

ANSWERED for the Minister,—That the proportion of stipend payable out of the lands of Kerse, was without any division upon particular rouns; but indefinite, and general over the whole barony, *tanquam unum tenementum*; and so he might distress any tenant for his whole rent, to the avail of the stipend lo-called on the whole. But the truth was, here were sundry specialties: for, Kerse being broken, the rest of the rouns were lying waste, and this was only tenant-sted: and as Kerse himself was personally liable, so must his tenant be. And to restrict him to the fifth part of the rent, was to send him to lift the rest of his stipend from windlestraws and sandy laverocks; and he was not to distress them any further than his proportion of stipend laid upon these lands; and, till that was paid up, *unaquæque gleba servit*, unless the stipend had been specially divided, so much on every roun.

REPLIED,—It is unheard of doctrine, that stipends can affect the stock; and, *esto* he were a parson or titular, he could get no more but *ipsa corpora*, and no part of the stock; and much less can a stipendiary claim more: for, by the canon law, *decimæ debentur parochis*; but no part of the stock:—See 24th June, 1662, *Vernor* against *Allan*, and 3d December 1664, *Hutchison* against the *Earl of Cassils*. And it is not to be presumed of any heritor in his right wits, that he will cast four parts of his lands waste to disappoint the minister of his teind.

The Lords, by plurality, found the minister in this circumstantiate case was not to be restricted precisely to the teind of this roun, but might affect the whole for his stipend, in so far as it extends; though sundry of the Lords thought this an extraordinary privilege, and not to be granted, unless he had affected it by arrestment, or other legal diligence; which method would be more agreeable to the analogy of our law.

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1710. February 23. WEIR of NEWTOUN against HAMILTON of GILKERSCLEUGH.

THE deceased John Hamilton of Gilkerscleugh, having conceived a prejudice against Newtoun, on account of a process against him; he went, in 1682, to Major White, the Laird of Meldrum, and others commissioned by the Privy Council, to search out those who had been at the Bothwell-bridge rebellion, or had resetted or harboured them; and delated Newtoun as accessory, in having furnished horses to some of those rebels, and dealing with him by many arguments to join them, threatening he would be ruined if he did not; and that he did not retire till he heard the Duke of Monmouth was marching against them: and that he harboured those ministers in his house, who privately baptized the children round about, and had several intercommuned rebels on his ground: And, on this malicious information, he got him imprisoned, first in Edinburgh, then in Dunbarton, where he was kept two years and a half close prisoner, and put to vast trouble and expense, besides the loss of his own business, extending to more than L.500 sterling. After the Revolution, Newtoun gives in a bill to the Parliament, in July 1690, representing, That, by Gilkerscleugh's false and malicious information, he was brought in hazard of his life, being accused of treason, and was damnified in his estate to a great sum; and, therefore, craved reparation of his losses: who remitted the affair to the commission of Parliament for fines and forfeitures. And they having called Gilkers-

cleugh before them, and taken precognition of the fact, and examined witnesses on both sides, it seemed evidently proven, That Newtoun's imprisonment was occasioned by Gilkerscleugh's delating and giving a subscribed information against him, with a condescence on the witnesses to prove; and that he offered some of them money to depone against him, and had threatened to prosecute him to the gallows. On which, the committee gave their opinion, that he ought to refund Newtoun his damages, which they restricted to 3,500 merks, though it was more than the double of that sum.

But the Parliament rising, they remitted the cognoscing it to the Lords of Session; and, during the dependence there, Gilkerscleugh dies, and Newtoun transfers his complaint against his son: for whom it was ALLEGED,—1mo. That this action, being penal, was odious and unfavourable *quoad* the heir of the delinquent, who was innocent, and represented his father in his estate and heritage, but not in his crimes; seeing *delicta suos tantum tenent authores*, and do not transmit to heirs; for *noxa caput sequitur, sec. 1. Institut. de perpet. et tempor. act. ex maleficiis provenientes actiones in rei hæredem non competunt*, as *furti, vi bonorum raptorum, injuriarum*, (of which kind this is, being *injuria verbis concepta*;) and therefore it died with its author, and cannot be insisted in against his heir.

ANSWERED,—That this action was not merely penal, but likewise *rei persecutoria*, being for making up his damages, arising by your falsely accusing one of treason. 2do. It is *certissima juris regula*, that even penal actions, if litiscontested against the committer in his own lifetime, *transeunt in hæredes*; because litiscontestation is a judicial transaction, contract, and novation, which perpetuates the action: And here there was a full and plain litiscontestation; for, not only is there a probation led before answer, but likewise defences proponed for Gilkerscleugh, viz.: That he was forced, by those in the power and government at that time, to give information against Newtoun; so it was no voluntary act.

ANSWERED,—That what passed in private conversation betwixt Newtoun and him could never arise in judgment against him, had he not maliciously discovered it: for there were no witnesses present to divulge, or bring him in hazard of concealing treason; so that the affair in his own lifetime wanted nothing but the Lords' authority and approbation of the report to finish it by a decret.

REPLIED,—All that was done by the commission, was, by way of summary inquiry and precognition, which never amounts to a litiscontesting; for that requires the discussing of the relevancy: for which, see *l. unica Cod. de Litiscontestat.*; though with them it was much less than with us.

The Lords shunned directly to find it was litiscontested in Gilkerscleugh's lifetime, but did the equivalent, by finding this action did not terminate by his death, but was transmissible and competent against his heirs; reserving all defences his father could have proponed, as accords of the law.

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1710. February 25. DANIEL REID, Petitioner.

DANIEL Reid, late servant to Sir William Bruce, presents a tailye of the lands