No. 15. part. The Lords, however this might militate against him, if a co-creditor were pursuing him to count, yet they considered Ministers had action against none but intromitters with the teinds; therefore they sustained the defence, and found him liable only for what he possessed. 2*do*, He alleged, I cannot pay you at the rate of £.60 yearly, because, by a decreet of valuation produced, the teinds extend only to four bolls of bear of Nithsdale measure, and he is content to pay conform to that. Answered, In dear years, these four bolls (which will be ten of Linlithgow measure) will be more than £.60, yet he must have it in money, because he offers to prove he has been thirteen years in possession of it; and by the regula cancellariæ apostolicæ triennialis et decennalis possessor non tenetur docere de titulo; and was so found, Lesly against Parishioners of Glenmuck, No. 200. p. 11001. *voce* PRESCRIPTION. Replied, That rule held only as a presumptive title of a churchman's possession, where the true one does not appear; as is evident by the decision, Bishop of Dumblane against Kinloch, No. 28. p. 7950, *voce* KIRK PATRIMONY; but here the valuation (which must be the only rule of the Minister's stipend) is produced. The Lords found it enough for the Minister to prove seven years use of the payment of the £60, to make the heritor liable for bygones, till the valuation, in a declarator, were made the rule in time coming. See TACK.

Fol. Dic. v. 2. *p.* 394. *Fountainhall, v.* 1. *p.* 782.

1698. *December* 22. CATHCART *against* PATON.

No. 16.

A creditor having poinded corns standing in the stouks, and carried a rip of them to the market-cross, which was all he could do in that case; and the Minister for his stipend, and some preceding rests, having poinded the same corns before they were threshed, and carried away as much as would answer to the teinds; the Lords found, That the Minister had committed no spuilzie, but that he had right to retain, in so far as extended to the common debtor's proportion of a year's stipend, but not for any bygones; and that he must restore the superplus.

Fol. Dic. v. 2. *p.* 394. *Fountainhall.*

*** This case is No. 41. p. 10524. *voce* POINDING.

1726. *June.*

Mr JOHN CAMPBELL, Minister at Kirkbean, *against* Dr. JOHN MURRAY of Cavens.

No. 17.
Whether an heritor, upon whose lands the stipend is localled, is liable

In the year 1750, a decreet of modification and locality was obtained at the instance of the Minister at Kirkbean, against the heritors; and the proportion of stipend, which by that decreet was charged on the teinds of the twenty-four merklands of Preston, which are now the property of Dr John Murray, extends to 440

No. 17.
personally to the Minister, though he intromit not?

merks. These lands of Preston being parcelled out in small tenantries, the tenants were in use to pay the allocate stipend; but the arrears in two or three years having run up to the sum of 1020 merks, Mr. Campbell, the present incumbent, charged Dr. Murray, the heritor, upon the decreet of locality for the same. The heritor suspended, upon this reason, That he was neither titular nor tacksman of the teinds, nor intromitter with a joint duty for stock and teind, and therefore not personally liable.

It was urged for the pursuer, That in the present case, where there is no titular in the possession of the teinds, where there is no mortal that receives or intromits with the teind but the heritor, or those deriving right from him, the heritor must certainly be liable, whether he himself actually intromit, or his tenants deriving right from him: The lands which are here burdened with this stipend, are truly possessed by the heritor, though he lets out the same to his tenants, for tenants are not properly accounted possessors; therefore, as possessor, the heritor becomes liable for the Minister's stipend. And certainly it can make no alteration, whether one cultivate land himself or by others: The product does truly belong to him, whether he receives the same immediately out of the ground, or has it handed to him by tenants, to whom he commits the culture thereof: When he receives the rent, he gets the product of the ground, for the rent is but the product converted into money. And as the teinds are a debt upon the fruits, chargeable on the intromitter, the suspender is liable as intromitter, though he has not actually touched the specific product, since he has accepted of a rent in lieu thereof.

It was answered, That where the heritor lets his land for a joint duty for stock and teind, where he lets the teind expressly as well as the stock, there the pursuer's argument is conclusive; because in a word, *Qui facit per alium, facit per se*; but it fails, in that here the tenants have no tacks of the teind from the heritor. He lets to them nothing but his own interest in the ground, and the rent he draws is expressly in lieu of that interest, not at all for the teind; so that he has this relevant defence, "That he never intromitted with any parcel of the teind, nor any thing in lieu thereof." It is indeed true, that by the master's tack of the stock, the tenants have access to the teind; but that has no influence: Whoever draw the teind, whether titular or tacksman, the master has no concern; if the tacksman, he must be liable no doubt, according to his intromission, but not at all his master, since none can be liable for the facts of others whom they did not authorise: The master gave authority to his tenants to labour and sow the ground, and to separate the fruits therefrom; but by none of these are the tenants made liable for the teind, but by their *fact* of appropriating the teind, by *perception*, which they had no authority to do from their tacks, and which they had in their power to shun, by intimating to the titluar, or others having right, to come and make a separation betwixt stock and teind; and in defect of them, to make the separation themselves, at the sight of a competent judge.

No. 17. It was pleaded, in the second place, for the pursuer, Whatever is in the general case, here where his right is founded upon a decreet of modification and locality, the heritor must certainly be liable. A stipend being *debitum decimarum*, affecting all the teinds, whenever it is localled upon any particular teinds, it ceases to be a burden upon the rest; which would be unreasonable, as taking from the Minister's security, if in lieu thereof, by the decreet of locality, there were not a personal action against the heritor. Whence it is, that when a decreet of modification and locality is made out to the Minister, and that a proportion of stipend is laid upon the teinds of any particular heritor's lands, it is always the meaning of such determination, that the Minister have access for his payment against that heritor for one entire sum; which therefore cannot split and be divided amongst his tenants without the Minister's consent.

To which it was answered, That this would not even be a plausible argument, though the pursuer could say, that a decreet of locality is designed in favours of the Minister; whereas, on the contrary, the power of localling stipends is given to the patron, without any view thereby of making the Minister's condition better. For the Minister's security is not weakened, in respect, notwithstanding a decreet of locality, the remanent teinds continue to be liable, though only, in the *second* place, failing the localled bolls. But more directly, by what power can it be pretended, that the proprietor of a piece of land must be liable for stipend personally, because it pleases the patron to burden the teind of that piece of land with more or less of the stipend, which teind perhaps belongs to quite another person? There is not the smallest connection to produce such an effect. The stipend indeed may be localled upon any portion of the teind; for stipends being a burden upon the whole teind, this is no more but restricting a right to a part, which was before over the whole; but that in consequence of this restriction, any third party who has no right to teind, should become personally liable, without his consent, and contrary to the nature of his right, is so repugnant to the common principles of equity and justice, that the pursuer must surely bring more than a plausible argument, drawn from conveniency, before he gain his point. And this looks still more odd, when it is considered, that no mortal is directly liable for stipend, which affects only the teind, and not the teind-master, except in so far as he intromits therewith; and yet the intent of this process is, to make one liable for stipend, who is neither teind-master nor intromitter.

It was further urged, That unless the heritor were personally liable, where the stipend is localled, it would be easy for him, in the management of his lands, to defeat the Minister's right: For, if he turn them all into grass, by this argument he shall be quite exeemed, and liable for no localled bolls.

Answered, where bolls are localled, whether the lands produce that species or not, it is thought the Minister will have an action against the possessor *pro interesse*; for as he would be liable for no more than the localled bolls, however great his quantity of teind happen to be, he ought to be liable for no less, however small be the quantity. But were this otherwise, the argument would yet be

inconclusive; for when the stipendiary cannot make his locality effectual, the remanent free teinds of the parish are liable *subsidiarie*; which is evident, in that, the stipend being *debitum decimarum*, the decreet of locality does not exeem the other teinds, but decerns only the stipendiary to draw the localled teinds first. No. 17.

The Lords found the heritor not liable; but this sentence being reclaimed against, the cause was afterwards taken away by a submission.

Fol. Dic. v. 2. *p.* 394. *Rem. Dec. v.* 1. *No.* 77. *p.* 174.

1738. *July* 7. MARSHALL *against* The TOWN of KIRKALDY.

No. 18.
A second Minister established by private agreement, not entitled to an augmentation.

Where a second Minister is not established by the authority of the commission for plantation of kirks and valuation of teinds, but by private agreement with the heritors or Magistrates of burghs, neither he nor his successors are entitled to pursue an augmentation out of the teinds.

So it was found in the question between Mr. David Marshall, second Minister of Kirkaldy, and the Magistrates of the burgh, and Heritors of the parish of Kirkaldy.

Fol. Dic. v. 4. *p.* 299. *Kilkerran, No.* 1. *p.* 520.

1741. *February* 26. CAMPBELL *against* M'DONALD.

No. 19.

Found, that a judgment of the Church, loosing the relation of a Minister to his parish, or depriving him of his charge, did not deprive him of his right to the stipend, as what could only follow as a consequence of deposition.

Fol. Dic. v. 4. *p.* 299. *Kilkerran, No.* 3. *p.* 521.

1742. *July* 30. MINISTER of ESKDALEMUIR *against* SCOTT.

No. 20.

A decree of locality subjects the heritor personally to the stipend localled upon his land, and upon that medium it was found, That the Minister may charge any of the tenants for payment of the sum localled, and that the tenant is liable to the extent of his rent, stock, and teind, so far as the rent is in his hands.

Rem. Dec. v. 2. *No.* 31. *p.* 47.