1808. *June* 15. ROBERT DAWSON *against* SIR JAMES PRINGLE.

No 5.
Interest is due on arrears of ministers' augmented stipends, from the date of the process of augmentation to that of the decree of locality, without any charge upon the former decree, or even demand of payment, during that time.

THE Reverend Robert Dawson, minister of Stow, raised a process of augmentation in the year 1788, and obtained an augmentation. In the year 1795, he raised a second process, and obtained another augmentation. No decree of locality, however, was pronounced in either of these processes till the year 1802. During all this interval, from the date of the summons of augmentation to that of the decree of locality, the minister never received payment of any part of his augmented stipend. He never gave any charge to the heritors to pay it, nor did he ever make any demand for payment of it. But after the decree of locality, he demanded from each of the heritors payment of his proportion of the arrears of this augmented stipend from the two periods of augmentation, and he also demanded interest of these arrears from the dates when they became due. Sir James Pringle refused to pay his proportion of this interest; and Mr. Dawson brought an action to compel him to pay it. He also threw in a conclusion for periodical interest on some arrears of old stipend, on which no charge had been given or demand had been made, and another for interest on the aggregate sum, not only of capital, but even of interest, since the date of citation in the action.

The Lord Ordinary reported the case on informations.

Argument for pursuer.

Without maintaining that interest is due on all debts, the pursuer has various grounds on which, in this case, he is entitled to demand it upon the arrears of his stipend.

Point I. New stipend.

1*st*, This stipend, when modified to the pursuer, was by the decree of modification ordained to be paid at certain terms; and decree to this effect was pronounced against the heritors. This individual defender, to be sure, was not ordained to pay a certain sum till the decree of locality was pronounced, but he was bound to bear his share of the general obligation of the heritors, when it should appear what that share was. This general obligation was to pay the stipend at the legal terms; on failure, it became an obligation *ex mora* to pay interest from these terms; and as the defender's share of this obligation is now fixed, he *must* fulfil it.

2*dly*, Interest is payable by those who are *kurati*, by the use of money due to another person, when there is no delay on his part to demand it, 17th Feb. 1624, Laird of Durie, No. 80. p. 542; 28th January 1663, Lord Balnagown, No. 85. p. 545. Now, in this case, the defender certainly is, or ought to be, *kuratus*; and there has been no delay to demand payment on the part of the pursuer, because he had a perfectly good reason for waiting till the process of locality was determined. He wished not to impose a hardship on any of the heritors. It would be particularly hard if the defender was to be allowed to

No. 6. take advantage of this forbearance to keep in his own pocket that interest which otherwise would have been in that of the pursuer. The only consequence of adopting such a rule would be, that all ministers would have immediate recourse to charges against one or other of the heritors whenever they got a decree of augmentation.

This very point was determined in the case of Wright against Kennedy, 18th December 1804, (not reported.) There the augmented stipend was witheld for five years, in consequence of the dependence of the process of locality; and the Court found the minister entitled to interest.

The case of Anderson, No. 43. p. 14836. was to the same effect. There, to be sure, a charge was given on the decree of modification, but no denunciation followed, so that interest was not due by statute 1621. The charge, therefore, could make no difference. It was the situation of the parties which was held equivalent to the requisites of the act 1621.

Point II. Old Stipend.

As to the old stipends they were clearly due at the terms; and, therefore, interest must be due *ex mora*.

Point III. The claim for interest on interest was scarcely insisted on.

Argument for the defender.

Point I. Interest upon debts is not due in general by our law; it is only due by agreement, by particular statute, or act of sederunt, or by common law, on account of a *mora* in the debtor, peculiarly blameable. But in the present case, there is no agreement, no statute or act of sederunt, and no *mora* at all on the part of the debtor. There never was even a demand made against the defender for payment of this debt, so that it is absolutely impossible to accuse him of *mora*; on the contrary, there was *mora* on the part of the pursuer in not demanding payment.

But, 2*dly*, The pursuer can have no claim to interest, because he has neglected to give a charge to any of the heritors for payment on the decree of modification, and to denounce on that charge, according to the act 1621, C. 20. This is the process pointed out to him by the law for obtaining payment or interest. If he had used this, he would have been by law entitled to interest. But as he has neglected this legal compulsitor, he has himself to blame that interest is denied him by the law. In this respect, his case is similar to that of all other ordinary creditors: It is a stretch in the law even to allow this privilege to ministers, since the heritor charged is really not properly bound to the whole extent. The law, however, indulged ministers so far; but there is no reason to say it intended to go farther, and give them interest without any charge at all.

It is true, in the case of Anderson, *denunciation* was found not necessary to constitute a claim for interest, but that was because the heritor had himself rendered it impossible by suspending the charge; and as the suspension was found to be groundless, he was not held entitled to take any benefit by it.

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It is not even pretended that in any case interest was found due on ministers' stipends without a charge at all, except in that of Wright against Kennedy, which is not reported; because the collector expressly says it was a special case, and decided on specialties by the majority of the Court *.

Such a charge is peculiarly necessary in this particular case. For here, till so charged, an individual heritor is really not *in mora* at all, nor can reasonably pay any thing, because the sum truly due by him is not known; and it is the charge only which lays him under any obligation to pay the whole augmentation, in so far as his free teinds go. It never was supposed that, without this charge, any one heritor was bound to take the whole augmentation on himself.

Point II. As to the second claim for periodical interest on the arrears of old stipend, it is impossible to imagine any reason why periodical interest should be given upon ministers' stipends more than upon arrears, feu-duties, annuities, or rents; yet it is notorious that no interest is ever given on these prior to a demand for payment of them.

Various opinions were expressed on the Bench on the first point relating to the new stipends. One Judge went solely upon the ground that the question had been decided already; and that in cases of this nature it was of more moment to have a steady rule than strictly to examine the original propriety of the rule. Several other Judges thought that on this subject our law was very different now from what it had anciently been. That anciently interest was reprobated; now it is given in almost every case. That though there may be exceptions in cases where payment is refused or delayed *bona fide*, yet the general rule is to give interest. That in this case there was no dispute as to the debt. The heritor knew he was keeping money that was due to the minister; and he knew very nearly his proportion, so that he could stock it out for the minister. That he must in fact have done so; he must have pocketed interest on it; and therefore ought to pay over this to the minister. That it would be inexpedient to force ministers to have recourse to the odious measure of charges to individual heritors in all cases, and unjust to let them suffer from their unwillingness to use such a measure.

The Lord President expressed his opinion that this was not properly a question of debt; there was here no giving of credit,—no borrowing; it was a case of *intromission*. That teinds originally belonged to the clergy, and were drawn by them. That afterward the heritor got a right of drawing his own teinds, but under the condition that he should pay the minister's stipend: That to that extent the heritor is an intromitter with the estate of the clergy: That interest, therefore, must be due on these intromissions, as it is on all intromissions; for instance, on the intromissions of a factor: That these must either be paid over to the constituent, or laid out at interest for his behoof: That a period is

* See Note p. 14837.

No. 5. fixed by law for doing this in the case of stipends, viz. the term of Candlemas: That the minister has nothing to do with the process of locality, which is entirely the concern of the heritors: That when the burden of the stipend is laid on the whole teinds, it is their business to arrange the proportions in which they are to pay it, by an interim locality, or in any other way they please, till they get it fixed by a final decree of locality: That no doubt each of them is liable to the minister for the whole stipend to the amount of the teinds he draws, till he can shew another who is preferably liable by the decree of locality; but that it is reckoned an oppressive and odious thing for the minister to charge one heritor for the whole, and there is no good reason for obliging him to do this, by denying him interest on his stipend, unless he does it.

As to the second point, It was held by the majority of the Judges to be very clear that interest must be due. It was observed that, in cases of this sort, there was no need of a demand to constitute a right to interest. That the maxim, *lex interpellat pro homine*, applied.

On the other side, several judges observed that there could be no right to interest on the old stipend, without a demand, nor on the new stipend, without a charge or a decree of locality. That in the latter case, the heritors could not pay, if willing, nor deposit the money; and it would be unjust to hold them liable for full legal interest, while they were forced to keep the money, and could not draw that interest on it without some risk, of which the minister did not relieve them.

On advising informations, the judgment of the Court was, "Sustain the "defences, in so far as regards the pursuer's claim for interest upon the amount "of his periodical interest; but, *quoad ultra*, repel the defences; and find the "defender liable to the pursuer in payment of the following sums, viz. first, "of £28. 5*s*. $8\frac{5}{12}$*d*. Sterling, being the principal sum of augmented stipends "from the year 1778 to 1803 inclusive, with the legal interest thereof from and "since the term of Candlemas 1804, till payment; 2*dly*, of £ 3. 12*s*. $11\frac{6}{12}$*d*. "Sterling, as the amount of periodical interest due upon the said sum at and "preceding the said term of Candlemas 1804; and, 3*dly*, of £16. 14*s*. $1\frac{6}{12}$*d*. "Sterling, as the balance of old stipend, including interest due thereon at said "term of Candlemas 1804, conform to the state in process, and of the interest "of so much of said sum as is principal, from the said term of Candlemas "1804, till payment."

And on advising a petition against this judgment, with answers, the Court, by a majority of nine to five, adhered.

Lord Ordinary, *Glenlee*. Act. *Norman Hill*. Alt. *David Monypenny*.
H. Davidson & Wm. Walker, W. S. Agents. *Pringle*, Clerk.

M. *Fac. Coll. No. 53. p.* 195.