

No. 30. 1750, Jan. 17. SAME PARTIES.

See second Note of No. 29.

No. 31. 1751, Feb. 13. CAPTAIN ANSTRUTHER *against* MARQUIS OF TWEDDALE, &c.

THE Lords found the teinds of the Abbey of Dunfermline saleable, notwithstanding of the annexation to the Crown by the 160th act 1593, *renit.* President and Kilkerran. My reasons were none other than what are set forth in the papers. I thought that by the *proviso* in that act, there was no other annexation of those tithes than of the tithes of the other Prelacies by the act 1687. 2dly, I thought there was a total dissolution of that annexation in favours of the Queen and heirs of that marriage, which might have been different from the heirs of the Crown. 3dly, I thought that annexed or not annexed, the sale under the acts 1633 and 1690 reached the Crown tithes as well as the subjects, and as it was admitted they might be valued, that was allenary as falling under these acts.

No. 32. 1752, Jan. —. SPOTTISWOOD *against* SIR. T. KIRKPATRICK.

(LORD ELCHIES'S observations upon this case are written upon the petition for Sir Thomas Kirkpatrick, bound up in the volume of his Lordship's Session papers, marked P. R. S.—As his Lordship gives no statement of the case, it becomes necessary for the Editor shortly to explain it.—

The parish kirk of Dalgarno in Nithsdale belonged, before the Reformation, to the Abbey of Holyrood House, of which John Bothwell was made Commendator in 1582. Upon his decease in 1612, the King named John Spottiswood, eldest son of Archbishop Spottiswood, to succeed Bothwell as Commendator. In 1621, Spottiswood resigned into the King's hands the teinds and patronage of Dalgarno, together with some other kirks belonging to the Abbey, and obtained from his Majesty a charter of them to himself, his heirs and assignees, upon which he was infeft. In consequence of this grant, Sir John Spottiswood executed inhibition against the possessors of the teinds, and assigned certain tack-duties of victual payable by the possessors to the Minister in full of stipend. In 1633, King Charles I. proposing to erect the new Bishoprick of Edinburgh, purchased from Sir Robert Spottiswood the Barony of New Abbey, and Sir John and his brother Sir Robert concurred in disposing six Churches to his Majesty, of which Dalgarno was one. An act of Parliament was passed dissolving this Abbey, and these Churches, from the acts of annexation, passed in favour of the Crown, and this act is particularly excepted from the general act *salvo jure* passed in that Parliament. In the same year the King, by a charter under the Great Seal, erected the Bishoprick of Edinburgh, and mortified the lands and teinds disposed by Sir John and Sir Robert, as a constant revenue to the Bishop of this new See. Episcopacy having been abolished in 1640, these lands and teinds of consequence reverted to the Crown. But as no price had been paid to the Spottiswoods, the King, in 1641, granted a signature to Sir Robert of the subjects which he and his brother had resigned. In consequence of the ensuing civil war, the

effect of this signature was interrupted; but it was renewed by King Charles II. in favours of Alexander, Sir Robert's son. However, in 1662, Episcopacy was restored, and the Bishop of Edinburgh assumed possession of the lands and teinds, and continued in possession until the abolition of that Church government 1689, when they, as well as all the revenues belonging to the Bishops, were seized by the Crown. John, the heir of Alexander Spottiswood, obtained in 1695 a recommendation from Parliament to the King to grant a new signature, which however, never was obtained. John's son, the present pursuer, at last obtained a charter in 1741.—The teinds of the parish of Dalgarno are particularly mentioned in this charter, and the right of patronage of the whole six Churches is reserved to the Crown. Founding upon this right, Spottiswood insisted against the heritors of the parish for payment of the teinds. The claim was opposed by the defender, Sir Thomas Kirkpatrick, who founded on a charter from King James VI. in 1594, erecting this parish into a *parsonage*, and granting the *patronage* thereof to Sir Thomas's predecessors. Sir Thomas pleaded, that after this the teinds could not be disposed by the King to Sir John Spottiswood; that Spottiswood's titles were consequently void; that by erection of the parish into a parsonage, the teinds came to belong to the parson; that they continued to belong to the parson until 1693, when a statute was made transferring them to the patron; and consequently Sir Thomas, as patron, has right to the teinds. Lord Drummore pronounced an interlocutor, finding “that the pursuer has right to the teinds of the parish of Dalgarno under the burdens naturally affecting the same; and as to the patronage of the said Church, that albeit it appears that the same belongs to Sir Thomas Kirkpatrick, in virtue of his titles produced, yet that does not entitle him to compete with the pursuer Spottiswood for the teinds thereof; and therefore preferring the pursuer to the said teinds.” The petition for Sir Thomas against this interlocutor is drawn by Robert Craigie; the answers for Spottiswood by James Ferguson. Lord Elchies's notes written upon the petition follow.)

It will be necessary to read again at least the answers to the petition, and therefore I won't state the case and arguments, which are long, but only what opinion at present occurs to me. The first question is touching the validity or lawfulness of the charter 1594, erecting the kirk of Dalgarno into a parsonage, and granting the patronage to Sir Thomas Kirkpatrick's ancestor, which the pursuer says was null by the annexation 29th act 1587 and 121st act 1592, and observes, that if the 199th act 1594 had made all common kirks parsonages, which would have given them right to the whole benefice, few teinds would have been saleable in consequence of the act 1633. With respect to the first, the petition says that Holyrood-House Abbey is excepted from the act, and 2dly, that the teinds are excepted. As to the first of these, the answers rightly observe, that the Abbey is not excepted, only Bothwell's liferent right; and as to the second, I confess I do not think the teinds of this kirk fell under the exceptions in the act, which is only of teinds pertaining to any parsonage or vicarage, whereas this was neither, but a common kirk of the Abbey. But then I do not find any words in the annexing clause that comprehend teinds, for it is not the general words “other casualties, emoluments, and profits whatsoever,” as these general words can only apply to subjects of the same nature with the particulars that preceded, and never are extended in any conveyance to teinds unless expressed. 2dly, The act 1592 only forbids

the erecting of temporality and teinds of kirk-lands into temporal lordships; but this was a common kirk of the Abbey, yet none of them say that it was kirk-lands. 3dly, As the kirk was not patronate before the act of annexation, the patronage could not be annexed. 4thly, The act 1594, according to my present notion, seems to imply that the King could give away the patronage of these common kirks, for I do not see how a common kirk could be patronate, while it remained common, for there could be no vacancy in the kirk, though there might be in the convent or chapter, and therefore I do not see any thing in the erection of the parsonage or patronage contrary to the law at the time.

By the 10th act 1567, the third of the whole benefices, which includes the teinds, is resumed, first for stipends to Ministers, and next for the King's use, and thereby the Ministers become stipendiaries. By the 100th act 1581, which is the second of that Parliament, every parish-kirk, or so much bounds as was sufficient for a parish, was to have their own Minister, with a sufficient stipend, according to the state and habilites of the place, and particularly all kirks annexed to prelacies were to be so provided, and all gifts to be void and null. By the King's revocation 1587, act 31, he specially revokes all gifts of common kirks, to the effect they might return to the Crown till further order be taken therewith, but with the burden of Ministers to be sustained out of the first and readiest, as shall be modified; and in the month of February thereafter 1587, (the Parliament being in July 1587) an account was made by the King and Council, and Session and Exchequer, reciting the several former acts and revocations, and declaring that the third of benefices and all common kirks could only be applied first for stipends to Ministers, and the rest for sustaining the King's house, and this act was again ratified 133d act Parliament 1592. Thus stood the law in 1594, when the act was made declaring all common kirks to be of the same nature with other parsonages and vicarages, and ordaining them to be conferred by presentation of the lawful patron seeing they are benefices of cure. Now certainly this act did not mean to make these Ministers titulars of the whole teinds, and to take away what was destined for his Majesty's house, and that it did not further appears, for that that act of Secret Council and Session is again ratified after this act 1594, and the 245th act, 15th Parliament, James VI. in 1597.—Now this explains, in my apprehension, the defender's charter, which I think was made in consequence of it, agreeably to the act 1594, that preceded it. The Minister thereby became a parson, but was not titular of the teinds. These remained with the Crown, and he had right to no more than what was assigned to him, and Sir Thomas Kirkpatrick's ancestor was lawful patron.—But as to the foundation of the pursuer's right; first the right *in commendam* to Sir John Spottiswood of the Abbey of Holyrood-House in 1613, after the death of Sir John Bothwell in 1612, and the heritable right to that Abbey, comprehending this kirk, to the said Sir John in 1621 on his own resignation, and the heritable right of the Abbey of New-Abbey in favour of his brother Sir Robert Spottiswood,—I confess I cannot reconcile them to the acts either as to the temporality, or as to the thirds or common kirks, however they might be good while the possessor had interest enough with the Crown not to quarrel them; and therefore when in 1633 Sir John concurred with Sir Robert in resigning this and five other kirks jointly with Sir Robert's barony of New-Abbey in the Crown's hands, in order to erect the Bishoprick of Edinburgh, there appears to have been good reason for the act of dissolution in Parliament, not only in

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 disposed 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 choosing 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 disposed, 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