by the pursuer does not meet the case; because the question there was of the titular's right to the teinds, which does not prescribe in less than 40 years as to the duties in time coming, but only for bygones, which prescribe against titulars as well as ministers or tacksman. THE LORDS repelled the defence, and found that the act of Parliament did only extend to ministers' stipends or teinds due to the inferior clergy, but could not be extended to teind-duties due to bishops or other titulars. No 255.

Sir P. Home, MS. v. 1. No 442.

1753. *July* 3. WILLIAM GLOUG *against* JOHN MACINTOSH.

No 256.
Vacant stipends fall under the quinquennial prescription.

MACINTOSH being pursued by Gloug for payment of certain vacant stipends, *objected* prescription by act 9th Sess. 1. Parl. 2. Cha. II.

Answered for the pursuer; The act is a correcory law; it mentions 'ministers stipends' only, and may not be extended to 'vacant stipends.' The stipends of ministers are an alimentary provision, and, by reason of their special privileges, may be speedily collected; they are therefore subjected to a short prescription. Vacant stipends resemble them in name only; they are not of an alimentary nature, have not the same privileges, nor are comprehended under the words of the stasute; to them therefore the quinquennial prescription does not extend.

Pleaded for the defender; The expression 'vacant stipends' is indeed improper; but our statutes are not framed with critical accuracy; and, since in act 52d Sess. 1. Parl. 1. Cha. II. 'vacant stipends' are termed 'the stipends of vacant kirks,' they may well be comprehended under the denomination of 'the stipends of ministers.' The quinquennial prescription was introduced for the benefit of the heritors liable in payment of stipends; vacant stipends, as well as ministers' stipends, fall under the reason of the law; and the former ought to be subjected to the prescription as well as the latter.

"THE LORDS sustained the defence of prescription."

Reporter, *Lord Minto.* Act. *J. Craigie.* Alt. *Macintosh.*

D. *Fol. Dic. v. 4. p. 104. Fac. Col. No 77. p. 115.*

1799. *February* 20.

Lady CHRISTIAN GRAHAM and her COMMISSIONER and FACTOR *against* CATHARINE PATE and Others.

No 257.
The right of a patron, who

THE Marquis of Annandale, patron and titular of the parish of Moffat, having become insane, the Earl of Hopetoun was in 1758 appointed his tutor-in-law.

No 257.
has paid the ann and expended vacant stipends on pious uses, to recover their proportions from heritors, is not lost by the quinquennial prescription.

A locality of the parish, which had been in dependence from 1730, was soon after brought to a conclusion.

In 1761 the minister of the parish died, and the Earl of Hopetoun paid the ann to his representatives, and afterwards expended the vacant stipend in repairing the church *.

In 1762 he used an inhibition of teinds against Pate of Harthope, one of the heritors.

From that period Mr Pate, and his children who afterwards succeeded to him, paid to the minister their proportion of stipend fixed by the locality, but made no payments to the titular; and in 1793 Mr Pate's Representatives sold the lands.

In 1784 the teinds were valued in terms of a lease of the lands, current from 1762.

The Marquis of Annandale died in 1792.

In 1796 his executrix, Lady Christian Graham, and her commissioner and factor, brought an action against Pate's Representatives, for their proportion of the ann in 1761, vacant stipend in 1792, and arrears due to the titular from 1760 to 1793. By an amendment of the libel, the claim for arrears was afterwards carried back to 1730.

The defenders, *inter alia*, maintained,

1*mo*, That the claim for the ann and vacant stipend was cut off by the quinquennial prescription, introduced by 1669, c. 9.; 3d July 1753, Gloug against Macintosh, *supra*: And, 2*do*, That in terms of the opinion of the Court, in the case 25th February 1795, Scott against the Heritors of Ancrum, *voce* Teinds, the claim for the arrears to the titular, prior to the present action, could not be supported, as it was impossible for the pursuer to establish the precise amount of teindable subjects each year, of which a lease of the lands afforded no evidence.

Answered; 1*mo*, The lunacy of the Marquis of Annandale prevented the currency of the prescription against his claim for recovery of the ann and vacant stipend; Bank. b. 1. tit. 7. § 106.; Ersk. b. 1. tit. 7. § 52.; l. 1. § 12. 13.; D. De oblig. et act.; l. 1. § 4.; l. 32. § 2. D. De acq. possess.; l. 5. D. De Reg. Jur.

2*do*, When a landholder has neither an heritable right to his teinds, nor a lease of them, he ought, strictly speaking, to separate them from the stock, and intromit only with the latter, 1617, c. 9.; and when he takes possession of both, he may in some degree be considered *in mala fide*, and must therefore submit to the titular afterwards taking the best means in his power of ascertaining their amount; Ersk. b. 2. t. 10. § 35. This holds more particularly after an inhibition has been used against him; Bank. b. 2. tit. 8. § 179.; Ersk. b. 2. t. 10. § 45.

* Parties were not agreed as to the facts here, but the Court understood them to be as above stated.

Teinds are rated in valuations at one-fifth of the rent. The same rule is adopted in judicial sales, and other cases where the amount is not precisely ascertained, and it may fairly be so in the present case; Bank. b. 2. t. 8. § 150. 179. 181.; Kilkerran, 22d June 1738, Sinclair against Groat, *voce* TEINDS; 8th July 1748, Smith against Oliphant, IBIDEM. At all events, the valuation in 1784 must regulate the rights of parties since its date. No 257.

The Lord Ordinary had repelled the plea of the quinquennial prescription as to the ann and vacant stipend paid within the five years; but sustained the defence against payment of the other arrears prior to the inhibition; and found, "That the decree of valuation in the 1784 must be the rule for stating the worth of the teinds."

Upon advising a petition for the defenders, with answers, the Court thought the plea of prescription clearly groundless. This opinion, however, was not founded on the lunacy of the Marquis, but on his tutor being to be considered as *negotiorum gestor* for the heritors, when he paid the ann and vacant stipend. On the other point, it was observed, that the effect of the inhibition in the present case had been lost *mora;* that no arrears could be demanded prior to 1784, from the impossibility of fixing their amount, but that the valuation must be the rule from its date.

THE LORDS, "in respect the pursuers did not follow out their inhibition of teinds executed in 1762, and that they did not now offer to prove the annual value of the teinds previous to the decreet of valuation in 1784, assoilzied the defenders from the claim made by the pursuers for the teinds intromitted with by the defenders and their predecessors previous to the said decreet, and decerned and adhered to the interlocutor of the Lord Ordinary reclaimed against, *quoad ultra*; and remitted to the Ordinary on the Bills, in place of Lord Swinton, to proceed and determine in the cause as to his Lordship should seem just."

Lord Ordinary, *Swinton.* Act. *Williamson.* Alt. *W. Baird.* Clerk, *Pringle.*

D. D. *Fac. Col. No* 113. *p.* 257.

SECT. IV.

Bargains about Moveables.

1683. *January* —. WHITE *against* SPENCE.

FOUND that a bargain of victual not constitued *scripto* prescribes in five years, *quoad* the manner of probation by witnesses; and that it is not relevant to prove the delivery of the victual *juramento*, unless it be likewise referred to oath, that the price is resting owing. No 258.

Fol. Dic. v. 2. *p.* 118. *Harcarse,* (PRESCRIPTION.) *No* 764. *p.* 216.