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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The ſaid Earl of Forth, and Bramford in 1645, was declared to be forfeited by the then government, for his adherence to the royal cauſe, and his eſtates were ſeized into their hands, ſeveral gifts were made by them out of the ſame to different perſons, and in particular one of 23,036 merks, to Sir Alexander Hope of Kerſe, the reſpondent's grandfather, which he received out of the ſaid debt due by the Earl of Erroll.

The Earl of Forth, and Bramford died under the ſaid forfeiture in 1651, leaving the Counteſs his widow, and one daughter the Lady Jane Ruthven, afterwards married to the Lord Forreſter, ſurviving him. In 1661 an act of parliament was paſſed, reſcinding and annulling the ſaid forfeiture, *to the end* the heirs and executors of the ſaid Earl, might enjoy all ſuch eſtate as belonged to him, as if no forfeiture had been. This act was oppoſed in the extracting and execution thereof, by Sir Alexander Hope and others, who had intrometted with the eſtate of the ſaid Earl, and ſuch extracting and execution were ſuſpended by ſeveral acts of parliament for ſeveral ſeſſions following (*a*), but on the 20th of Auguſt 1670, another act of parliament was paſſed, whereby the ſaid act reſciſſory was ordained to be extracted; which was accordingly done.

An agreement was ſoon after entered into between the Counteſs of Forth and Bramford, and the Lord Forreſter and his Lady, for an equal diviſion of the ſaid Earl's eſtate between them. But a repreſentation being made to parliament in 1672 by Lord and Lady Forreſter and Edward Ruthven their ſon, ſtating that they had been ſurpriſed into the ſaid agreement, another act was paſſed, whereby his Majeſty and eſtates of parliament declared their intention to have been, that for ſupporting the honour of the ſaid Earl's family, he the ſaid Edward Ruthven, the ſon of the Lord and Lady Forreſter, ſhould be entitled to the whole eſtate of the ſaid late Earl; and therefore the agreement was thereby reſcinded and made void, decreeing the ſaid Earl's eſtate to belong entirely to the ſaid Edward Ruthven, reſerving a liferent of the half thereof to Lord and Lady Forreſter; and ſaving to the ſaid Counteſs any right of terce due to her as relict, or any proviſion in her favour by contract of marriage with her ſaid huſband, and any action competent to her for ſuch ſums as ſhe had expended profitably for behoof of the ſaid Lord Forreſter or his Lady.

An action was afterwards brought before the Court of Seſſion againſt Sir Alexander Hope the reſpondent's father, for the ſaid 23,036 merks, received as before mentioned, with intereſt for the ſame (*b*). In this action a decree was made on the 15th of November 1672, decerning Sir Alexander Hope, the reſpondent's father, to make payment of the ſaid ſum of 23,036 merks and 14,000*l.* Scots of intereſt for the ſame, to that time, with intereſt

(*a*) Theſe expreſſions ſhew that acts of parliament of that nature were conſidered in Scotland, at that period, only in the nature of decrees.

(*b*) Stair's Deciſions, 9th January 1672. Sir Geo. Mackenzie's Works, vol. i. *Pleadings*, p. 52. No. 2, folio edit.

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to grow due in time coming to the ſaid Edward Ruthven, reſerving the liferent of the half thereof to the Lord and Lady Forreſter, and alſo reſerving to the Counteſs what ſhe could claim by her marriage contract in terms of the ſaid act of parliament; and likewiſe decerning that the ſaid Counteſs, or Lord and Lady Forreſter ſhould not bring any action againſt the reſpondent's father, for what he ſhould pay to the ſaid Edward Ruthven. And a ſubſequent decree was given againſt the reſpondent himſelf to the ſame effect in 1677.

In 1690 the reſpondent brought his appeal before the parliament of Scotland (according to the method then practiſed,) againſt the ſaid decrees of 1672 and 1677, upon the ground that his father had been a bona fide creditor to the uſurping government and that he had received the ſaid ſum as payment of a debt, and not as a gratuity and that though the act of parliament did appoint reſtitution to be made by all ſuch as had received any of the ſaid ſums of money, though even by warrant from the government, yet that was to be underſtood of ſuch only who had received the ſame gratuitouſly, and not of ſuch as were creditors who were not concerned out of what fund the government paid them; and in this caſe the money was paid to the curators of the reſpondent's father when a minor. This matter having been ſeveral times under the conſideration of the ſaid parliament, they on the 12th of July 1695, remitted the ſame to the Court of Seſſion to review the ſaid decrees, and determine finally therein. The cauſe was heard ſeveral times before the Lords of Seſſion, and on the 18th of February 1697 (*a*), the Court ſuſtained the reaſons of reduction againſt the decrees of Seſſion obtained in 1672 and 1677, and reduced the ſame particularly upon this ground, that in the ſaid decrees this defence was repelled, that *qui ſuum recipit conditione non tenetur*, and that the reſpondent's father being creditor to the goverment *bona fide* for the time for onerous cauſes, what he had received was for payment of his own debt by warrant and order from the government then having authority, ſo that in effect it was the government who was receiver and not the reſpondent, who was not bound to take notice out of what funds he got his payment. And afterwards the Court, on the 16th of February 1698, adhered to their former interlocutor, and aſſoilzied the reſpondent from any further payment of the ſums craved by him to be reduced, than what was already paid, and reduced the foreſaid decrees as to the ſurplus, without prejudice to the reſpondent to inſiſt for repetition of what he had paid.

The Counteſs of Forth and Bramford executed a teſtament on the 21ſt of Auguſt 1676, in which ſhe appointed Janet Urrie her executrix, and died in Auguſt 1679. Janet Urrie having confirmed the ſaid teſtament, did, by a deed on the 3d of May 1680, for the cauſes therein ſpecified, aſſign to the appellant all her right and title to the arrears of the Counteſs's annuity, and in and to

(*a*) *Vide* Fountainhall of that date.

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the bond of proviſion, the decree of 1672, and all other writs and evidents relative to the ſame.

In November 1713 the appellant commenced his action againſt the reſpondent, before the Court of Seſſion, for payment of the ſaid ſum of 23,036 merks, and 14,000*l.* Scots as the intereſt thereof to the 15th of November 1672, with all intereſt that had grown due ſince that time, or ſo much thereof as might be ſufficient to ſatisfy and pay the appellant what was due to him in reſpect of the ſaid annuity, amounting in the whole to the ſum of 64,000 merks and upwards. To this action the reſpondent appeared and made defences; and the Court, by interlocutor on the 16th of February 1714, "Found that by the act of parliament "and decree of the Lords in 1672, Edward Ruthven had the "*jus exigendi* of the ſums due by the reſpondent."

Entered, 12 April 1714.

The appeal was brought from "an interlocutor or decree of "the Lords of Council and Seſſion of the 16th of February "1714."

Heads of the Appellant's Argument.

The firſt action againſt the reſpondent's father was brought by the Counteſs; and in that action Edward Ruthven, appeared by his curator for his intereſt.

Both in the act of parliament, and the decree ſubſequent thereto, the Counteſs's right of terce or by contract of marriage was ſufficiently reſerved to her; ſo that her bond of proviſion, which came in place of the marriage contract, was thereby rather ſtrengthened than weakened. Her legal proviſion, therefore, was ſupported by the ſaving clauſe, which could bear no other interpretation than the reſerving and eſtabliſhing thoſe rights in their original force, and was wholly uſeleſs in any other ſenſe; for the Counteſs, without ſuch reſervation, might have ſued the ſaid Edward Ruthven, and all others who had intromitted with the ſaid Earl's eſtate. The ſaid decree, too, was only relative to and to be explained by the ſaid act in 1672; by which, though the ſaid Edward Ruthven was preferred to the ſums, to which the Counteſs before that act had right by her contract, and to the fee of the whole ſums, and the right of exacting payment thereof eſtabliſhed in his perſon both by the act and decree; yet that right was expreſsly burdened with the reſervation in the Counteſs's favour. And more eſpecially as to the intereſt of the ſums in queſtion, received by the reſpondent's predeceſſor, there can be no doubt of her preference, for the ſame had been particularly aſſigned to her by her ſaid deed of proviſion, and were reſerved to her by the ſaid act and decree. The preference in the decree being only in reſpect of the principal ſum, ought not to prejudice her as to the intereſt thereof.

Heads of the Reſpondent's Argument.

The Counteſs did not produce any marriage contract, or claim her terce againſt Lord and Lady Forreſter, Mr. Ruthven their ſon, or the reſpondent, though ſhe lived till 1680. Neither did

her executrix, or any claiming under her, bring any action till November 1713, being more than 50 years after the forfeiture was reverſed, though by the laws of Scotland the lapſe of 40 years eſtabliſhes a limitation of preſcription. On the contrary, the ſaid Edward Ruthven brought his action againſt the reſpondent's father in 1672; and, in obedience to the decree pronounced in that action, the reſpondent's father and he himſelf made payment to Edward Ruthven at ſeveral times of about 1300*l.* ſterling.

The act of parliament and decree of the Court of Seſſion in 1672 do expreſsly ordain the right of all ſums of money and eſtate belonging to the Earl of Bramford, or that might be recovered by virtue of the act of reſtitution, to be paid to the ſaid Edward Ruthven, as the party having the beſt right thereto, without diſtinction of principal or intereſt. In the decree of 1672 the reſpondent's father is decreed to pay, not only the principal ſum of 23,036 merks, but likewiſe the intereſt, then amounting to 14000*l.* Scots, and the intereſt that ſhould afterwards grow due. And by the decree in 1677 the payments made by the reſpondent and his father to the ſaid Edward Ruthven are expreſsly imputed to the payment of the intereſt, and not of the principal ſum, which could never have been done, if they had intended by the reſervation in the Counteſs's favour to entitle her to ſue for and receive the intereſt equivalent to her annuity. But the decree in 1677, notwithſtanding the reſervation in favour of the Lord and Lady Forreſter of the liferent of half of the ſums, directed the reſpondent's father to pay the principal and intereſt entirely to the ſaid Edward Ruthven. The reſervation in their favour could afford them action againſt Edward Ruthven; and by the ſame reaſon the reſervation in favour of the Counteſs could not entitle her to an action againſt the reſpondent for the intereſt; but he being obliged to pay the ſame to Edward Ruthven, the Counteſs had an action againſt him; and this the more eſpecially, ſince the Counteſs's right was but a perſonal obligation not completed by infeftment.

If the ſaid reſervation had not been made, it was a queſtion if Edward Ruthven, in whom the eſtate was veſted by an act of parliament, and in effect gifted to him, would have been obliged in the performance of the Earl of Forth and Branford's deeds.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutor or decree therein complained of be affirmed.* Judgment, 3 June 1714.

For Appellant, *Rob. Raymond, P. King.*
For Reſpondent, *J. Jekyll. John Pratt.*