

possessio; but upon a decret of locality, wherein, though the measure be indefinite, it cannot be understood to be any other measure than the common measure of Scotland, seeing the act of Parliament anent Minister's provisions, bears expressly, that they shall have eight chalders of victual, Linlithgow measure. No. 224.

The Lords having considered the decret of locality, and that it did not extend to eight chalders of victual, but to three chalders of victual, and 400 pounds, which is the rate of four chalders of victual, at 100 pounds the chalder, as is ordinarily rated by the commission in that place of the country, they found the use of payment and common custom of the country, sufficient to declare it to be the measure of Ayr, seeing by that measure, it would not come up to eight chalders of victual.

Stair. v. 1. p. 465.

1669. *January 19.* EARL OF ATHOLE *against* ROBERTSON.

No. 225.

Use of payment to the Minister who granted yearly discharges, mentioned to be for the whole teind-duty, was found to defend the heritor from any additional teind until citation or inhibition.

Fol. Dic. v. 2. p. 427. Stair. Gosford.

* * * This case is No. 34. p. 7804. *voce* JUS TERTII.

1670. *July 15.* BIGGAR *agaigst* CUNNINGHAME.

No. 226.

In a process for teinds libelling the fifth part of the rent, the defenders produce a decree of valuation, against which the allegiance was found relevant, that it was a deserted right, never having taken effect by payment, but tacks accepted by the defenders, and duties paid by them thereafter to a greater quantity.

Fol. Dic. v. 2. p. 428. Stair.

* * * This case is No. 45. p. 14061. *voce* RES INTER ALIOS.

1677. *November 9.* RUTHERFOORD *against* MURRAY.

No. 227.

John Rutherford, as assignee by Mr. James Buchan, pursues Murray of Skirling for several years stipend of the kirk of Skirling, being 500 merks and two chalders of victual yearly, Skirling having the whole teinds of the parish. The defender alledged, *1mo*, That he had a tack of the teinds from the former Minister as titular, for 700 merks yearly, which was yet unexpired, and therefore could be liable for no further. The pursuer replied, that he offered to prove a greater duty paid since the said tack. It was duplied, that albeit the defender had gratified the former Minister with some more than was due, that could not annul

Use of payment to the minister of more than stated in the tack of teinds, found to constitute the rule in future, independent of the tack.

No. 227. his tack, or continue that use of payment. The Lords repelled the defence, and sustained the reply to be proved *prout de jure*. The defender further alleged absolvitor, because there being no locality of the stipend of this kirk, he had by a decret of his Court, allocated or assigned proportionably of his rents paid by several tenants yearly to the Minister, equivalent to the stipend, which he had accepted, and entered in payment, which behoved to import a liberation of the heritor, or at least a diligence against the tenants. It was answered, that both the heritors and possessors were liable to the Minister for his stipend, so that the assignment to the tenants did not import passing from the heritor. The Lords repelled that defence, unless it were offered to be proved that the Minister did except the assignment upon the tenants in full satisfaction, or in place of the heritor, whom they found liable, in so far as the tenant paid not. The defender further alleged, that for the first three years he produced a general discharge. It was answered, That the discharge was elicited by circumvention, because Skirling had affirmed to the Minister, that the stipend was a chalder less than truly it was, and he having no decret of modification, or locality, but use of payment, and being newly come to the charge, trusted Skirling. It was answered, *1mo*, That circumvention is not relevant, without a fraudulent machination; *2dly*, That it is not competent by way of exception or reply, but by way of reduction.

The Lords found the reply of circumvention relevant and competent against a personal right, not requiring reduction, or production, and found that affirming to the Minister new entered, that the stipend was less than the true use of payment, Skirling was liable for the *superplus*, notwithstanding of the general discharge so procured.

Fol. Dic. v. 2. p. 428. Stair. v. 2. p. 556.

* * Fountainhall reports this case :

Mr. James Buchan, Minister at Skirling, and his assignee, pursuing Sir James Murray for paying the tack-duty contained in the tack set to them by the preceding Minister; alleged, Absolvitor for some years, because paid; *2do*, As to other years, they can acclaim no more but the teind tack-duties, he having no modified stipend; *3tio*, He had accepted a locality for these teind-duties on some tenements, and a decret conform. Replied, The discharge was elicited by fraud, in concealing the true quantity; as to the rest, he had been in use to pay a greater quantity than the tack-duty to the pursuer's predecessor. Duplied, *Dolus non dedit initium contractui*. The Lords repelled the first allegiance and duply, in respect of the reply; and reserved the allegiance of circumvention *via exceptionis*, because referred to the defender's oath; as also found, That the use of payment of a greater stipend to a Minister's predecessor did make the payers liable to pay the like in all time thereafter, and the accepting a locality did not prejudice the Minister but he may recur against the heritor and tacksmen.

Fountainhall MS.