1806. *January* 29. SHAW *against* HERITORS of ROBERTSON.

No. 5.
An assistant and successor to a minister cannot pursue an augmentation.

THE Reverend James Hay, minister of the parish of Roberton, having, from bad health, become unfit to discharge his clerical duties, Mr. William Berry Shaw was presented by the Crown, the patron, to be his assistant and successor. He accordingly entered into this office, and was regularly ordained (25th December 1801) by the presbytery. Mr. Hay resigned to him the manse, glebe, garden and offices, and contributed £20 *per annum* for a stipend; the heritors agreed to pay £15 in addition to the above annually.

Mr. Shaw raised a process of augmentation against the heritors; to which it was objected, that, not being the minister of the parish, he had no title to pursue such an action.

The Court dismissed the process.

Against this Mr. Shaw reclaimed, and

Pleaded: It is a matter of great importance that the person who performs the clerical duties of the parish, whatever his ecclesiastical character may be, should be placed in such a situation, as that his ministry may be respectable and useful. An assistant, named by the incumbent himself, and, consequently, removeable at his pleasure, may have no title to pursue an augmentation. He is paid by the minister himself, and has no connection with the teinds. But the pursuer is a regularly ordained clergyman; he has a presentation from the patron; he has been inducted into his office by the proper church judicatory; and he performs all the clerical duty of the parish. He does not insist that two stipends should be paid, but that such a stipend should be modified as is adequate to the circumstances of the parish; or, in other words, such a stipend as the minister himself would have obtained, had he continued doing the duties of the parish. The heritors, because they have two clergymen, ought not to be relieved from paying the same sum which they would have been found liable to pay, if there had been but one.

It does not appear that the right of prosecuting an action of modification was intended to be limited to any particular party; hence such a process has been sustained at the instance of the patron; Queensberry, No. 66. p. 15662; as well as of an assistant and successor, who appeared in the process, when the augmentation had been refused to the minister, who had retired from his charge; case of Melrose, 1797, (not reported,) and of Garvock, 24th November 1804, (not reported.)

Answered: The statutes authorising stipends to be modified, uniformly direct, that this shall be to the minister of the parish; and he, of course, is alone entitled to insist in such a process. The pursuer is not the minister of the parish. He has no stipend to augment. He has a salary paid jointly by the minister and the heritors, according to an agreement, by which he undertook for that remuneration to perform a certain duty; and he cannot oblige

the other contracting party to give more, by a process of augmentation of a stipend which does not belong to him, when the minister does not insist. A second minister, who is established by private agreement, cannot insist for an augmentation; Marshall against Town of Kirkaldy, 7th July 1738, No. 18. p. 14795. nor an assistant, Macruer against Macnicol, 18th May 1803, No. 95. p. 15711. No. 5.

The Court adhered.

Act. *Campbell*, Agent, *James Robertson*, W. S. Alt. *Gordon*.
Agent, *A. Storie*, W. S.

F. *Fac. Coll. No. 234. p. 529.*

1808. *February* 3.

MINISTER of PRESTONKIRK, and the PROCURATOR for the CHURCH of SCOTLAND, *against* THE EARL of WEMYSS.

No. 6.
Stipends of Ministers may be augmented by the present Court of Teinds, tho' augmented by it before.

IN the year 1796, the Minister of Prestonkirk raised a process of augmentation, and obtained an augmentation of his stipend accordingly. In the year 1806, he brought a second process, demanding another augmentation. The Earl of Wemyss, being one of the heritors of the parish, opposed this demand; and pleaded that the present Court of Teinds, having already granted an augmentation to this living, had no power to grant another.

The point was argued first in presence, and afterwards in memorials.

Argument for pursuers.—At the time of the Reformation, the teinds were the property of the church. They were possessed by ecclesiastics of different kinds; but the clergy having the actual cure of souls, had always a super-eminent right, to a sufficient maintenance at least, out of the teinds of the parishes in which they served. To this extent, the rule, *decimae debentur parocho*, was the law of Scotland.

See now on this subject, Act. 48. Geo. III. Ch. 138.

As the Reformation was not an abolition of all national establishment of religion, and as the establishment of the parish clergy in particular was in no degree superseded or diminished by it, the claim of this part of the church to a sufficient provision out of the teinds only became stronger, when the other ecclesiastical institutions, to which they had been appropriated, were abolished.

The reformed clergy, indeed, claimed the full property of the teinds,—Spottiswoode's History, p. 150 and 199. and the justice of their claim was admitted by Parliament in act 1567, C. 10. which calls the teinds 'the proper patrimonie' of the church.

Notwithstanding this, the teinds, in various ways, came almost wholly into the hands of laymen; but all the grants by which they were conveyed were under burden of giving a sufficient maintenance to the clergy of the parishes from which they were drawn; and the existence of this burden on the property