1798. *January* 24.

The Reverend THOMAS MITCHELL *against* LORD DOUGLAS and DAME ELIZABETH BAILLIE.

No. 38.
An augmentation of stipend may be given in grain, although the teinds of the parish should be valued in money.

The teinds of the parish of Lamington were valued in 1695, and 1771, at 22 bolls 1 firlot 2 pecks $1\frac{3}{5}$ of a lippie of oats, 3 bolls 3 pecks $\frac{4}{5}$ of a lippie of bear, and £1207. 18*s*. Scots.

The stipend was £.58. 5*s*. Sterling, 1 chalder of oatmeal, and half a chalder of bear.

Mr Mitchell the Minister, in 1793, obtained an augmentation of two chalders and a half of grain, £8. 8*s*. 4*d*. Sterling, and £.5 Sterling for communion-elements.

Lord Douglas and Dame Elizabeth Baillie, the only heritors of the parish, in a reclaiming petition, contended, that as, after deduction of the grain formerly payable to the Minister, there remained only 1 boll 2 firlots 1 peck and $\frac{2}{5}$ of a lippie of teind victual, the Court could not give an augmentation in grain beyond that extent.

As this plea involved an important question, which had never been fully considered, namely, whether an augmentation can be given in grain, where the teinds are valued in money? the Court ordered memorials.

The Minister pleaded: Tithes were understood to pass to the Crown at the Reformation, under burden of supporting the Protestant clergy. Accordingly, by act 1567, C. 10. the third of benefices was appropriated for their maintenance; and every grant of church-lands, or tithes, in favour of the Lords of Erection, contained an obligation upon the grantee, to give competent stipends to the Ministers within its bounds. In like manner, when Bishops were restored by 1606, C. 2. they were subjected to the burden of supporting the parochial clergy out of the teinds; and soon after, they were put on a more independent footing, by the statutes 1617, C. 3. and 1621, C. 5. appointing Commissioners to modify permanent stipends.

At that period, the titular had it in his power to take the tenth of the produce, which bore hard on the proprietor, and was a great discouragement to agriculture.

These grievances were alleviated by the statutes 1579, C. 73. 1606, C. 8. 1612, C. 5. 1617. C. 9. Afterwards Charles I. chiefly with a view to their ultimate removal, executed a revocation, and brought a reduction, of all the grants of church-lands, and teinds, which had been made by his father. This measure produced submissions to the King, by the Lords of Erection, the Bishops, the inferior clergy, and all others concerned in the tithes, empowering him to regulate their interests in them; and it was by his well known decrees arbitral, ratified by various statutes in 1633, that the landholders obtained the privilege of valuing, and, in most cases, of purchasing, their tithes.

The clergy till then had a substantial interest in the tithes, which, from the general tenor of Charles' administration, it cannot be supposed he meant to lessen;

No. 38. on the contrary, his decrees-arbitral proceed expressly on the ground, that it was necessary, " for the better providing of kirks and Ministers' stipends, that each heritor have, and enjoy, his own teinds."

The valuation of tithes, therefore, was a measure intended for the mutual benefit of all parties. And although the King's decree-arbitral bears, " That the rate and quantity of all teinds of the kingdom is, and shall be, the fifth part of the constant rent which each land pays in stock and teind, where the same are valued jointly," it cannot be thence inferred, that it was meant to preclude Ministers from a stipend in grain, in every case where it was suitable that the stipend should be so modified, whether the teinds were valued in grain or in money. For, *first*, At the date of the decree-arbitral, rents were paid almost universally in grain, at least in the low parts of Scotland, and, consequently, the case of a parish, the teinds of which would either be wholly or chiefly valued in money, could not be in the view of the Legislature; *2dly*, To exclude stipends in grain in such cases, would be ruinous to the clergy, as, from the rapid depretiation in the value of money, the whole valued teinds, where grain has been converted into money, might become insufficient to afford a suitable maintenance for them. Indeed, even in the reign of Charles I. it was found necessary, owing to this very cause, to raise the *minimum* of stipends to 800 merks; a sum which greatly exceeded the highest stipend immediately after the Reformation. It is not likely, therefore, with this example before them of the bad effects of giving stipends in money, that the Legislature could have it in view to prevent, in many cases, the possibility of modifying the stipend in grain.

The plea of the clergy is also strongly confirmed by a comparison of the Parliamentary commissions for the plantation of kirks, prior to the King's decree-arbitral, with those subsequent to it. By those in 1617 and 1621, the Commissioners had a discretionary power of giving stipends, either in grain or money. The next commission was in 1633, after the Parliamentary ratification of the decrees-arbitral; and if it had been intended, that a valuation in money should prevent the modification of a stipend in grain, the commission would certainly have contained a limitation in that respect of the powers of the Commissioners. But no such limitation occurs in it, or in any subsequent commission; which proves, that the Court still possess the same discretionary powers which belonged to the former Commissioners, and which they have accordingly exercised in many late cases, by awarding augmentations in victual, where the teinds were valued in money; 21st November, 1744, Parish of Clunie; 21st February, 1763, Dunlop; 26th July, 1762, Fossaway and Tillibole; 21st June, 1780, Old and new Cumnock; 9th February 1791, Glenluce. (None of these cases reported.) See APPENDIX.

It was further argued in the memorial for Mr Mitchell, that even if the general point were determined against the clergy, still a stipend might be given in grain, notwithstanding a valuation in money had taken place, if the lands had been, at the date of the valuation, either in the manurance of the proprietor, or let for a rent, payable either wholly or in part in victual; because, both in terms of the

statute 1633, and the established rule of Court, the valued teind should, in the two first cases, have been wholly, and in the last proportionally, in victual. No. 38.

Answered: On the Reformation, the tithes fell to the Crown, as *bona vacantia;* and although a provision for the Protestant clergy was soon after made out of them, it was no longer pretended that they belonged to the church *jure divino*, Knox, last edit. p. 113. Consequently, the Legislature had full power to alter their nature, and qualify the right which the clergy retained in them. Indeed, after the Parliamentary ratification of the decrees of King Charles I. tithes existed only nominally in this country. Every titular was obliged to relinquish them in favour of the landholder, for a fifth part of the yearly rent of his lands, where the stock and teind were valued jointly; and, in ascertaining this fifth, the Commissioners are fettered by no restriction. Indeed, as money had not at that time fallen very perceptibly in its value, (Thurlow's State Papers, vol. 2. p. 476. vol. 3. p. 43. vol. 4. p. 160. vol. 6. p. 33, 35.), it cannot be imagined, that an apprehension of that event would induce the Legislature to appoint the valued teind-duty to be always fixed in victual. If prior to the valuation, therefore, the rent was in money, the valued teind fell to be in money also; and if it was in grain, the Commissioners might, and often did, convert the grain into money; and the heritor, ever after, was entitled to hold by the decree of valuation, both as to the *quantum* and species of the *surrogatum* to be paid by him; consequently, when his whole valued teind-duty is in money, it is impossible to burden him with grain to the Minister. He has an evident interest to oppose such an allocation; for, even if the proportion of the victual-stipend imposed on him could at present be purchased for a less sum than his money-teind, and, in accounting with the titular, he were also allowed to charge the current price for it, yet a period may arrive, when such a quantity of grain will cost more than the whole sum which was payable by him to the titular.

The possible inconvenience which may rise to the clergy from this doctrine, cannot enter into the consideration of a court of law; and if they should come to be ill provided, the Legislature can have no difficulty in finding other sources for their maintenance. It ought also to be considered, that if the clergy were losers, in one respect, by the introduction of valuations, they were gainers in another, as, when tithes stood on their original footing, they might have been deprived of any provision, except the vicarage, by the proprietor's keeping his grounds in grass.

It is a mistake to suppose, that the commissions for plantation of kirks, subsequent to the King's decree-arbitral, gave the Commissioners the same powers with those before it. Those in 1617, and 1621, gave an express discretionary power to modify stipends, either in money or in victual; but subsequent commissions merely authorised them to modify stipends "out of the teinds:" consequently, if these are fairly valued in money, nothing but money can be given. Besides, even if the prior and posterior commissions had been in the same terms, the statute 1633, C. 17. which altered the nature of the teinds, must be held to have virtually altered the powers of the Commissioners.

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The practice of the Court can, in this case, have little weight. It has not been uniform; The Minister of Strathdon against the Earl of Fife, No. 34. p. 14821. 19th June 1793. Duke of Gordon against the Minister of Drumbleat, (not reported; see APPENDIX); and the general question has never before been fully argued.

In answer to the special case stated by the Minister, of a valuation in money when the rent had been in victual, in which it was contended, that at all events a stipend in grain could be given, it was observed, that although it might be true, that valuations could not in that case be made in money, without the acquiescence of the Minister, yet, where this had been obtained, such valuation was not challengeable by his successor, especially as the statutes 1663, and 1690, C. 30. have declared, that decrees of valuation should not be called in question, on account of lesion, except on evidence of collusion between the titular and heritor, to the extent of one-third of the rent of the lands *.

Several Judges were of opinion, on the grounds stated for the heritors, that where the rents of a parish had been in money at the time of the valuation, the Minister was precluded from an augmentation in grain.

A majority of the Court, however, were for adhering to the interlocutor. When teinds, it was observed, were first allowed to be valued, the Legislature had no intention of preventing the stipends of the clergy from being modified in grain. Nor, in general, would the land holder suffer the smallest injury from their being so. If, indeed his rent was in victual at the time of he valuation of his teinds, and (as has happend in many cases) he had nevertheless, in the process of valuation, got the fifth of his victual-rent, set apart for his teinds, converted into money, at what is called the Court conversion of £.100. Scots *per* chalder, he will, no doubt, deservedly suffer, because he got himself an undue advantage over the titular, first, In getting his teind converted into money at all; which, although necessary in the process of sale, in order to fix the price, can never be either necessary or proper in the valuation; and, 2*dly*, In getting it converted at too low a rate. In accounting with the titular, therefore, he will be entitled to charge no more for the grain, which may have been re-converted in favour of the Minister, than at the rate of the £.100. Scots, at which it had been previously converted in his own favour, in the process of valuation; but if his rent was payable in money when the valuation took place, he will be entitled, in accounting with the titular, to charge the fiar-price of the grain which he pays to the Minister; and if that price should ever come to exceed his whole money-teind, he will be entitled to the alternative of giving it to the Minister, in place of the grain allocated upon him; because, although a landholder may be obliged to pay victual to the Minister, where his teinds are valued in money, yet, as this Court has no power to affect the stock, he can in no case be burdened with a payment which ex-

* The Heritors of Lamington had no occasion to resort to this plea, because their rents were paid in money when their teinds were valued; but, in the case of the Minister of Skene, advised the same day, this argument was maintained by Mr. Skene of Skene, who had obtained a valuation in money at a low conversion, when his rent was payable in grain. As to this last case, see note at the end of this report.

ceeds the value of these teinds, as fixed by a fair decree of valuation. It is frequently necessary, indeed, not merely as a matter of expediency, but of justice, that lands, the teinds of which have been fairly valued in money, should be burdened with part of a victual stipend: For instance, it may often happen, that the teinds of one heritor in a parish are valued in victual, and those of the rest in money: In that case, the Minister certainly ought to have part of his augmentation in victual; and perhaps the whole of it may be so given, for the Court must always have a discretionary power in such cases, But it would be extremely unjust to burden the single heritor with the whole of this augmentation in grain. For, either on the supposition that the heritors of a parish so situated, had purchased their teinds, or that they had not, he would suffer an equal injury. In the one case, he would pay more than his proportion of the stipend; in the other, he would, in consequence of the allocation of his teinds to the Minister, be precluded from ever purchasing them, which would place him in a situation of great disadvantage, compared with the other heritors; while the rule of law is, that the burden must be laid equally on all whose rights are the same. No. 38.

It was further observed, that in the cases of Strathdon and Drumbleat, there had been little or no discussion upon the general point, the Court having, in the exercise of their discretionary powers, thought it more fit, that in these two Highland and remote prrishes, the stipend should be in money.

The Lords (6th July, 1796) adhered to the interlocutor complained of, and refused the desire of the petition for the heritors. But as the Judges were much divided in opinion, it was agreed, that parties should be allowed to bring the case again before the Court.

And accordingly, on advising a second reclaiming petition, with answers, the following special interlocutor was pronounced:

"Find, That victual-stipend may be allocated on heritors, whose teinds are valued in money, the value of the money being in the present, or any similar case, computed at a medium of the fiar prices for the county, which have been struck for the last seven years preceding the interlocutor of augmentation, agreeably to the rule followed in the case of the process of sale; Sir Alexander Ramsay against Mr. Maule of Panmure, on the 14th May, 1794, *voce* Teinds; and with this explanation, that as the stock cannot be enroached upon, it shall be optional to any heritor, instead of delivering and paying the quantity of victual and money stipend thus laid upon him, at any time to give up, and pay in all time thereafter, to the Minister, the whole of his valued teind, according as the same shall have been ascertained by his decree of valuation."

Act. *Robertson, Tait.* Alt. *H. Erskine, Hay, Gillies.*

Fac. Coll. No. 57. p. 128.

*** In the case of Skene against the Minister of Skene, the Court, 22d June, 1791, gave an augmentation in victual, against which Mr. Skene reclaimed, insisting, that as his teinds were valued in money, the augmentation should be solely

No. 38. in money. The Minister made the same answer as in the case of Lamington; and further observed, that the valuation had been recently obtained, and the victual-rent improperly turned into money, at a very low conversion, for which reason he had executed a summons of reduction, in order that the valuation might be set aside, or rectified. The Court (31st January, 1798,) pronounced the same judgment as in the case of Lamington; at the same time ordering memorials in the process of reduction. Mr. Skene then acquiesced in the judgment, and the Minister being satisfied with the augmentation which had been given him, proceeded no further in the reduction.

In the case of the Earl of Mansfield, &c. against the Minister of Cummertrees, the Court (31st January, 1798,) pronounced the same judgment as in the case of Lamington. And afterwards, of consent of parties, this interlocutor was recalled, and the Minister found entitled to the whole valued teind; 20th November 1799.

1798. *December 5.*

SIR WILLIAM MAXWELL *against* The EARL of HOPETOUN.

No. 39.
In an united parish, where the teinds of the parishes of which it is composed belong to different titulars, an augmentation of stipend must be allocated on them, in proportion to the proven rental of each parish.

The parishes of Kirkpatrick-Fleming and Kirkconnel, were united about the end of the last century. The Earl of Hopetoun is patron and titular of the former, and Sir William Maxwell of the latter. They present a Minister to the united parish alternately.

In the parish of Kirkpatrick-Fleming, the teinds are chiefly in the hands of the titular. The whole parish of Kirkconnel belongs in property to Sir William Maxwell, who, besides being titular *qua* patron, has an heritable right to his teinds.

The Minister of the united parish having obtained an augmentation of his stipend, the Earl of Hopetoun gave in a scheme of locality, by which the augmented stipend was divided between the two parishes, in proportion to the old stipend paid by each.

Sir William Maxwell objected to the same, and

Pleaded: The union of the parishes must necessarily have the same effect as if the two had been originally one parish. Consequently, the whole free teinds in the united parish must be exhausted, before any part of the augmentation can be laid on teinds which have been heritably disponed. The parishes are united *quoad omnia*. If it had been meant that the civil rights of parties should not be affected, the union would have been *quoad sacra* only.

Answered: In so far as relates to the cure and the rights of the Minister, the parishes, in consequence of the union, are no doubt to be held as one. But all the beneficial purposes of uniting two parishes are obtained without depriving the respective titulars of their civil rights; accordingly, it has been found that they are not affected by the union; 13th July, 1774, Fotheringham against Bower, No. 27. p. 14815.