

No 190. the Sheriffs or Justices of the Peace, to mention the controuling power of the Court of Session.

A majority, however, were of opinion, that as all civil power had been taken from the clergy at the Reformation, and as the office and character of a school-master were in no respect ecclesiastical, all questions relating to them fell to be determined by the civil courts. That in the act 1693, the presbytery were not considered as an ecclesiastical court, but merely as a body of men, in whom that power might with propriety be vested, subject to the controul of this Court; in the same manner as in their jurisdiction with regard to manses and glebes, or as in that of the kirk-session on other points.

The COURT, May 21. 1793, altered the interlocutor reclaimed against, and found, that the sentence of the presbytery was not final, but that the power of review lay in this Court, and not in the superior church-judicatories; and therefore advocated the cause, and remitted to the Lord Ordinary to proceed accordingly, and to do further as he should see just.'

And upon advising a reclaiming petition and answers, ' the LORDS adhered.'

Lord Ordinary, *Justice-Clerk.*

For Allan, *Dean of Faculty Erskine, Jo. Millar, jun.*

Alt. *Solicitor-General Blair, M. Ross, W. Robertson.*

Clerk, Sinclair.

D. D.

Fol. Dic. v. 3. p. 347. Fac. Col. No 74. p. 161.

* * * This case was appealed :

THE HOUSE OF LORDS ORDERED and ADJUDGED that the interlocutors of the Court of Session should be reversed. See SYNOPSIS.

S E C T. XI.

Jurisdiction of the Court of Session as a commission of Tythes.

1763. *January 19.*

The MINISTERS of Edinburgh *against* The MAGISTRATES and TOWN-COUNCIL.

No 191.
The teind-
court sustain-
ed its juris-
diction in a

THE ministers of the city of Edinburgh having received no addition to their stipends since the year 1693, brought an action before the Lords of Session, as

commissioners for plantation of kirks and valuation of teinds, against the Magistrates and Town-Council of Edinburgh, concluding for an augmentation of the former use of payment, and the modification of a competent stipend to them and their successors in office.

The defenders objected to the jurisdiction of the Court, and *pleaded*, That, by several statutes appointing commissioners for plantation of churches, in whose place the Lords of Session are now substituted, by the 9th act 1707, these commissioners are only authorised to modify stipends to each minister out of the teinds of the parish where they serve the cure; and that, as judges invested with a particular jurisdiction can take cognizance of nothing without the limits prescribed, the Court could not augment the pursuers stipends out of any other funds than the tithes, and had no authority to inquire into the other various funds belonging to the city, such as the church-rents, annuity, seat-rents, the impost, the duty of a merk upon each peck or tun imported at Leith, and the annualrents of mortified sums. How far all or any of these funds are allocated, or are applicable by the original grants to the payment of the pursuers stipends, was not necessary to be inquired into; and, if the pursuers thought themselves entitled to call the defenders to account for their administration of such funds, they must insist in a proper action before the Court of Session.

Answered for the pursuers; The jurisdiction of the Court in modifying stipends is by no means limited to teinds in general, far less to the teinds of one particular parish. The smaller benefices in the church had sometimes lands or annualrents held of them, which yielded the beneficed persons certain feu-farms or other duties; and the 23d act 1690, which declares, that the superiorities of such lands and annualrents should belong to the Crown, but reserves to the patrons the feu-farms, until they should receive payment of the price thereof, at the rate therein mentioned, except when the said feu-farms are a part of the minister's modified stipend, shews clearly, that, when a minister applied to have a modified stipend, it was usual for the commission to allocate such feu-farms as a part of his stipend, though they had no connection with the teinds, but were quite a separate fund.

In like manner, there are few decreets of modification of stipends to ministers of royal burghs, in which there are not other subjects comprehended besides teinds, as is particularly the case in the decret of modification of the parish of Dysart, 23d January 1723;* in the modification and locality of the second minister of Culross, 24th January 1722;* and in the decret in favour of the two ministers of Inverness in the year 1754.* In all these, and in many other cases, stipends have been modified and localled upon other funds as well as teinds. And there are also cases where they have been taken wholly out of other funds, as in the late decret of erection of the new churches in Paisley, by which that burgh is burdened with the stipend to the minister or ministers

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process of augmentation of stipend, though the fund, out of which the stipend was paid, did not arise from tiends.

* Examine General List of Names.

No 191. to be called to the said churches, and ordained to free the titulars, and teinds, heritors, and whole lands within the parish, from any burden whatever.

Indeed, it seems to be a plain consequence, that, wherever the commissioners have a jurisdiction to erect churches, they must also be entitled to decree a provision to the incumbent; and, as it is undoubted that this court has authority to erect churches in burghs as well as in landward, their power to modify a provision to the minister cannot be disputed. Though the statutes generally speak of providing ministers with stipends out of the teinds, yet this is nowise taxative, or exclusive of other funds which by law may be subjected to the support of the clergy. Nay, the purpose of these statutes could not otherwise be extricated; for, not only teinds, but also other funds, may often happen to be liable to the provision of the same church; the court could not judge in such cases at all, if it were not to take the whole funds at once under its consideration.

Neither will the words of the statutes admit the distinction which the defenders would establish. The first act that devolved this power to the commissioners, though it speaks most frequently of teinds, yet, at other times, it speaks of the whole fruits pertaining to the patrimony of the churches, as subject to the allocation; Parl. 1617, act 3. § 4. Here then is no distinction made, whether the fruits arise from teinds, or from other rents or emoluments of any kind that have been appropriated, either by the common law, or by particular grants, to the patrimony of the church which is to be provided.

Further, there are large quantities of tithes subject to the pursuers claim; the tithes of a number of churches, chaplainries, altarages, and prebendaries, having been granted by royal charters, in the days of Queen Mary and King James VI. for the sustentation of the ministers of the city of Edinburgh. The quota of the stipend, affecting this part of the fund, can be ascertained by this Court only; and the defenders will find no precedent for the modification of one part of a minister's stipend by one court, and of the remainder of it by another.

Replied: It is unnecessary to enter at present into the question, with regard to the tithes of certain parishes said to have been granted to the city for the support of the ministers; as it has not been alleged, that there are any surplus tithes after payment of the stipends in use to be paid. If the pursuers seriously mean to insist for an augmentation out of these tithes, and will depart from the other funds, the defenders are ready to join issue with them in having that matter tried; but, at present, they only object to the jurisdiction of the court, so far as it respects the other funds; and though the pursuers have been at pains to investigate precedents of the court's having modified stipends out of other funds; yet it appears from the record, that, in all these cases, the modification proceeded either upon the express consent of the parties interested, or upon a presumed consent from inveterate use of payment. Nor can any argument be drawn from the court's having power to erect churches in burghs.

The mere building of a church cannot possibly infer an obligation upon a burgh to endow it; and the court never has hitherto, nor ever will grant their authority for erecting a new church, or establishing a second minister, without before hand seeing a proper fund provided for a stipend.

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Observed from the Bench; The present action is brought for an augmentation of stipend, which can be tried only before this court; the objection to the jurisdiction therefore must be repelled. When indeed the merits of the cause come to be determined, perhaps the defence, that there are not tithes sufficient for an augmentation, may be sustained; but certainly the court has power to try the question.

THE LORDS repelled the objections offered to the competency of the court.

Act. Geo. Wallace, David Dalrymple, M^cQueen, Ferguson, Lockhart. Alt. Rae, Garden,
Johnston, Montgomery, Advocates.

A. W.

Fol. Dic. v. 3. p. 350. Fac. Col. No 104. p. 244.

1784. July 8. The MINISTER of KIRKDEN *against* The HERITORS.

THE stipend payable to the ministers of the parish of Kirkden was augmented in the year 1716. The present incumbent, however, dissatisfied with that allowance, brought a process of augmentation, which was dismissed, in respect of the rule of court, that no new augmentation should be granted where one had been obtained since the Union.

No 192.
An appeal to the House of Lords, from a judgment of the Court of Session, as Commissioners of Tithes, is competent.

The action was afterwards carried, by appeal, to the House of Lords; when it was objected by the heritors, that because the Court of Session judged in questions of this sort as a Committee of Parliament, and as vested with special powers from the legislature, their decisions were not subject to review. In support of this objection, they

Pleaded; The subject of the jurisdiction granted to the Commissioners of Tithes before the Union, was not a matter of civil right, nor cognisable by the ordinary courts of law. The Judges were composed of a certain number of persons out of the three Estates in Parliament, and their proceedings were declared to have the strength and authority of an act of the legislature; 1617, c. 3.; 1621, c. 5.; 1633, c. 19.; 1661, c. 61.; 1663, c. 28.; 1672, c. 15.; 1685, c. 28.; 1686, c. 22.; 1690, c. 30.; 1693, c. 23. The same authority must undoubtedly belong to the Court of Session, erected by the statute 1707, c. 9. into a perpetual commission of tithes, and empowered 'to cognosce and determine in all matters referred by the former laws to the courts of commission, conform to the rules laid down, and powers granted by the statute 1633, and other acts already mentioned.'

Answered; That the Commissioners of Teinds, before the Union, were not a Committee of Parliament, is apparent from their having continued to act