

No. 41.
the selling
prices of the
victual due as
bygone sti-
pend.

not yet (1801) settled; and at last he extracted the decree of modification, and charged for the bygone augmented stipend, commencing with the half of crop and year 1795. The heritors proposed paying the victual according to the fiars of the respective years for which it was due; but Wright claimed the selling prices at Candlemas, because, in the county of Ayr, the fiars do not ascertain the price of the best and the price of the worst bear; nor do they ascertain the price at Candlemas, when victual stipend is payable; but they fix an average of the prices of best and worst from November to March. During some of the years in question, the market price in the parish of Maybole was double of the fiars of the county. In support of this claim, were quoted Barclay against Simpson, No. 1. p. 4413. *voce* FIARS OF THE YEAR; Henderson against Henderson, No. 4. p. 4415. *IBID-EM*; Mitchell against Reid, 10th July, 1800, (not reported; see APPENDIX.) The Minister is entitled to the *ipsa corpora*; and if these are not demanded, the heritors must pay the selling market-price; the price they have themselves actually obtained for the victual.

The Lord Ordinary, (11th July, 1801,) rejected this claim, and found him entitled only to the fiar prices of the bygone victual-stipend; but on advising a petition and answers,

The Court, (8th December) altered this interlocutor,

Although the heritor pleaded, That he could not be obliged to keep the grain itself from the market for a course of years, nor could the Minister be obliged to accept of the market price, if it happened to be lower than the fiar price. While this last is the fixed rule by the provision of the law, as the act of sederunt, 21st December, 1723, expresses it, "to liquidate the price of the victual in divers processes that come before the Court of Session and the subordinate judicatories," it would be difficult to ascertain the real price from the fact, amid the fluctuations of the market, and depending upon the varying skill and speculations of buyer and seller. In so much is this held to be the rule, that objections to the accuracy of the fiars are never listened to; Treasurer of Aberdeen against Feuers of Elsieck, No. 5. p. 4415. *voce* FIARS OF THE YEAR, as it would produce great uncertainty, and much delay and expense in the administration of justice.

Lord Ordinary, *Meadowbank*.

Act. *A. Campbell, junior*.

Agent, *P. Robertson*.

Alt. *Fergusson*.

Agent, *A. Blane, W. S.*

Clerk, *Home*.

F.

Fac. Coll. No. 10. p. 21.

1802. *March 3.*

JOHNSTON *against* The HERITORS of ST. CUTHBERT'S.

No. 42.
The Minis-
ter's right to
a suitable sti-
pend, is pa-
ramount to

About the beginning of the seventeenth century, the parish of North Leith was disjoined by act of Parliament from the parish of Holyroodhouse, and a church was erected for the accommodation of the parishioners. The inhabitants of Newhaven finding this more convenient than their parish-church of St. Cuthbert's, were ac-

customed to resort to North Leith church ; and, in the year 1630, the Commissioners of Teinds united and annexed the lands of Hillhousefield and Newhaven to the parish of North Leith ; but the teinds of these lands which had been paid to the Ministers of St. Cuthbert's, continued to be drawn by them, and remained a part of their stipend.

Matters continued in this situation until the year 1797, when Dr. David Johnston, Minister of North Leith, raised a process of augmentation. In this process, he called the heritors of St. Cuthbert's, and contended, that as there were not sufficient teinds in his parish to provide a suitable stipend, independent of the teinds of Newhaven and Hillhousefield, he was entitled to a modification out of these teinds, though they were in use to be paid to the clergymen of the parish of St. Cuthbert's.

The heritors of St. Cuthbert's resisted this claim, and contended, that the annexation of the lands of Newhaven was only *quoad sacra*, the patrimonial rights of the two parishes remaining in their former situation.

But the Court found, that the lands were annexed *quoad omnia*. Upon this, the heritors of St. Cuthbert's

Pleaded : The continued use of payment to the Minister of their parish, proceeded upon regular decrees of Court, and is therefore a sufficient title to acquire by the positive prescription, and the Minister of North Leith has lost his right by the negative prescription ; Minister of Kingsbarns against the Heritors, November 27, 1798, APPENDIX TO GLEBE ; Minister and Heritors of Eyemouth against the Officers of State, and Heritors of Swinton, February 4, 1756, *voce TEINDS*. And farther, in point of fact, they pleaded, That there were teinds enough in the parish of North Leith to be allocated to the Minister's stipend, independent of the teinds in question. The Minister

Answered : Prescription does not apply to cases of this sort ; for so long as a Minister has a competent stipend modified to him out of other teinds, he is *non valens agere*, and in this case he had neither title nor interest to oppose the payment to the Ministers of St. Cuthbert's. The plea of prescription cannot affect the claim of the Minister of a parish to a suitable stipend ; for whoever may possess the teinds, must hold them under this inherent burden. It makes no difference whether they happen to be drawn by the Minister of another parish, or by a charitable institution, since the right of the Minister is paramount to all other claims. And, in point of fact, he contended, that, exclusive of these, there was not a sufficiency of teind for a suitable stipend. The heritors

Replied : The Minister of North Leith cannot be considered as *non valens agere*, so as to prevent the operation of prescription ; for every Minister of a parish has a constant interest to prevent the teinds from being diverted to other purposes, so as to keep the fund of augmentation as broad as possible.

This argument, the Minister contended, proceeded altogether upon a *petitio principii*, That his right to a suitable stipend was lost by the teinds being for a length of time in possession of others.

No. 42.
all other
claims upon
the teinds of
his parish.

No. 42. The Court, (27th May, 1801,) repelled the defences offered on the part of the heritors, and found, " That in allocating the pursuer's stipend as modified, after continuing the old stipend drawn by him, conform to use and wont, and after exhausting any other free teind in his parish, the pursuer is entitled to all, or as much of the victual presently paid out of the teinds of Newhaven to the Minister of St. Cuthbert's, as may be necessary for completing his said modified stipend." And upon advising a reclaiming petition, with answers, they adhered to this interlocutor.

It is to be observed, that the Ministers of St. Cuthbert's were nowise concerned in the decision of this cause, as it was admitted on all hands, that there was abundance of teind unappropriated in their parish, independent of these lands of Newhaven; and as it was of no sort of consequence to them from what teinds in their parish their stipend was paid, they made no compearance.

Lord Ordinary, *Glenlee*.

For Minister, *Robertson, Ar. Campbell, junior*.

Agent, *Geo. Andrew*.

For Heritors, *Craigie, Douglas*.

Agent, *Ja. Steel*.

Fac. Coll. No. 31. p. 62.

1805. *January 31.* *ANDERSON against URQUHART.*

No. 43.
A Minister is entitled to interest upon his augmented stipend from the date of a charge upon his decree of modification, although the locality had not then been adjusted.

In the year 1796, the Reverend John Anderson, Minister of the parishes of Stronsay and Eday, obtained an augmentation of stipend, commencing in 1791. Having extracted the decree of modification, he charged Mrs. Elizabeth Trail Urquhart of Elsness, one of the heritors, for the stipend due for seven years and a half preceding the charge, (3d April, 1799.) The charge was suspended; but the letters were found orderly proceeded by the Lord Ordinary, and also, (17th November, 1802,) by the Court.

The charger now raised a summons, concluding for payment of interest on the sums charged for from the date of the charge. This was conjoined with the process of suspension.

The cause was reported, when the charger

Pleaded: Whoever has intromitted with money belonging to another, or has unjustly detained it, is in general liable for interest, at least from the time that a legal demand has been made for it. This is not so much from any real or supposed *mora*, but rather as a recompense to the creditor for being deprived of the use of his money; Ersk. B. 3. Tit. 3. § 80. The charge for stipend having been declared well founded, it has been in fact pronounced, that the charger was entitled to payment at the time the demand was made. If it had been then paid, he would have had the benefit of the interest. The heritor, by refusing payment, has obtained all this benefit, which now, that the resistance has been declared illegal, he must communicate to the charger. Otherwise a groundless suspension would place a person in a better situation, than if he had at once paid his debt.