then all in one hand. It comes thereafter to be dismembered, and in sundry hands. The minister pursues one of them for the stipend due furth of the whole.

He ALLEGED,—He was only liable *pro rata portione*, conform to his teinds, and that the most he could be obliged in was, *dedere ipsa corpora* of the teinds; for stock pays not ministers' stipends. Yet it is affirmed, the Lords found him liable *in solidum*, reserving his relief against the rest for their proportional possessions; since the minister *ab initio* had to do with but one: and if, *ex post facto*, by alienations unknown to him, and without his consent, it came to be divided, he who is *persona in jure favorabilis*, must not be distracted from his function to convene all: and the whole barony was made liable by decreet of locality, and so *unaquæque gleba servitat*; and the stipend was in this like the soul, *tota in toto, et tota in qualibet ejus parte*. And such a quantity being imposed on the barony, it was without respect to the teinds more than to the stock; and, in this case, both were confounded and consolidated together. Yet, in law, the teinds seem to be the proper and specific subject-matter which can only be affected with ministers' stipends. Act 10, Parl. 1567. See Durie, *20th Dec.* 1622, *Preston*. *Vol. I. Page* 28.

1678. *December* 12. GAIRDEN *against* GAIRDEN, her Husband.

A BILL of advocation was presented to the Lords of Session, of a process of divorce upon adultery, pursued before the Commissaries of Edinburgh, by one Gairden, against Gairden her husband, in regard of some irregularity and informality in the Commissaries' procedure, in examining of witnesses before litis-contestation.

The Lords refused the bill, and remitted it back to the Commissaries, as the only judges competent to such actions in the first instance; but if they had found any irregularity, the Lords would have rectified the same, and sent it back to the Commissaries; as they have done in the case of services of brieves, and the like. See an example of it in the case of *Fork* and *Fyfe*, *July* 1678. *Item*, in advocations from the Admiral Court, June 1673, [No. 391.]

Vol. I. Page 29.

1678. *December* 12. REPRESENTATIVES of WILLIAM KAY *against* CLEGHORN.

IN a cause pursued by the executors and representatives of William Kay, late bailie in Edinburgh, against Cleghorn a baxter there, before the Commissaries of Edinburgh, for payment of a debt which they referred to his oath; he deponed, it was true he was once owing that debt, but it was as true he had paid it, but only the sum of yet resting. This being advised by the Commissaries, they repelled the quality of payment, and ordained him to prove it *aliunde*.

This being quarrelled upon iniquity, before the Lords, in a suspension, they found the quality intrinsic, and assoilyied, and would not divide the oath. See

14th November 1677, *Edgar*; *30th July* 1678, *Hamilton*; and Dury, *10th July* 1624, *Kinloch*; *28th March* 1629, *Gall.* *Vol. I. Page* 29.

ANENT COMPRISING.

IT was queried, where a man comprises lands of a value worth less than the sum he deduces the comprising for, if he can charge his debtor for the superplus of the sums above the value of the lands comprised. Some think he cannot, because the style of comprising runs, that the lands apprised are adjudged and decerned to him in payment and satisfaction of the sums apprised for, and doth not say, in satisfaction *pro tanto*; and so like a judicial vendition, the appriser seems to acquiesce, and accept of the apprised lands for payment. But this seems *durum et iniquum*; however, it is not yet decided, and it were surest, in such a case, to make the decerniture words of the comprising to bear only *pro tanto*, and in part of payment. Craig thinks, *p.* 331, he may crave the remanent; and the Roman law decides the same, *l.* 23 *D. de Reb. Cred*; for an apprising is *pignus prætorium*. And the 6th Act, Parl. 1621, decides he may crave the remanent. *Vol. I. Page* 29.

1678. *December* 12. KIRKALDIES *against* KIRKALDY of GRANGE.

IN the action, Kirkaldies against Kirkaldy of Grange, for maills and duties, upon a comprising, it came to be debated, if a mother, who is tutrix, can emit any promise, and can be forced to depone thereon, to prejudge her pupils. It seems not. Yet see Stair, *25th July* 1661, *Helen Hepburn*, where the Lords found curators might transact. *Vol. I. Page* 29.

1678. *December* 14. MENZIES of GLASSIE and CAMPBELL *against* NAPIER of WRIGHT'S-HOUSES.

IN the cause, Menzies of Glassie, and Campbell his assignee, against Napier of Wright's-houses, (Jan. 1678, page 223;) they offered to prove the passive titles against Wright's-houses as representing his uncle, *prout de jure*, and there is a day assigned them to that effect; after which day Wright's-houses circumduces the term against them for not proving. The pursuers, to stop the circumduction, declare they refer the passive titles to his oath. Wright's-houses being ready to depone, they resile, and declare they will prove *aliunde*, viz. *scripto*; and crave a diligence for recovery of writs, wherein he not only designs himself heir, (which were not *per se* relevant,) but also obliges himself, if need be, to serve heir.

This the Justice-Clerk refused, as against all form; but, in regard the pursuers offered to make faith that the writ was *noviter veniens ad notitiam*, he ordained them to depone thereupon; and, if they affirmed it, then he allowed them a short term, but no more. *Vol. I. Page* 29.