

1673. July 27. MONTGOMERY *against* MONTGOMERY.

No. 32.

The annuity of teind is a burden upon the principal tacksman, unless the contrary be expressed, and divides not betwixt him and the subtacksman, in proportion to the benefit that each has by the teinds.

Stair.

* * This case is No. 34. p. 841. *vide* ASSIGNATION.

1674. January 14. JOHNSTON *against* STUART.

Margaret Johnston, as executrix to her father, who was Minister of Orphar, in Orkney, pursues Robert Stuart for payment of the vicarage teinds of the parish for several years of her father's incumbency. The defender alleged, Absolvitor, because there is no right produced in her father's person of the vicarage, there being nothing produced but a presentation and admission of the Presbytery, in which the vicarage is presented to, and a decret conform, which is only in general against all and sundry, but nothing to instruct that the vicarage was a part of the patrimony of that kirk, or that ever the Ministers there were in possession thereof. It was answered, That the Minister's presentation, and decret conform, doth sufficiently instruct his title; and as to the point of right, he is not obliged to dispute the same with the defender, unless he could allege upon a better right to himself, or that he had made payment to any having a better right; for the right of teinds, both parsonage and vicarage, is constituted *de jure communi*; and as to the party having right thereto, the rule of the common law, allowed by our custom, is, that *decimæ debentur parochæ nisi alterius jus appareat*. It was replied, That vicarage teinds are local and consuetudinary, and different in divers places, and in some none at all due.

No. 33.
Teinds vicarage *de jure communi debentur parochæ nisi alterius jus appareat*; though no possession instructed.

The Lords found the pursuer's title sufficient, seeing the defender neither alleged a right, or that he had paid to any having a right, neither was there any thing alleged of prescription of freedom.

Fol. Dic. v. 2. p. 439. Stair, v. 2. p. 251.

1674. February 13. WATSON *against* Lord BALMERINO.

The Lord Balmerino having sold the teinds of Woodhill to one Jack, *anno* 1631, with this warrandice, "from his own and his father's facts and deeds, and from all augmentations to the Minister of Barrie, in all time coming;" thereafter, the Minister obtained augmentation; and now the right coming to Watson, by

No. 34.
Warrandice from Ministers' teinds was found to extend to the relief of an

No. 34.
augmentation
in conse-
quence of a
subsequent
law.

progress, he pursues recourse, upon the warrandice, against the Lord Balmerino; who alleged, Absolvitor, because the augmentation was granted by a subsequent law, viz. by the act of Parliament 1633, extending ministers' stipends to 8 chalders of victual; and warrandice can never be extended to burdens incurred by a subsequent law, as is observed by Durie, in the case betwixt the Countess of Dumfermline and the Earl, her son. See WARRANDICE.

The Lords found, That in respect of the conception of the clause, being special, as to the ministers' stipends, in all time coming, and that the *quota* of stipends was not *casus incogitatus*, by a subsequent law, but that the King, by his decree-arbitral, *anno* 1629, before this disposition, had determined the *quota* of stipends, which was ratified in the Parliament 1633, thereafter, they sustained the recourse, and modified nine years purchase for the teind, conform to the act of Parliament, with annual-rent since the distress; and if the pursuer could instruct a greater price paid to Balmerino for the teind, they sustained the same price.

Stair, v. 2. p. 266.

1676. June. 9.

BURNET *against* GIBB.

No. 35.
A glebe
found teind
free, though
mortified to
a chapel
without de-
signation by
process.

Alexander Burnet having right to a tack of the teind-sheaves of the burrow-lands of Aberdeen, granted by the Bishop of Aberdeen, pursues thereupon William Gibb for the teinds of that piece of land, called Fittismire, and of the craft of Fittie, possessed by him. The defender alleged Absolvitor, because as to Fittismire, it was a piece of overflowed and marsh ground, as the name expresses; and he drained the same, and did inclose it, and did sow upon it victual at first, and since hath made it a yard for kail, carrots, and herbs; so that there hath no victual grown upon it during the years libelled, and therefore he can demand no teind-sheaves thereof: And albeit he had right to both parsonage and vicarage, yet vicarage is local, and due only according to custom; and there is no teind for kail, herbs, and roots in that place, or any other place in Scotland. The pursuer answered, that he offered to prove that the land had been accustomed to be plowed both before and after the draining, and to have borne victual, and so was liable to parsonage teind, which being a just and favourable right, cannot be taken away by the proprietor at his pleasure; but the pursuer hath as good right to the teind as the heritor hath to the stock. It was replied for the defender, that teind is only a right affecting the crop, and not the ground, until a valuation be led, which liquidates the teind, *communibus annis*, and therefore is due, though it were waste, and no more is due, though the crop were so plentiful that the teind-sheaf were ten times better; but so long as the teind remains in its proper nature, and *ipsa corpora* are set and drawn, it is but casual according to the crop, birth, and fruits, and puts no servitude nor restraint upon the proprietor or his tenant, but he may freely dispose of his land as he pleases, and may make it all corn, or all grass, or all gardens, orchards, or yards, and