No. 45. for teind. Found, that he could not burden merchants with any such servitude, without use of possession of such a right.

the second or third hand; and that all these decimæ minores seu vicariæ sunt locales et consuetudinariæ, et tantum in iis est præscriptum quantum est possessum, et non amplius; and even in the Popish countries, they are totally regulated by possession; so that sometimes the *quota* is not the *decima*, but the twentieth or thirtieth part. And, on the 24th of November, 1665, between this same Bishop's predecessor and the Fishers of Greenock, as observed by Stair, in his decision, No. 58. p. 10758. the Lords found they had prescribed an immunity of paying any teind to the Bishop for the fishes taken in their creeks, because he could not prove he had been in possession within these 40 years. And, in the case of Mr. George Shiels, Minister at Prestonhaugh, against his Parishioners, mentioned by Stair, Tit. of TEINDS, No. 61. p. 10761. the Lords found a Churchman's possession of such teinds did only tie the payers, but not others in the same parish, as to such species and kinds as they had not been in use to pay. And the decision recorded by Stair, 13th December, 1664, Bishop of the Isles against James Hamilton, No. 23. p. 15633. does nowise prove his possession, but, on the contrary, ordains him to adduce probation of the custom. And as to the demand of £.4 *per* last, it is most extravagant; for, by a decision in Durie, 26th July, 1631, Bishop of the Isles against Shaw, No. 17. p. 15631. it appears the price then was only a merk the last. And as to fish taken *in alto mari*, seeing it was not determined how many miles the Bishop's jurisdiction extends beyond the shore, he can claim no teind thereof. "The Lords, upon Harcarse's report, found the Bishop could not burden the merchants of Edinburgh with any such servitude and teind-duty, unless he proved that he or his authors had been in possession of exacting and getting payment thereof."

Fol. Dic. v. 2. *p.* 437. *Founainhall, v.* 1. *p.* 350.

1688. *June.* LIRITHILL *against* SIR JAMES COCKBURN.

No. 46.

A minister having assigned a tack of teinds he was titular of, let by himself, the Lords found the tacksman, or sub-tacksman, liable as intromitters to the assignee, as they were to the titular; but determined not if they have a hypothec in teinds as in lands.

Harcarse, No. 967. *p.* 274.

1695. *February* 26.

SIR WILLIAM BRUCE of Kinross *against* SIR DAVID ARNOT of that Ilk.

No. 47. Heritor not bound to keep his land in tillage for the benefit of the titular.

Sir William Bruce pursued Sir David Arnot for payment to him, as titular, of his parsonage-teinds. Alleged, He has converted his arable ground to grass, and so there is no parsonage due; and for vicarage, Sir William has no right to it. Answered, an heritor may inclose and improve his ground as he thinks fit; but he must not do it *in æmulationem vicini*, or in prejudice of me, who have a right;

otherwise, he may evacuate my teinds, and make them wholly unprofitable, (though it is not to be presumed malice will extend so far as to persuade a man to cast his own interest waste, of purpose to defraud the titular of his teind); heritors having the free use and disposal of their ground, yet so as not to wrong third parties; for *quoad* the teind, he is but a tenant; and a tenant is bound to labour, that his master may have a hypothec in the fruits of his ground for his security; 27th February, 1623, Randifurd, No. 136. p. 15256.; which agrees with the Roman law, L. 25. § 3. D. Locat. And thus, ground converted into a garden was thereby found teind free, when it was evident that it was *principaliter* done for improvement; 9th June, 1676, Burnet against Gib, No. 35. p. 15640. This was ordained to be farther heard. No. 47.

1695. *January* 21.—The Lords now decided the point, and found Sir William, as titular, could claim the parsonage-teinds of no more but what was laboured and tilled, and that he could not hinder a proprietor to turn arable ground into grass; but he had an easy remedy, by pursuing a valuation, which, by the act of Parliament in 1633, is fixed at the 5th boll; and if all be vicarage, then the parsonage great teinds are mortified out of these.—See Stair, Tit. TEINDS. But this puts titulars, before valuation, to great trouble, to liquidate how much each year was in corns and how much was left in grass.

Fol. Dic. v. 2. *p.* 439. *Fountainhall, v.* 1. *p.* 672. & 702.

1698. *June* 29.

JOHN CALLANDER, Merchant in Edinburgh, *against* CARRUTHERS of Holmends.

No. 48.
Teinds a distinct subject, and not understood to be comprehended under a right to lands.

The deceased Holmends having married John Callander's daughter, for his second wife, by a bond of provision, in 1689, is obliged to infeft her in the liferent of some rooms for her jointure, to belong to her during her life-time, after and from the first term of Whitsunday or Martinmas after his decease; which is interpreted to make her entry, not at the first term after the dissolution of the marriage, by his death, but the second. And accordingly, he being the first deceaser, leaving only one daughter of this marriage, there is process raised by the said John, as her assignee, against this Holmends, on these three heads; 1*mo*, To pay her aliment, as the Lords should modify it, ay till her jointure should commence; 2*do*, To pay the aliment of his sister, by-gone, and in time coming; 3*tio*, To pay her the teinds of her jointure-lands, though not expressly provided, because she is burdened with the Minister's stipend, which, naturally affecting teinds, imports she must have right thereto. Alleged for Holmends, the defender, That he could not be liable to entertain the relict any longer than to the first term immediately after her husband's decease; because that practice was introduced by no law, but only custom, which could not be extended: And though it was pre-