkden case went far in the way of precedent.

" The decision of the House in the subsequent Tingwall case, appears to have gone a great deal farther. The interlocutors, in the general point of law, were reversed; Lord Thurlow thought the judgment therein wrong, and sent it back to be considered in the special circumstances, (which I do not well understand), and to see if the clergyman had not right to the *ipsa corpora* of the tithes.

" But even supposing both these judgments had proceeded on the general question, I should have been sorry that the decision, in the present case, had rested upon these. I consider, however, that the series of decisions given, since the act of 1707 was passed, are sufficient to support the principle of the present judgment.

" While I must, therefore, offer my negative to the motion of the noble Baron, I must still move for an alteration of the interlocutor, conceiving that it expressed a good deal more than is necessary to sustain it; and that, if it was affirmed as it stood, a record would be framed which I doubt if there be grounds to support."

Here his Lordship concluded with his motion.

Ordered and adjudged, that the interlocutor complained of in the said appeal be varied as follows:—After the words (find that), the following 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 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); and that after the words (to receive) the word (such) be left out; and after the word (applications) the following words be inserted, (for modifying and augmenting the stipends of parochial ministers out of the 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 inserted. And it is hereby ordered and adjudged, That with these varia-

tions 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 to proceed as is just.

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For the Appellant, *Wm. Adam, Henry Erskine, Ad. Gillies, Geo. Cranstoun, F. Horner.*

For the Respondent, *David Boyle, John Connell.*

NOTE.—This and other cases led to the act 48 Geo. III. c. 138, by which the law on the subject of augmentations is now regulated.

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The EARL OF WEMYSS, . . . *Appellant;*
ALEXANDER CARRE, ESQ., . . . *Respondent.*

## House of Lords, 24th May 1808.

BILL—PAYMENT—ACQUIESCENCE.—Circumstances in which it was held, that a bill granted by a party for £500, and which bore, by relative letter, to be granted in order to be discounted for his accommodation, was not due as a debt against that party, it appearing that he had expended the £500 in serving the appellant's political interests, and those of his family, this being supported by acquiescence, no claim having been made upon the bill for six years after it fell due, and after the death of that party.

The respondent's brother possessing great political influence in the burgh of Jedburgh, &c., had exerted it on several occasions in securing the election of the appellant and his family for the burghs of Haddington, Jedburgh, &c. That influence had been influential in securing the return of Lord Elcho his son in 1780. In consequence of serving the appellant's family in their political interests, he had involved himself in pecuniary embarrassments.

He died in 1798, and, in consequence of these embarrassments, the respondent had to serve heir *cum beneficio inventarii* to his brother in 1799. Soon thereafter the appellant brought the present action against the respondent, concluding for payment of the sum of £500, said to have been advanced by him to the late Mr. Carre fifteen years before, conform to bill dated 31st Jan. 1784, drawn by Mr. Carre on the appellant, accepted by him, and discounted at the banking house of Sir William Forbes and Co. in Edin-