

S E C T. III.

Stipends.

1678. July 23. BAIRD *against* The PARISHIONERS of FYVIE.

JAMES BAIRD, as donatar to the escheat of the Minister of Fyvie, pursues the Parishioners for bygone stipends, who *alleged*, Absolvitor, because by the late act of Parliament, stipends prescribe if not pursued within five years after they are due. It was *answered*, That the act is not a simple prescription, but *quoad modum probandi*, that they shall only be proved by writ, or oath of party: *Ita est*, there is writ here, viz. a decret of locality. It was *replied*, That the act requires probation by writ, under the hand of the debtor, acknowledging the stipend to be resting, which is not in this case.

THE LORDS sustained the defence, seeing there was no writ under the Parishioners' hands acknowledging these stipends resting, or that they were proved by their oaths resting, albeit several years had run before the pursuer had got the gift of escheat, which he alleged should not be counted, the right being then the King's.

Fol. Dic. v. 2. p. 118. Stair, v. 2. p. 639.

1683. March.

HAMILTON Executor of BISHOP of GALLOWAY *against* JOHN HARRIES.

In a pursuit at the instance of the Executors of the late Bishop of Galloway, for some teinds whereof he was titular, *alleged* for the defender, That five years being elapsed since the teinds pursued fell due, the libel is not relevant, unless it be proved by the defender's oath, that these teinds are resting, conform to the late act of Parliament concerning the quinquennial prescription of ministers' stipends. *Answered* for the pursuer, That the said act concerns not the revenues of bishops, but only the stipends of stipendiary ministers of the inferior clergy, upon this presumption, that the latter having small provisions, will not probably let their stipends lie long over unpaid; but that the teind belonging to the bishop as patron would no more prescribe against an ecclesiastic than against a laic titular. *Replied*, The rent of any benefice may be called a stipend; and by the act 20. Sess. 3. Par. I. Cha. II. pointing for ministers' stipends is applicable to any ecclesiastic benefice.

THE LORDS sustained the answer made for the pursuer.

Harcarse, (PRESCRIPTION) No 762. p. 215.

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No 254.

A stipend not being pursued for in five years, can be proved only by writ or oath of the defender.

No 255.

The act 1669 found not to apply to the revenues of Bishops.

No 255.

*** P. Falconer reports this case :

IN the action pursued by Isobel Hamilton, executor to the deceased Bishop of Galloway against Herries of Maybie, for certain teind-duties due by the defender to the Bishop before his decease ; it was *alleged* for the defender, That this action was prescribed by the act of Parliament 1669, anent prescription of ministers' stipends, not being pursued within five years after they became due ; and it being *replied*, That that act concerned only ministers' stipends, which in effect were alimentary, and were presumed not to lie over unpaid, but could not be extended (being a correctory law) to Bishop's or other titular's teind-duties ; the LORDS found, that the act did only extend to ministers' stipends, or teinds due to the inferior clergy, but could not be extended to teind-duties due to the Bishop, or other titulars.

Fol. Dic. v. 2. p. 118. P. Falconer, No 62. p. 41.

*** Sir P. Home reports the same case :

ISOBEL HAMILTON, as executrix to the Bishop of Galloway her father, having pursued John Herries of Maybee for his teinds, parsonage and vicarage, the years 1661, 1662, and 1664, of the lands within the parish of Traqueer, as being a part of the bishopric ; *alleged* for the defender, that by the 9th act of his Majesty's 2d Parliament, concerning prescriptions, it is provided, that ministers' stipends not pursued for within five years after the same are due, shall prescribe in all time coming, except it be offered to be proved that the same are due resting and owing, by the defenders' oaths, or by a special writ under their hands, acknowledging what is resting owing ; and therefore, the defender cannot be liable for the teinds, unless it were offered to be proved by his oath, or by writ, that the same are still resting owing. *Answered*, That the defender is not in the case of the act of Parliament, which is only as to stipends payable to ministers, but not as to teinds to which the Bishop has right as titular ; the Bishop in that respect being in the case of other titulars, who has right to the bygone teinds or tack-duties, does not prescribe in less than 40 years ; and it was so decided at the instance of this pursuer against Linn of Larg, *See TEINDS. Replied*, That the teinds and other duties payable to bishops are in the same case of ministers' stipends, they being all considered as beneficed persons ; so what is statuted in the one is understood to be statuted in the other, unless the contrary were expressed ; and albeit there were any difference as to that particular, as there is not, then the bygone teinds will be considered as mails and duties of lands which by that same act prescribes *quoad modum probandi*, not being pursued for within five years ; and was so decided in the case of Scott against Ballantine, and in the case of Sir Francis Scott of Thirlestoun, titular of the teinds, against Bannatyne, *See TEINDS*: And the practick adduced

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. I. No 442.

1753. July 3.

WILLIAM GLOUG *against* JOHN MACINTOSH.

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

No 256.
Vacant stipends fall under the quinquennial prescription.

Answered for the pursuer ; The act is a correcorey 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 statute ; 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.*

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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.

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.
The right of a patron, who