respect of the Abbey of New-Abbey, resigned by Sir Robert, but also of these six common kirks, which though they were not properly annexed to the Crown, yet were by the several acts above mentioned 1592 and 1597, and acts referred to in 1592, appropriated to particular uses, first for stipends to Ministers, and the rest for the King's household, from which they could not legally be divested; and accordingly they were dissolved, and the dissolution excepted from the act *salvo jure*, and given to the Bishop of Edinburgh. And as Sir Thomas Kirkpatrick by the charter 1594 had, I think, a lawful right to the patronage, I think by the grant the Bishop, as come in place of the Crown, had right to the benefice with the burden of a stipend to the Minister; and the possession of both parties seems to have been agreeably to this opinion; and I think the act 1690, or rather 1693, gave Sir Thomas no right to the teinds, because they had been before lawfully disponed to the Bishop; for I think these acts did no more than justice, and did not properly make any donative to the patrons; for before 1690, the patrons had in effect right to the benefice over a competent stipend to the Minister; because as they had the nomination of the titular, they bargained with him for a right to the benefice, the tithes, after giving him a competent stipend, which was accounted no simony, and got from him tacks of the tithes. Therefore, when in 1690 they took from the patrons this right of chusing the titular, which they valued only at 600 merks, they of consequence deprived him of this power or right of bargaining for the teinds, a right of much more value, and therefore it was doing no more than justice the giving the patrons directly what before they had indirectly, a right to the surplus teinds over a competent stipend, whereof they were depriving them by that act. But then it was equally just and necessary to except teinds heritably disponed, for as the Ministers were not titulars of these, the patrons had no power over them. To apply that to this case, the Minister here was not titular of the teinds, which were properly vested in the Bishop of Edinburgh, and at the Revolution returned to the Crown; and as the act 1693, had Episcopacy then subsisted, would not have deprived the Bishop of the surplus teinds over the stipend, no more did it take them from the Crown,—and therefore I at present think Drummore's interlocutor right, though we can here give no opinion on the right of patronage, which the pursuer does not claim, and the Crown is not called, or in the field.—31st October 1752.

(It does not appear that the petition and answers were ever advised, the matter having been settled by reference to Lord Drummore.)

No. 33. 1752, July 22. GORDON *against* DUNBAR.

THIS being a process for localling a stipend, it was begun, and the stipend modified, as early as 1710, and the modification extracted, but no locality insisted in till November last, and the last scheme of locality given in by the patron only in December. Kilkerran found that the locality must draw back till 1737, when the patron first withheld some of the Minister's modified stipend; and it might as well have been drawn back to 1710. Sir Robert reclaimed upon several specialties, to difference this from the common case, which, with the answers, coming this day to be advised, I mentioned a point not noticed by either party, viz. that modifications and localities at the instance of a Minister unprovided, or not sufficiently provided, were justly drawn back to the execution of the

summons, and the locality, so far as the stipend exceeded the former use of payment, necessarily behoved to be drawn back. But this case was quite different. The Minister was parson and titular of the whole teinds, and till 1710 was in possession of a very good benefice by drawing the teinds, worth, as I have heard, L.150 sterling yearly; and when the patron commenced this process of modification and locality upon the 25th act 1693, to turn the Minister out of possession of the benefice, the condition of which act is, that the Minister continue in possession till the patron get a stipend modified and settled on him,—therefore the Minister should have kept the benefice till a stipend was localled; and the way the patron performed this condition was by paying the stipend himself, and thereby getting the benefice of much greater value; and as the locality could not have been drawn back had the Minister still possessed the benefice, no more can it now that the patron possesses. The Court seemed all to go into that opinion, but as that point had been overlooked, they on my motion remitted back to the Ordinary to hear the lawyers on it. 10th July 1751.

The parish of Duffus was a parsonage, and the parson in possession of drawing the teind, except as to some lands that paid rental bolls. Dunbar of Thunderton, the patron, upon the act 1693, pursued a modification and locality against the Minister, and called the heritors, and obtained decreet of modification, qualified that the Minister should continue in possession till the patron gives him an extracted decreet of modification, which he did in 1712; and from that time the patron drew the teind of Sir Robert Gordon's lands, except a part that paid rental bolls, which he allowed the Minister in part of his modified stipend, and paid the rest himself. In 1732, Sir Robert, and the tenants to whom he set the lands, began to turn the corn land into grass, but still the patron drew the teind of such corns as grew, till 1737 that the whole was turned into grass. But Sir Robert got no more rent than he drew before 1732 for the stock, when the patron drew the teind; and they continued in grass till 1744, that Sir Robert obtained a decreet valuing his teinds; and from 1737, Mr Dunbar of Newton, heir to Thunderton, retained a part of the Minister's stipend; and in 1750 he wakened the old process for localling the stipend, and gave in a scheme of locality which he made to draw back from 1737, whereas Sir Robert alleged it could have no retrospect at all. My opinion was that while the patron or titular was in possession of drawing the teind, there could be no locality upon the lands or stock, nor upon the heritors, which is agreeable to the words of the acts of Parliament from 1633 downwards, viz. that the constant local stipend could only be appointed after closing the valuation, because the heritors of the stock not in possession of the teind cannot be burdened with the stipend, and the localities are usually drawn back to the date of the summons; and no injustice is done the heritors who are in possession of both stock and teind, that is who receive a joint rent for stock and teind, though the locality retrospect beyond the valuation of these teinds. Yet that cannot hold where the heritor is not in possession of the teind but the titular draws them, and therefore here the locality cannot retrospect till 1710, the date of the summons, because either the Minister or patron confessedly drew the teinds of his lands; and nothing new with respect to Sir Robert's right or possession of the teinds happened in 1737, except that his tenants turned their lands into grass, for still he set no more to them than the stock, and received no more rent than he formerly received for the stock. And I did not think that the tenants'

turning their farms into grass could in law make any difference, or could have any influence on the question, how far the locality could retrospect. And whether the titular could have any claim of damages was a separate question. To this some of the Lords argued, if the whole heritors of a parish should turn their lands into grass, the Minister would lose his stipend. But the reply was obvious; that the law had provided an easy remedy to both Minister and titular, by pursuing a valuation; 2dly, that in this case there was abundance of teinds, either drawn or payable out of the other lands in the parish, much more than sufficient to answer the modified stipend. However, the Lords found that the locality ought to draw back to 1737, *renit. tantum* Kames, Murkle, *et me.*

No. 34. 1752, July 22. MINISTER OF CUSHNEY *against* THE HERITORS.

IN a process of modification and locality, as the teinds were of small extent, the Minister made all possible objections against deductions; and, 1st, a large article paid by the tenants to the heritors, in name of multures. We agreed, that as ordinary multures are teind free, should the heritors convert them to dry multures, so as the tenants would pay nothing at the mill but knaveship, &c. that is for the miller's labour, but not for the mill, these dry multures should also be deducted; but if under that pretence a victual rent should be paid, more than the multures could amount to, that should be liable in teind. Therefore before answer we ordained the parties to show what multures would by the custom of the country be paid at the mill out of an estate of that extent, or what rent the millers in the neighbourhood paid for the mill and multures. 2dly, As to poultry, we thought, what are called reek-hens, and are paid out of every cot-house or reek are teind-free, as the houses are; but other custom fowls are liable, agreeably to the words of the act 1633, by which the price is to be rated of all teinds consisting in money, victual, or other bodies of goods; and therefore we considered such a number of reek-hens as we thought suitable to the estate. 3dly, We thought that such services as are usual and *bona fide* paid, ought to be teind-free, though they be converted; and remitted to the Ordinary to enquire whether the converted services here were such as was agreeable to the judgment 23d July 1740, Douglas of Dornock. (No. 14.) 4thly, Found that all other customs but these reek-hens must be considered as rent, and not deducted in valuing the teind. 15th Nov. Adhered.

No. 35. 1753, Feb. 28. EARL OF MORTON, &c. *against* MARQUIS OF TWEDDALE.

EARL OF MORTON and Captain Stewart pursued a process of approbation of a valuation of their teinds led before Sub-Commissioners in 1629, wherein the defence was that the valuation was departed from by a contrary use of payment ever since. Answered: The payments made were of less value than the valuation. We allowed a proof before answer; and the proof came out that the valuation of Morton's lands was six chalders victual, two-thirds bear, and one-third meal, and L.8 for vicarage; and that there was an old rental of two bolls and a half of wheat and four bolls bear, and 18 bolls best black oats, and L.8. 6s. 8d. of money for vicarage, which has constantly been paid ever since;