

1671. December 2.

MR. JAMES WHITE *against* PARISHIONERS of SYMINGTON and MR. JOHN GEMMIL.

Mr. James White, sometime minister of Symintoun, having charged the parishioners to pay the stipend of the crop 1669, they suspend, and allege, that they have made payment to Mr. John Gemmil, and that upon obedience to an act and ordinance of the Council ordaining the parishioners to pay the stipend to Mr. John Gemmil; *2do*, That though they had not paid in obedience, as they have done, or were not *in bona fide*, yet the payment made by them is sufficient, because Mr. John Gemmil had the only right to the crop 1669; and the charger had no right to any part thereof, because he had demitted his charge as minister at Symintoun before Whitsunday 1669, and so, not having attained Whitsunday, the first legal term, he can have no part of that year. The charger answered, That he has only right to the one half of the stipend, because he constantly served the cure till the month of April, 1669, and frequently thereafter till Lammas, and alleged, that Whitsunday was not the legal term of entering and removing ministers, but the sowing and separation of the crop, so that if the charger served till April, that all or most of the crop was sown, he has right to that term. The suspender answered, That albeit the legal terms of the stipend of removing and intrant ministers be in respect of the sowing and separation of the crop, yet these not being definite and determinate, but one year later and another year earlier, law hath necessarily and justly fixed the time to Whitsunday and Michaelmas, so that though the sowing and separation should not be complete at that time, yet the law holds the same as then complete, and it is not the beginning of the sowing and separation thereof, but the ending thereof, that could be the term; and therefore the Privy Council have ordered as to the vacancies that the intrants before Whitsunday shall have Whitsunday, and if after Whitsunday, that term should be vacant.

The Lords found, That Whitsunday was the first term, and found the reason relevant, that the charger had demitted his charge, and was out of office before Whitsunday; and superseded to give answer to the payment made upon the Council's order, there being a process at the charger's instance before payment in obedience thereto.

Stair, v. 2. p. 17.

* * * This case is reported by Gosford :

Mr. James pursuing for the half year's stipend 1670, it was alleged by Mr. Gemmil, the new entrant, who succeeded him, That he could have no part of that year's stipend, because, upon a call to the kirk of Strichen, he had procured from the Bishop of the diocese a warrant to be transported in the month of April that

No. 27.

Where a Minister is removed before Whitsunday, he has no right to any part of the stipend payable for that year.

No 27. year, and so could have no part of the stipend, unless he had continued in his charge till after Whitsunday, conform to an act of Privy Council, which is made upon the resolution of some of the Lords of Session, who were of the Council, to a query made to them concerning vacant stipends, either by the death or dismissal of Ministers, finding, that Whitsunday and Martinmas were the legal terms for Ministers' stipends, and that they had right to a half or a whole as they survived these terms. It was replied, That, by our custom and practice, if Ministers served until the corns were sown, they had right to the half of the stipend; and if they had survived Michaelmas that the corns were separated, they had a right to the whole year's stipend. The Lords by their interlocutor did find, That the pursuer could have no right, unless he had served till after Whitsunday, (which he did offer to prove), in respect of the act of Council standing; but yet it seems that the advice was ill-founded, the sowing of the corns and separation of the crop being the legal terms.

Gosford MS. p. 207.

1673. July 3. SEATOUN against The LAIRD of CRAIGIVAR.

No. 28.
One obliged to perform an act a certain term, is bound to do whatever is requisite for performance.

Craigivar's grandfather having, by his bond, bearing, "for sums of money," obliged himself to cause a servant of his to subscribe a translation of a bond due by Seatoun of Disblair, at a certain term, mentioned in Craigivar's bond, which is *in anno* 1633, which bond doth also bear, "that Pitmeddan had received Disblair's bond, and the assignation;" Mr. Alexander Seatoun, now of Pitmedden, as representing his grandfather, by progress, pursues Craigivar, as representing his grandfather, for payment of the sums contained in Disblair's bond, seeing the translation thereto was never granted until Disblair became altogether insolvent. The defender alleged, Absolvitor, because his good-sir was neither *in culpa* nor *in mora* in procuring the translation, unless it were alleged, that Pitmedden had produced to him the bond and assignation, which is acknowledged to be received by him, and without which the translation could not be drawn. It was answered, That Craigivar having obliged himself to obtain the translation at a certain term, dies *interpellat. pro homine*, and he was *in mora* after the term, unless he had required Pitmedden to produce the bond and assignation, and had not done the same; for being obliged for a deed at a term, he was obliged to do all things requisite for performance of that deed; and it cannot be thought but that he hath kept a double or minute of the bond and assignation, for forming the translation, seeing his bond is not granted conditionally upon production of the assignation,

The Lords repelled the defence, and found the pursuers not obliged to offer the bond and assignation, but that the defender, being obliged to perform at a term, should have demanded the same, if he had had need of it.

Stair, v. 2. p. 220.